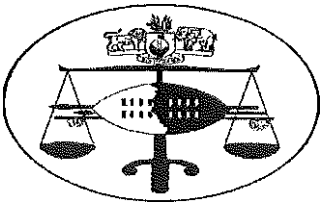

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Held in Mbabane

Case No. 05/2022

In the matter between:

The Registrar of the Supreme Court of eSwatini	First Applicant
N.O. The Honourable Chief Justice of eSwatini N.O.	Second Applicant
And	
Mduduzi Bacede Mabuza	First Respondent
Mthandeni Dube	Second Respondent

In re:

Mduduzi Bacede Mabuza	First Applicant
Mthandeni Dube	Second Applicant
And	
The Registrar of the Supreme Court of eSwatini N.O	First Respondent
The Hinourable Chief Justice of eSwatini N.O.	Second Respondent
The Director of Public Prosecutions	Third Respondent
The Honourable Attorney General N.O.	Fomth Respondent

*Neutral Citation: The Registrar of the High Court, Eswatini N.*O.,*The Honourable Chief Justice of Eswatini N.O. vs Mduduzi Bacede Mabuza and Mthandeni Dube (05/2022)[2022]* SZSC*...08(...06 May 2022.)*

Coram: **Hon. M. J. Dlamini JA**

Heard: **30 March 2022**

Delivered: **06 May 2022**

Summary: *Application for leave to appeal - Interlocutory order of mandamus issued by the High Court against the Applicants - Whether High Court has jurisdiction - Appealability of the order - Importance of the proposed appeal and interests of justice to be considered -Leave granted - Meaning of pending before the supreme Court considered.*

JUDGMENT

M.J. Dlamini JA

Introduction

[1] This application for leave to appeal is a sequel to an urgent application at the High Court by the Respondents for a mandatory order *"Directing the JS' and 2"d [Applicants] to take all measures to enroll the [Respondents'} urgent bail appeal [under] Supreme Court case number 19/2021 and 20/2021 for hearing by the Supreme Court".* The urgent application was opposed by the Applicants who raised a point *in limine* arguing that the High Court had no power to grant the order prayed for. That is, that the High Court had not the requisite jurisdiction to issue a mandatory order against the Supreme Court.

[2] The Learned Judge *a quo* took the view that the High Court had the necessary jurisdiction, dismissed the point *in limine* and granted the Applicants to file answering affidavit. The

Applicants did not like the order and were aggrieved by it. The Applicants applied for leave to appeal the order of the High Court which they considered to be interlocutory.

[3] Whether Judge Shabalala erred or not that is not part of the leave appeal, which, unfortunately has been argued on rather broad terms. In light of the disputed jurisdiction, the Applicants contend that the appeal should not be abandoned as moot. To that end, Applicants, in paragraph 10 of their founding affidavit, assert that the *"application for leave to appeal, is therefore directed towards the final order that was issued by the court a quo solely on the basis that the interlocutory order issued by the court, in terms of which the court a quo found that it had jurisdiction over the matter was wrong in law".* That order was interlocutory in nature and it required leave to appeal; it did not dispose of any portion of the relief claimed *a quo.*

[4] When the application for the mandatory order was launched on or about 8 December 2021 with timelines set for the way forward, the bail appeal had apparently been idling at the Registry since about 5 October 2021, a period of about two months. Both sides had filed their pleadings including heads of argument. What exactly the appeal had been doing; what held up or delayed the enrolment or set down of the appeal, is nowhere explained by the Applicants. The Applicants' concern *a quo* was whether the High Court, in its plenitude of jurisdiction, had the authority to entertain and grant the mandatory order sought by the Respondents. It being common cause that the Supreme Court is the apex court in the jurisdiction, the Applicants deny that the High Court can lawfully tell the Supreme Court what to do with a matter allegedly pending before it. That is an argument founded on the hierarchy of the courts of law of eSwatini which is said to bind the High Court to respect the Supreme Court as a big brother/sister.

[5] The issue for determination in this application is whether the Applicants, aggrieved by the judgment of Shabalala J in dismissing the point taken *in limine* may seek leave to appeal that judgment, and if so, whether the leave to be sought from this Court or from the High Court.

The appeal sought by the Applicants is described by Mr. Jele, Counsel for the Applicants as *"directed towards the final order that was issued by the Court a quo ... in terms of which the Court a quo found that it had jurisdiction over the matter . . ."* The appealability of the judgment of the High Court comes to the fore.

Background

[6] It appears that the bail appeal which had prompted the urgent application by the Respondents was at some point enrolled for hearing on 29 April 2022 but was finally enrolled and heard on 25 March 2022, ahead of this leave appeal. By the time of the hearing of this appeal,judgment on the bail appeal had not been delivered. If the bail appeal has been enrolled and heard, is this leave appeal still live or has become academic? I understood Respondents' Counsel to be submitting to the latter effect while Applicants' Counsel argued to the former, that is, so long as the judgment of the Court *a quo* stands, unconfirmed or set aside by the Supreme Court, the jurisdictional question will continue being problematic. It seems to me that the leave application stands not so much on the bail appeal (enrolment and disposal) but more on the judgment of Judge D. Shabalala, dismissing the point *in limine.*

[7] The learned Judge did not issue the order of *mandamus* compelling the Applicants to enrol the bail appeal. The application for the mandatory order is still pending before the High Court, awaiting determination of this application.. The notice of motion accordingly seeks *"leave ...to appeal the judgment of the High Court handed down on 29th December 2021 per Justice D. Shabala/a wherein she dismissed a preliminary point of law on jurisdiction ...* " Her ladyship, Shabalala J., in para [35] of her judgment said: *"It is the view of this court that it has jurisdiction in the matter. The court's jurisdiction derives ... from its unlimited original jurisdiction coriferred by the Constitution, and further from the nature of the relief sought. It is trite that the [Applicants] hold public office and their fimctions which are the subject of this application, are both administrative and prescribed by law. For instance, Ruler 14 titled*

'Notice of hearing' provides at sub-rule (1) that 'The Registrar shall, after obtaining directions from the Judge President, cause notice of the date of hearing to be served upon the appellant and the respondents'". In para [34] of the judgment, the learned Judge had stated as follows:

> *"The matter before court is a simple application to grant a mandatory order directing the Respondents to perform their public or statutory function of enrolling or ensuring enrolment of the Applicants' bail appeal for hearing on urgent basis before the Supreme Court. The application is based on assertions that there has been inordinate delay since October when the urgent matters are said to have been ripe for hearing, with no date set. There are allegations of non-response to inquiries on the delay".*

[8] The main contention of the Respondents is that they approached the High Court *"simply to direct the First Applicant to perform her duties i.e. by the simple act of placing [the] bail appeal on the roll for hearing by the Supreme Court. ...* ***Only once our bail appeal has been placed on the roll for /tearing,*** *it can be said that* ***'the case is pending before the Supreme Court'."*** [Emphasis added] The Applicants contend that the High Court in dismissing the point *in limine* assumed powers it did not have. They argue that the High Court has no power or jurisdiction to tell or direct the 'Supreme Court' how to handle a matter "pending before" it; that the bail appeal became pending before the Supreme Court from the time the appeal was received, accepted and registered by the Registrar.

[9] In these proceedings, the Applicants sometimes purport have replaced or substituted the 1st and 2nd Applicants with the 'Supreme Court' and as such present themselves as not amenable to the order of the High Court. The Respondents do not agree with this purported transposition. Nor do the Respondents agree that the bail appeal was 'pending before' the Supreme Court as it had not been enrolled. In paragraph 15 of their founding affidavit the Applicants submit:

> *"The issue of jurisdiction is of considerable importance not only to the litigants in this matter but also to the administration of justice in the country. It goes to the hierarchy of*

courts, the doctrine of precedents and the doctrine of effectiveness in so far as it relates to execution of courts judgments ... "

[10] I may observe in passing that, if in fact, as Applicants' Counsel contended, the application *a quo* was directed at the Supreme Court and not at the officers of the Supreme Court, then even before the point *in limine* was taken, Applicants ought to have addressed the composition of the bench since the purported application necessarily raised constitutional issues. That was not done. Incidentally, even the point *in limine* was of a constitutional nature requiring a full bench. It may also have to be considered whether the Applicants, in light of their duties under Rules of Court 3 and 14, correctly identified themselves with or as the Supreme Court or extension thereof, and as such immune from the mandatory order sought from the High Court.

[11] In paragraph 23 of her judgment, the Learned Judge *a quo* summarized the application in relation to the court's jurisdiction, *inter alia*, as follows (i) The relief sought is administrative in nature and competent for the court to determine against the Respondents as public officers in relation to performance of their statutory administrative functions; (ii) The High Court has competent jurisdiction to hear the matter by virtue of its unlimited original jurisdiction; (iii) The Supreme Court has no original jurisdiction. In general, I agree with the foregoing summary. I would also respectfully agree with the view that *"the mere fact of a matter pending before the Supreme Court may not per se be an automatic bar to the High Court's jurisdiction in all circumstances; it depends on the set of facts in each case".* Such as, in the instant case, when the appeal has not been enrolled where enrolment is required. The rationale for this may be adduced from the consideration that from registration through the pleadings to hearing and disposal of an appeal could be quite a journey.

Was bail appeal pending <u>before</u> the Supreme Court?

[12) The pendency of the bail appeal before the Supreme Court is also hotly contested. The Respondents deny that the bail appeal was pending before the Supreme Court when the application was launched. In their answering affidavit the deponent stated that "pending means a case is upcoming (coming up for hearing). As such, a pending case is an upcoming case that will be presented to the court at a certain date in the future. A pending case is the legal term used for any case that has *'yet to be presented to court'*. In their heads of argument, the Respondents argue that the *"registration of an appeal by the Registrar does not render such appeal to be pending before the Supreme Court".* Reference is made to the Concise Oxford South African Dictionary for the meaning of 'pending' shown to be 'adj.1 *awaiting decision or settlement.* 2 *about to happen'*. And also Black's Law Dictionary, 10th ed. (2014) at page 1314: *'pending, adj. (17c)* I.remaining *undecided; awaiting decision: a pending case'*. And to Words and Phrases Legally Defined, vol.4 pl 00. The impression one gets from the authorities by the Respondents is that the expression 'pending before the court' refers to a legal proceeding

or suit that is or has been before a court and remains wholly or partly undecided or awaits decision or settlement. The critical point for the Respondents is the enrolment of the matter which allocates a certain date of hearing.

[13] According to the Applicants the bail appeal was already pending before the Supreme Court: *"18. It is evident . . . . that the appeals had already been received. allocated case numbers by the office of the Registrar of the Supreme Court and accordingly were pending b fore that court".* That is essentially all that the Applicants have said on the critical q estion of whether the bail appeal was or was not pending before the Supreme Court. It was for the Applicants to show that the appeal was pending before the Supreme Court and therefore no basis for the application. There was no authority cited for the assertion that the mere registration of the appeal by the Registrar renders the appeal to be pending before the Supreme Court. However, even if the bail appeal was shown to be pending as alleged by the Applicants, there was still the need to answer to the specific quest by the Respondents for *enrolment* of the

appeal as some form of guarantee that the appeal was not only 'pending' as alleged but was due for hearing at a *certain* date.

[14] In their founding affidavit in this case, First Applicant avers that the Applicants' objection to Respondents' application for the mandatory order in the court below was founded on the *"notion that the hierarchy of courts necessitated that the matter ought to be dealt by the Supreme Court ..."* since "*... it is that Court which had jurisdiction to grant any order incidental and /or ancillary to the matter that was pending before the Supreme Court".* Simply stated: Applicants' demurrer to the jurisdiction of the High Court to grant the mandatory order is based on a notion of judicial hierarchy, that is, that a lower court (such as the High Court) has not the power in law to order or direct a higher court (such as the Supreme Court), for instance, to enrol an appeal where pleadings have been completed for some two months previously. In regard to what the Supreme Court can do, the Applicants did not refer to the statement by Currie AJA in **Tswelokgotso** [1], that the Supreme Court " *in general, is not possessed of any power to grant interim or injunctive or mandatory relief and in particular any power to order operation of a judgment pending appeal."* Now, if the Applicants are not amenable to a mandatory order issued by the High Court, in what circumstances would the Applicants ever be ordered by a court to perform in terms of Rule 3 and 14, bearing in mind that there is no express exemption of the Applicants from the jurisdiction of the High Court.

[15] On the assumption that the 'Applicants' are the 'Supreme Court', Mr. Jele premised his submission in this regard on the argument that the bail appeal was (at the launch of the application *a quo)* "pending before the Supreme Court". In that sense, the mandatory order could not move the Applicants without moving or interfering with the *operations* of the Supreme Court. Ultimately, whether the 'Applicants' are the 'Supreme Court' and whether the bail appeal was pending before the Supreme Court, are matters for this Court on appeal to

[1] Tswelokgotso Health {Pty) Ltd v. Rivi {Pty) Ltd and Others [2019] SZSC 36 [23] (17 September 2019)

consider and determine. Suffices at this juncture to observe that if indeed the bail appeal was pending before the Supreme Court in the circumstances of this case, in the sense that the Supreme Court was seized of the appeal then the Court would find for the Applicants. In that regard, I would consider that the bail appeal, wherever it was at the launch of the proceedings *a quo* can no longer be dealt with in any way by anyone else except by order of the Supreme Court itself. That is, the bail appeal is out of the hands of the Applicants except as mere agents of the Supreme Court. If the bail appeal was then out of the hands or control of the Applicants, the set downs of 29 April and 25 March 2022 without a court order raise more questions than answers.

[16] The **Siboniso Clement Dlamini** cases[2] cited by the Applicants in support of their contention that the High Court has no power to deal in any way with a matter pending before the Supreme Court were considered by Shabalala J. in her judgment. See in particular paras
[25] to [30]. The learned Judge *a quo* apparently considered these cases in light of the remedy of *mandamus.* The Applicants also pressed that one of the **Dlamini** cases, *viz,* **Dlamini v. The Registrar** was a precedent *"almost on all fours with the issue for determination"* before this Court. Dlamini had approached the High Court for a mandatory order: *"1.1 Directing and compelling [the Registrar of the Supreme Court as 1"[1] Respondent'] to accept, register and mark as registered with the official stamp the review application dated 29th May 2017.* " And to that end, the *1st Respondent* was required to *"take all steps ancillary to and necessary for purposes of enrolment before the Supreme Court of review application"* that Dlamini intended to launch in terms of section 148(2) of the Constitution. And the review application was attached to the application for the mandatory order. In my view, the alleged similarity with this case is severely limited. The limitation is clearly shown in para [20] of the **Dlamini** case. Nothing of the sort can be said of the present case. In para [20], Maphanga J. stated as follows:

[2] Dlamini v The Registrar of the Supreme Court and Others [2017] SZHC 155 (27 July 2017); and Dlamini v. Phlndlle Ndzinisa and Others, Case No, 1007/2017 (H. C.)

"In essence, the preliminary point is to this effect: That on account of the judgment of the Supreme .Court of the 30th June 2017 effectively dismissing the applicant's application for leave to bring the contemplated section 148 (2) application, it is not competent for this Court to open, alter and consider the present application as its cause or subject-matter is the very matter on which the supreme Court has pronounced itself".

[17] It suffices here to refer to what Shabalala **J.** says in para [30] *a quo* in connection with the **Dlamini** cases:"... *The court found against this background that it had no jurisdiction to order writ of mandamus against the Registrar of the Supreme Court* ***where the Supreme Court had pronounced itself*** *by dismissing the application for leave to review its own judgment. . .."* [My emphasis] The issue is not really whether the High Court can lawfully compel the Supreme Court to do anything regarding matters said to be pending before it; the issue here is whether the bail appeal was pending before the Supreme Court; and, if it was pending, whether it was so pending as to deny the High Court the jurisdiction to order the Applicants to effect enrolment as required. Apparently, in the absence of evidence of enrolment the Respondents were of the view that the appeal was not 'pending' in any realistic sense.

[18) According to Herbstein and Van Winsen[3] *"When the pleadings have been closed the case is ready for trial and in order to have it heard it must be set down on the roll",* (at p 388). It is trite that the superior courts have an inherent jurisdiction to regulate their own processes. In terms of this power the Supreme Court *"may do anything which the law does not forbid. ... Where for example a particular matter is not provided for by the rules of court, the superior courts will, in the exercise of their inherent powers, deal with it".* (Ibid p. 23) It would seem then that as the issue of the enrolment in this matter is regulated by rules of court (Rule 3 and

[3] The Civil Practice of the Superior Courts in South Africa, 3'd Edition

14), the Supreme Court may not interfere by the exercise of its inherent jurisdiction to order or direct the enrolment of the bail appeal said to be pending before it.

[19] In paragraph 17 of their founding affidavit, the Applicants sought to show that the bail appeal was **"already pending before the Supreme Court"** by reference to the wording of the order sought by the Respondents, to wit: " . . . *Applicants' urgent bail appeal under Supreme Court case number 19/2021 and 20/202* ...." In the process, the Applicants just ignored the words *"to enrol the bail appeal ..."* According to the Applicants: *"Once a matter is pending before the Supreme Court, then it is that court that has jurisdiction to make any determination and issue any order on matters that are pending before it".* It follows then that by the expression "pending before the Supreme Court", the Applicants meant that ***"the appeal had already been received, allocated a case number by the office of the Registrar of the Supreme Court*** ... " i.e. registered or recorded in the Register kept by First Applicant. In other words, once the appeal is received and registered, it begins to pend before that Court. That may be so in a general manner of speaking, but when a litigant desires to have its appeal enrolled it serves no practical purpose to contend as Applicants do. It is critical that the question when is the appeal pending before the Supreme Court be answered.

[20] In para [10] of the judgment, Shabalala J. sets out the points of law raised by the Applicants as respondents *a quo, inter alia:*

> *"2. The appeal on bail and all other incidental matters arising under Supreme Court of eSwatini case No. 19/2021 are before the Supreme Court and the High Court lacks the necessary jurisdiction to hear and determine any matter arising from the bail appeal.*
>
> *3. in the present matter the first and second applicants seek relief relating to matters within the realm of the Supreme Court in so far as they are pending in the bail appeal. The Supreme Court* is *autonomous ... and therefore the High*

Court has no power to direct the enrolment and hearing of matters before the Supreme Court". . ..

"[I I] The Respondents frame the question for determination by this Court thus: Whether the Court is vested with the necessary jurisdiction to hear and determine the present application. Put differently, the question is whether this Court has the power to direct ***the Supreme Court and*** *I* ***or its officers*** *to enroll matters".*

[21] In his oral submission Mr. Jele explained that 'Applicants' in this matter was equivalent to the 'Supreme Court'. This is in line with his written submissions. How this is so has been rather hard to understand. The Second Applicant has under the Constitution and the Rules of Court administrative functions which he performs assisted by the First Applicant. In the result, by and large, the Applicants work together in processing appeals for hearing. The Applicants were cited in their official administrative capacities. In my respectful opinion, there is a difference between the Applicants and the Supreme Court. To begin with, a court *(of* law) which is not constituted of personnel is an empty shell like an empty court room. Thus a 'court of law' is *"an assembly of judges or other persons acting as a tribunal in civil or criminal cases* ".[4] Unless by some legal order or fiat, the Applicants constitute a court of law, they can never, by themselves, be a Supreme Court as established by the Constitution. Evidently, no legal court order can be directed at the Supreme Court unless it was directed to a definite panel of judges.

[22] It is worth emphasizing that the anticipated mandatory order in question in this matter, could not have been directed at the Supreme Court. That would be a meaningless order, directed at no one in particular. For the Applicants to perceive or present themselves as the Supreme

[4] Concise Oxford Dictionary 8th edn.

Court does not seem to make much sense. The effort to identify the Applicants with the Supreme Court so to absolve the Applicants of responsibility which by law vests in them should not succeed. The Supreme Court has a number of Justices: before which of these Justices is the bail appeal pending? The bail appeal cannot reasonably be said to be pending before an empty supreme court. Rule 3 and 14 speak to the Applicants and not to the Supreme Court.

(23] The Concise Oxford English Dictionary, 12th edition, defines the word ***'before'*** to mean " *... 2 in front of; in front of and required to answer to (a court of law; tribunal or·other authority).* The same Dictionary defines *'pending'* as *"l awaiting decision or settlement. 2 about to happen".* In my view, it would not be correct to say that an appeal is 'pending before' a court on merely being registered and the court is not seized of the appeal, in the sense of being *'aware or informed of'* the appeal. I am not aware what control the Supreme Court as a court has over appeals that are at the Registry office, not set down or enrolled. The Court's inherent jurisdiction to regulate its own processes does not seem to me to cover a matter like the enrolment of an appeal which is ordinarily regulated by express Rules of Court. On registration the appeal or matter is pending in/at but not pending before the Supreme Court. As we have already stated, critical in this matter is 'enrolment', not 'pending in or before' Court of the bail appeal.

[24] In my opinion, an appeal said to be 'pending before the Supreme Court' assumes that the Supreme Court is as a matter of fact **seized of** the appeal allegedly pending before it. The Concise Oxford English Dictionary 12th edition, defines **'be seized of'** (to mean) " ... 2 *be aware or informed of".* In my mind if this Court, the Supreme Court, were seized ofan appeal that generally speaking would mean the Court was dealing with the appeal in the sense that the appeal has been called before the Court on the set day and the Court has pronounced itself on that appeal. "Pending before the Supreme Court" is not an easy expression; it is rather loose and not exact: it has to be contextualized for a better understanding.

within the one category or the other... When an order incidentally given during the progress of the litigation has a direct effect upon the final issue, when its execution causes prejudice which cannot be repaired at a later stage, when it disposes of a definite portion of that suit, then in essence it is final, though in form it may be interlocutory.

No comprehensive rule can be laid down, but a reference to the tests given by Merula, Voet, Gail and other writers will in most cases show whether an order is purely interlocutory or has the force of a final decree; and the judgments in Donoghue v. Van der Merwe (4 Off. Rep. *5), notably that delivered by Gregorowski J, will be found of muchassistance in connection with any inquiry into this somewhat dijjicult question.*

But the consequences of placing an interlocutory judgment in the one category or the other were in Dutch practice important. A purely interlocutory order could not, speaking generally, be appealed from, and it could at any time before final judgment be corrected, altered or set aside by the judge who gave it". See **Queen v Shaw** 13 SC 33; **Donoghue v Van der Merwe** (4 Off. Rep 5).

[27] In support of the argument that the dismissal of the objection to the jurisdiction is interlocutory and appealable, Applicants submitted that the decision to dismiss cannot be altered, set aside or corrected by the Judge Shabalala *mero motu* or on request. That decision was not therefore purely interlocutory. In terms of Rule 14, the leave to appeal must be sought from the Supreme Court. Section 147 of the Constitution which is relied upon by the Respondents is not applicable in this matter as the decision in question was by the High Court in exercise of its originaljurisdiction. Section 147 (1) (b) relates to decisions in which the High Court acted not in its original jurisdiction. The decision of the High Court is accordingly final and definitive even though it does not dispose of any portion of the main dispute: it is simply ancillary to the settlement of the main dispute.

[25] It may be fair to say that the expression 'pending before' the court has no exact meaning save in the context it is used. In **King v King** 1971 (2) SA 630 at 634 G - H, M.T. Steyn AJ, faced with the meaning of'pending action' as used in a Rule of Court, had to refer to Webster, *Seventh New Collegiate* (1963) for the word 'pending', which he found to mean 'not yet decided'. That was not very helpful, so the learned Judge resorted to the 'ordinary meaning' of the word in the context used. In the present case, the expression 'pending before the Supreme Court' must be similarly understood, in its ordinary meaning. In that case the expression may mean or not mean that the Supreme Court is seized of the appeal. Thus the need to make use of the context. In casu, the expression may then have to be understood from the view point of enrolment rather than registration.

Was Judgment *a quo* interlocutory?

[26] Innes CJ, in **Bell v Bell** 1908 TS at pp 890-891, said:

> *"The Roman-Dutch lawyers gave to the term* interlocutoire sententie *a very wide, but, regard being had to the derivation of the words, a very correct and logical meaning. They applied it to any order made at any stage between the inception and the conclusion of the litigation upon any incidental matter which did not finally determine the original dispute. According to Gail* (Obs. 129), **....** *And Voet* (ad Pandectas, 42, 1, 4) *defines an interlocutory order as follows: . . . All orders comprised within these general limits are in theory merely ancillary to the settlement of the main dispute. But it* is *obvious that in practice the differences in degree between them must be so great as to approximate to a difference in kind. Some would have little or no bearing upon the merits of the action; others might involve consequences practically decisive of the ultimate issue. This was fully recognized by the practitioners of Holland, and we find that all the authorities divide decisions of this kind into two classes - interlocutory orders proper and interlocutory orders which have the effect of definitive or final decrees. Various tests are suggested to determine whether any particular order falls*

[28] The Respondents in their answering affidavit contended that the leave to appeal was irregular in that it was a *"leave to appeal the judgment of the High Court. The Applicants should apply to the High Court for leave to appeal and not the Supreme Court".* They further submitted that the High Court was correct *"in dismissing the preliminary point of law on jurisdiction"* and that the *"High Court correctly granted the final order",* dated the 29th of December 2021. The Respondents saw no prospects of success and averred that the application for leave to appeal was brought solely to frustrate their right to be heard by the Supreme Court.

[29] For leave to appeal, the judgment, order or ruling appealed against, must be interlocutory with definitive effect. That the rejection by the High Court of objection to the jurisdiction was clearly interlocutory and with definitive effect has not been challenged. In their founding affidavit the Applicants refer to section 14 (1) (b) of the Court of Appeal Act, 1954 as the basis for their application for leave to appeal. The sub-section allows a litigant to appeal *"by leave of the Court of Appeal from an interlocutory order* ... "given by the High Court in the exercise of its original jurisdiction. In paragraph 10 of their heads of argument the Applicants stated as follows: *"It is a trite principle that the right of appeal is exercisable in respect of final judgments. Accordingly only final judgments are susceptible to appeal. Interlocutory orders and /or rulings may not be appealed against without leave of court ....* " This was stated by the Applicants against the contention of the Respondents that section 14 was unconstitutional in light to section 147 (1) (b) of the Constitution. It needs no concerted argument that Section 14 is not unconstitutional; the section deals with appeals emanating from the High Court while section 147 (1) (b) is concerned with appeals emanating from below the High Court. There is therefore no c.onflict between the two provisions. Mr. Jele has argued that the application for

· leave to appeal complies with the Court of Appeal Act and Rules, as well as with the Constitution. The Respondents deny this, arguing that in their view the application ought to have been in terms of Section 147 (1) (b).

[30] **In Steytler NO**[5], **Lord** de Villiers CJ observed as follows:

"As to the first question, distinctions were drawn in the Dutch practice between interlocutory orders which could and those which could not be appealed against. According to some authorities the test as to the right of appeal is, whether the order has or has not the effect of a definitive sentence, and according to others the test is, whether the order is reparable definitely, that is to say, whether the order, if wrong, can be set right by the Court making it, by its final sentence. Whichever test was applied the authorities with few exceptions, concurred in holding, that the decision of a Court on an exception to its jurisdiction could be appealed against. . .. In the case of ***Bell v Bell*** *(I 908 TS, 887), the Transvaal Supreme Court held, that a purely interlocutory order, that is, one not having the effect of a final decree, may, at any time before final judgment in the suit be varied or set aside by the Judge who made it, or by any other judge sitting in the same Court and exercising the same jurisdiction. In the course of his judgment Innes CJ said: 'Neither our statute law nor our Rules of Court draw any distinction between the two classes of interlocutory orders. They treat all judgments, decrees or orders as being either interlocutory or final. And it will be convenient infi1ture to follow the same lines and to hold, that the interlocutory orders of our rules correspond with the simple interlocutory order of the books; while what Dutch lawyers would have styled interlocutory orders having the force of definite decrees are to be classed with all other definite decisions as final judgments. ,.. ' I quite concur in this view, ... In the present case the substantial question, quite apart from the merits, to be decided on the exception was, whether or not the Eastern Districts Court had jurisdiction to try the case. Whichever way the decision was given it spoke the final word upon the issue of jurisdiction. If the Court had decided that it had no jurisdiction the plaintiff's suit as against the executor would have come to an end. The Court, however, decided that it had jurisdiction, with the result that whatever the final decision might be, the executor was*

[5] **Steytler NO v Fitzgerald** 1911 AD 295, 303 ff

made amenable against his will to a jurisdiction other than that of his own dwelling place. Such an order, in my opinion, has also the effect of definitive sentence".

[31] To rehash Lord de Villiers CJ in **Steytler NO**[6]: 'In the present case the substantial question, quite apart from the merits, to be decided on the **objection** was, whether or not the **High Court** had jurisdiction to try the case. Whichever way the decision was given it spoke the final word upon the issue of jurisdiction. If the **High** Court had decided that it had no jurisdiction the **Applicants'** suit against the **Respondents** would have come to an end. The Court, however, decided that it had jurisdiction, with the result that whatever the final decision might be, the **Applicants** were made amenable against **their** will to a jurisdiction other than that of the **Supreme Court.** Such an order, in my opinion, has also the effect of a definitive sentence.' The result is that an interlocutory order must further be characterized as simple or definitive.

[32] It will be realized that section 14 of the Court of Appeal Act does not refer to the two classes of interlocutory orders in terms of final and not final. On its face, there is only one form of interlocutory orders under the section. That is the form which requires leave to appeal from the Supreme Court or the High Court. This somehow complicates the application of the leave to appeal order since there is no statutory definition of what an interlocutory order is and which type of that order requires leave and which not. Herbstein and van Winsen, however, state as follows:[7]

"An interlocutory order is an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions in regard to some preliminary or procedural question which has arisen in the dispute between the parties. Such an order may be either purely interlocutory or it may be an interlocuto1y order having final or

[6] **Steytler NO v Fitzgerald** 1911 AD 295, 305
[7] **The Civil Practice of the Superior Courts in South Africa** 3" ed., p 709

definitive effect. The distinction between a purely interlocutory order and an interlocutory order having final effect is of great importance in relation to appeals ... "

[33] Regarding the distinction between the two classes of interlocutory orders, Schreiner JA in **Pretoria Garrison Institutes** [8] explained as follows:

"[But] since the decision of this Court in ***Globe and Phoenix GM Company*** *v.* ***Rhodesian Corporation*** *(1932 AD 146) the test to be applied has appeared with some certainty, whatever difficulty must inevitably remain in regard to its application. From the judgments of Wissels and Curlewis JJA the principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'. The earlier judgments were inte1preted in that case and a clear indication was given that regard should be had not to whether the one party or the other has by the order suffered an inconvenience 01· disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit. .... If then, one applies the test laid down in the* ***Globe and Phoenix*** *case the order of the Magistrate ... was a simple interlocutory order and not appealable, because it did not directly bear upon or dispose of the issues in the action or irreparably anticipate or preclude any of the relief which might be given at the hearing".*

[34] Corbett JA in **South Cape Corporation** [9] stated the matter as follows:

"I return now to the central issue of the point in limine, *viz whether the order of the Court a quo granting leave to execute was an interlocutory one or not .... The question raised*

[8] Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (AD) 870
[9] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (AD), 549

by the point **in limine** *is not an easy one. There is, however, a series of decisions of this Court, commencing with* ***Steytler's*** *case, supra, and ending with the recent judgment in* ***African Wanderers Football Club (Pty) Ltd v Wanderers Football Club*** *1977 (2) SA 38 (AD), from which the tests to be applied in determining whether an order is interlocutory or not emerge with reasonable degree of certainty ... 1 think, nevertheless, that the general effect of this series of decisions, together with consistent judgments of other Courts, may the summarized as follows:*

(a) In a wide and general sense the term 'interlocutory' refers to all orders pronounced by the Courts upon matters incidental to the main dispute, preparatory to, or during the progress of the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper' which do
not. (See, generally ***Bell v Bell*** *1908 TS 887 at pp 890-1;* ***Steytler, NO v Fitzgerald,*** *supra at pp 303, 311, 325-6, 342; .. .)*

(b) Statutes relating to appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word 'interlocutory', or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation (see generally ***Steytler's*** *case ....).*

(c) The general test as to whether an orde is a simple interlocutory one or not was stated by Schreiner JA in the ***Pretoria Garrison Institutes*** *case,*

supra, ...(at p 870): '... a preparatory or procedural order ... at the hearing'.

(d) In certain earlier cases the view had been expressed ...

(e) At common law a purely interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment, whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is resjudicata ***(Bell v Bell*** *supra pp 891-3;* ***Steytler's*** *case, supra at p 342;* ***African Wanderers'*** *case supra".*

Doctrine of effectiveness

[35] Watermeyer CJ, in **Graaff-Reinet Municipality v Van Reynold's Pass Irrigation Board** 1950 (2) SA 420 (A) at 424, stated as follows: *"Jurisdiction means the power or competence of a Court to hear and determine an issue between the parties, and limitations may be put upon such power in relation to territory, subject-matter, amount in dispute, parties etc.* " In the effort to fend off a possible mandatory order, the Applicants relied on some theory or doctrine of the hierarchy of the courts of law pleading that the High Court has no jurisdiction to order or direct the Supreme Court in any respect. In this regard, the Applicants argued that the decision or order of the High Court cannot be effective against the Supreme Court. This is in terms of the doctrine of effectiveness. In brief, that doctrine prescribes that a court will not have jurisdiction in a matter if it cannot give effect to its order or judgment in the event of non compliance. This doctrine was stated by De Villiers JP in **Steytler NO,** *supra*, in these terms: *"The question that presents itself is: Has the E. D. Court jurisdiction to give such an order, it being admitted that the executor lives in Cape Town? Now a court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit, but also of giving effect to its judgment. Can it be said that in the present case the E. D. Court has the power not only of taking cognisance of the suit, but also of enforcing its order in the event of prayer (c) being granted? The answer must be in the negative".* (p 346).

[36] In **Forbes v Uys**[10], the respondent sued the appellant for damages in the amount of€25 (Pounds Sterling) arising from a trespass by appellant's sheep on farm, Land Concession No.25, Swaziland, of which the respondent was the lessee. Both parties were residents of the Ermelo district, Union of South Africa. Having regard to the location of the trespass, objection had been unsuccessful to the Magistrate's jurisdiction. On appeal, de Wet J concluded and stated as follows: *"The guiding principle is that our courts will not exercise jurisdiction unless effect can be given to the judgment ...."* Jurisdiction was sustained because both parties were resident in the same area, Ermelo even though the trespass was otherwise out of jurisdiction.

[37] Counsel for the Applicants on the point of jurisdiction also cited Pollack[11] where the learned writer quotes from Dicey: *"The Courts of any country have jurisdiction over (i.e. have a right to adjudicate upon) any matter with regard to which they can give an effective judgment, and have no jurisdiction over (i.e. have no right to adjudicate upon) any matter with regard to which they cannot give an effective judgment"*. According to Pollack *"jurisdiction depends upon the power of the court to give an effective judgment"*. It follows, per Counsel's argument, that the High Court has no jurisdiction to issue the order of *mandamus* against the Applicants because the High Court has no means of enforcing that order[12]. The principle of the argument is accepted, the only question is whether it is applicable in the present case and circumstances.

[38] The alleged jurisdictional limitation on the powers of the High Court is apparently premised on the Supreme Court being hierarchically higher than the High Court. In the result, the argument goes, the High Court would not be able to enforce or give effect to its order should it be defied. In principle, I would agree with the argument that the High Court cannot ordinarily compel the Supreme Court to do anything within the competence of the Supreme Court. But

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[10] 1933 TPD 362, 369

[11] The South African Law of Jurisdiction (1937) p. 18

[12] **It would appear that according to Dicey an** [11] **'effective judgment' means a decree which the State, under** whose authority it is delivered, has in fact the power to enforce against the person bound by it, and which **therefore its Courts can enforce against such person".**

it has not been shown that that is the situation in this matter, as I understand it. The order sought from the High Court is directed at the Applicants, *qua* public officers. It has not been stated why the mandatory order cannot be given effect against the Applicants. The Applicants did not fully address this aspect of the case. I did not understand the Respondents in written and oral submissions to be saying that they want the Supreme Court to do anything. Respondents' wish is to have their bail appeal 'enrolled' for hearing by the Applicants. The Respondents, in these proceedings or in the proceedings before the High Court, are not demanding that the Supreme Court hear their appeal: for they believe that once enrolled the appeal would be positioned for hearing accordingly. So long as the rule oflaw reigns, the issue of effectiveness in a matter like the present ought not arise or even be seriously contemplated. The objection to the jurisdiction based on hierarchy just does not arise.

[39] The application *a quo* aimed at compelling the Applicants as officers of the Judiciary to perform their duties as prescribed. The performance of the said duties by the Applicants has a bearing on the liberty of the Respondents. If the argument is that the Applicants, by being attached to or being officers of, the Supreme Court, are immune to the mandatory order of the High Court, then the doctrine of effectiveness must still be tested against section 35 of the Constitution. That section provides *inter alia* for the enforcement of the protective provisions of the Constitution. To that end, the section anchors original jurisdiction in the High Court. Accordingly, the Respondents submit that they are entitled to be considered for bail and to be afforded speedy trial of their bail appeal. The implicit consideration is that the criminal trial will probably take longer to conclude while the question of bail (pending completion of the criminal trial) stands on its own. Reference is made to section I6 (3) (b) and (7) of the Constitution. That section is to the effect that where a person is arrested or detained upon reasonable suspicion of having committed a criminal offence, that person *"shall, unless sooner released, be brought without delay before a court",* failing which *"that person shall be released either unconditionally or upon reasonable conditions ....* " That the Respondents are currently being tried does not mean that they many not he released on bail. That is what the

Respondents seek through the bail appeal - to exhaust the local remedies as it were in quest of their liberty. See also paras [16] and [17] of the judgment *a quo.*

The mandatory order

(40] Wade and Forsyth[13] explain that: *"The prerogative remedy of a mandatory order has long provided the normal means of enforcing the pe1formance of public duties by public authorities of all kinds. Like the other prerogative remedies, it is normally granted on the application of a private litigant, though it may equally well be used by one public authority against another ...a mandatory order deals with wrongful inaction".* The authors also tell that as far back as 1762 Lord Mansfield had stated that the writ of *mandamus* was introduced to prevent disorder from a failure of justice and defect of police. That the writ ought to be used upon all occasions where the law has established no specific remedy: 'A mandatory order now belongs essentially to public law.... Today the majority of applications for a mandatory order are made at the instance of private litigants complaining of some breach of duty by some public authority. But public authorities themselves may still use the remedy, as they did in the past, to enforce duties owed to them by subordinate authorities'. The order sought by the Respondents herein is not against the Supreme Court, for instance, to hear and decide a matter before the Supreme Court. It is an order directed at public officers who have a statutory duty to perform.

Appealability of interlocutory orders - the test

[41] Speaking generally, appealability of an interlocutory order depends on whether it has final and definitive effect. As to when an order is final and definitive, reference is frequently mad e to Schreiner JA in **Pretoria Garrison Institutes** case. The Applicants have also approached the leave to appeal application from the point of view of appealability. In this regard, Applicants relied on two South African decisions under the democratic dispensation. The

[13] Administrative Law, 10 th edn. pp. 521 and 523

cases are **City of Tshwane[14] and.National Treasury[15]** . The cases set out the test for granting leave to appeal. In **National Treasury** case Moseneke DCJ had stated:

> *"[25} This Court has granted leave to appeal in relation to interim orders before. It has made clear that the operative standard is the 'interest of justice'. To this end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable".*

[42] In the **City ofTshwane** case, Mogoeng CJ had also made observations on appealability of interim orders. In para [39] the learned Chief Justice stated: *"The appealability of interim orders in terms of the common law depends on whether they are final in effect ..."* And went on

> *"[40] The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but sub-servient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has re/at/vised the final effect of the order or the*

[14] City of Tshwane Metropolitan Municipality v. Afriforum and Another 2016 (2(SA 279 (CC)
[15] National Treasury and Others v. Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC)

disposition of the substantial portion of what is pending before the review court, in determining appealability ..."

[43] My understanding of the South African position expressed by the then Chief Justice and his then Deputy, in separate cases, is that the new position builds on and develops the common law standard test. The issue raised by the Applicants is of constitutional significance and should not be allowed to remain unresolved - independently of the fate of the bail appeal. In my opinion, 'the interests of justice' standard is not necessarily at odds with the common-law based requirements for the grant of leave to appeal. In this regard, the reasonable prospects of success are important but not decisive. In that regard, some of the criteria regulating leave to appeal (to the Constitutional Court) stated by Currie and de Waal[16] are the reasonable prospects of success and the nature of the issue that is the subject of the appeal (including an appeal against an interim order). These grounds are considered in light of the interests of justice and are by themselves not necessarily decisive. The matter at issue must also be of some public importance. Granting the appeal does not thereby pre-judge the outcome on appeal. It is said: "The Court does not anticipate a decision as to the success of the intended appeal, but considers only the viability of the appeal."

Conclusion

[44] In my view if, as the Applicants have argued, the bail appeal was at the relevant time pending before the Supreme Court in the sense that the Supreme Court was seized of the appeal, then the enrolment of the appeal would have been out of control of the Applicants and in the court of the Supreme Court. Were that the factual situation, then the Applicants should have objected to being made the respondents in the first place, and if they had succeeded in that regard, the matter would probably have then come to an end, as indeed, the Supreme Court

[16] The Bill of Rights Handbook, Sixth Edition, Chapter 5.4 *passim*

cannot be told by the High Court how and what to make of a matter before it. Instead, the Applicants took the view that it made no difference where between registration and hearing the appeal was at the launching of the bail appeal. Once that was done, the Applicants thought the appeal was for all practical purposed pending before the Supreme Court, and they, the Applicants, as servants of the Supreme Court were not distinguishable from the Supreme Court. I can only express a doubt as to the correctness of the approach adopted by the Applicants generally, and in particular, in light of the specific order sought by the Respondents, that is, the enrolment, and not mere registration, of the bail appeal.

[45] On registration an appeal may be said to be pending before the Supreme Court for certain purposes, such as stay of execution on the judgment appealed from. Then to say that the appeal is before the Supreme Court is somewhat loose and vague as the Court may never know about the appeal until call-over on day of hearing. Until then it cannot properly be said that the Court is seized of the appeal. If on being called for hearing, the appeal is not struck off the roll or for some other reason dismissed, the appeal may then properly be said to be pending before Court until it is struck off or definitively concluded.

[46] As we have seen, the Respondents in their application *a quo* were only concerned with the bail appeal being enrolled. They were not concerned with the appeal being registered by the First Applicant since mere registration did not assure them of a hearing in the First Session of 2022. When the Applicants answered and argued that the bail appeal was pending before the Supreme Court because it had been registered, they were not answering to the claim of the Respondents as framed. It was for the Applicants to enrol the appeal when it was ripe for that purpose. Apparently, the appeal was allowed to float and linger for some time without being enrolled and no explanation given to Respondents. It is not the Court that supervises the Applicants in the enrolment of appeals. Under the Rules of Court the appeal was still within

control of the Applicants. On that account the Respondents may well have been justified to seek ways and means of compelling the Applicants to enrol the appeal.

[47] In paragraph 15 of their founding affidavit, the Applicants refer to the hierarchy of the courts in this country. They point to sections 146 and 148 and say that those sections endow the Supreme Court as the apex court with powers *"to supervise all lower courts of judicature, including the High Court"* and that *"accordingly, the High Court cannot issue any competent* mandamus *order pertaining to the operations of the Supreme Court"*. In my view the correctness of the foregoing contention depends on whether the mandatory order sought would impact on the *operations* of the Supreme Court. I need only observe, in passing, that the supervisory power under section 148 is a reserved jurisdiction which only comes alive on activation by a litigant and may not be cited in the name of the Supreme Court as a leash to intimidate and keep under control the lower courts, in particular, the High Court. If it is true that the pre-enrolment status of the bail appeal places it within the competence of the Supreme Court, and the mandatory order would affect the *operations* of that Court, then the proposed mandatory order would probably be incompetent. That is for the appeal court to determine.

[48] The arguments presented in this application were diverse and challenging. Of the three traditional grounds for granting leave, relevant here are the reasonable prospects of success and the substantial importance of the matter to one or both of the parties. The issue for the determination in the proposed appeal is important and calls for authoritative settlement. It is not an issue which can properly be determined indirectly by dismissal of this application for leave. Bearing in mind the varied considerations canvassed above, including the observation that this application may have become moot, and whatever the prospects of success, I consider it in the interests of justice and certainty of the law that the leave to appeal be granted. The matter is constitutional and calls for a proper bench to definitively deal with it.

[49] The application is granted and no order as to costs.

M.J. Dlamini JA

For the Applicants **ZJele**

For the Respondents **Adv. JLCJ Van Vuuren SC**
With BJ Simelane and M Mabuza