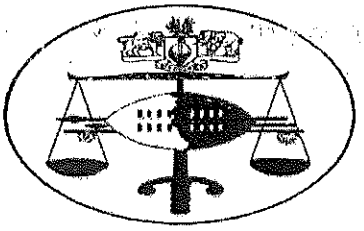

IN THE SUPREME COURT OF ESWATINI

Case No. 64/2022

HELD AT MBABANE

In the matter between:

TEE DOUGLAS MASUKU	**Applicant**
And	
LOBUSUKU GRACE MASUKU	**1ST Respondent**
MLONDO HOUSING (PTY) LTD	**2ND Respondent**
VUSIE MAMBA N.O.	**3RD Respondent**
MASTER OF THE HIGH COURT	**4TH Respondent**
STATION COMMANDER OF MANZINI –	
ROYAL ESWATINI POLICE	**5TH Respondent**
THE ATTORNEY GENERAL	**6TH Respondent**
THE HONOURABLE JUSTICE M. DLAMINI N.O.	**7TH Respondent**

Neutral Citation: *Tee Douglas Masuku V Lobusuku Grace Masuku and Six others* (64/2022) [2022] *SZSC* (January 2023).

Coram: **S.B. MAPHALALA JA, S.K.J. MATSEBULA JA AND N.J.HLOPHE JA.**

Date Heard: **24th NOVEMBER 2022.**

Date handed down: **7th FEBRUARY 2023.**

SUMMARY

Application in terms of Section 148 (1) of the Constitution - Supreme Court called upon to exercise its supervisory jurisdiction in civil proceedings heard by the High Court - High Court allegedly ignored several Notices of Appeal filed against various decisions it had made in various proceedings heard before it relating to the same parties - Applicable legal position in matters where an appeal has been noted is that it stays execution of the order, decision or judgment appealed against – Whether appropriate in proceedings brought in exercise of this Court's supervisory power to cite, serve and seek certain specific orders against the Judge who heard the proceedings complained of – Whether the Judge concerned is required to enter the fray, appoint her own attorneys of record, raise certain points of law including to file his or her opposing affidavit just because some irregularities are alleged against her in the conduct of the proceedings complained of – Scope of the proceedings brought in terms of Section 148 (1) of the Constitution discussed – Whether requirements for this Court to exercise its Supervisory Jurisdiction met – Appropriate orders to make in the circumstances.

JUGMENT

HLOPHE JA

[1] Claiming to be acting under Section 148 (1) of the Constitution of Eswatini, the Applicant instituted these proceedings under a certificate of urgency seeking *inter alia* an order of this court interdicting and restraining the 7th Respondent, the Honourable Judge M. Dlamini, a Judge of the High Court, from hearing any matters involving the above parties, pending the outcome of some noted appeals.

[2] There was also sought an order interdicting and restraining the 7th Respondent (the said Judge of the High Court), from making costs orders and/or issuing any further orders pertaining to the estate of the late Christian Gunka Masuku pending the outcome of the noted appeals.

[3] Further orders sought entailed the one seeking to have vacated by this Court, the orders issued by the 7th Respondent after the Applicant had noted appeals under Supreme Court case Numbers 10/22, 25/22, 54/22 and 57/22 as well as the one directing Judge Z. Magagula to proceed and hear a certain matter involving the same parties, which had commenced before him as an urgent application, to finality after he had decided to refer it to Justice M. Dlamini, the 7th Respondent, on account of her having earlier dealt with the related matters involving the same parties.

[4] There was also sought an order directing Justice M. Dlamini to issue a written Judgment, comprising written reasons, for her having issued the various orders or Judgments she had issued in the matters of the estate of the late Christian Gunka Masuku. An order for costs which were to include those of counsel in terms of Rule 68 of the High Court Rules was also prayed for.

[5] Soon after the matter had been placed before the current bench, it became clear that the orders sought were somewhat strange or unusual in that they were in the main sought against a sitting judge of the High Court, who was apparently being taken to Court for orders she had made as a Judge of the High Court. The direct consequence of the prayers concerned was to cast the Judge concerned as a litigant qua litigant, which entailed combining her together with the other litigants which did not sound normal. The veiled suggestion was for her to engage attorneys of her own to defend or oppose the proceedings against her in a matter she had acted upon or had been required to act upon as a judicial officer. The tone of the papers was that she had to file affidavits and defend a certain position, which would particularly be in line with that of one of the parties. Although strange, it did not come as a total shock that when the matter was mentioned in Court on the day of its first call, there was, among the attorneys of record who introduced themselves as representing the parties, one who said he was representing the 7th Respondent in the matter who happened to be Judge M. Dlamini.

[6] Owing to the unusual turn of events and the possible long ramifications of such a procedure the presiding justices called all the parties' counsel to the Chambers of the Presiding Judge where there was highlighted the strangeness

of the orders sought particularly that it seemed like a judge was being called upon to defend herself for having decided the issues complained of in the manner she had done. The concern was not so much that the prayers in question were sought than the fact that she was being turned into an active party and litigant to defend the decisions she had taken as a judicial officer which in terms of the Constitution, particularly Section 141 (4), was not appropriate. The Justices there expressed their prima facie view that it appeared like the Judge concerned was being called upon to do more than what was normally required of a judicial officer in proceedings which is simply to file her reasons in the form of a judgment. The Judges there expressed their prima facie view namely that it was not desirable for a judge to enter the fray and join forces with one of the parties to a matter which could bring with it negative connotations about the impartiality or otherwise of the Judicial officer concerned in the conduct of the matter in question.

[7] The prima facie view the Judges held has support in the comments of Schutz JA, in **Pretoria Portland Cement Company LTD and Another vs The Competition Commission and 4 others, [Case No.64/2001]**, (a case in which eminent Justices including Nienaber , Howie, Zulman and Nuggent, JJA, concurred). He there said the following:-

> *"There are good reasons of policy why judges should not be joined. In the first place there is no need for it. Judges know perfectly well that their decisions may be upset by a higher Court on appeal, or even by another single Judge in the case of an ex parte order. If one's order is set aside, one's vanity may be picked but one's function is finished.*

Perhaps the Judge will be consoled by the reflection of Ulpian contained in D.49.1.1 that an appeal sometimes alters a well delivered judgment for the worse, as it is not necessarily the case that the last person to pronounce judgment judges better. It is not for judges to participate in any stage subsequent to their judgments in order to defend their decisions. Indeed it would be improper to do so, except in those rare cases when an obligation to provide information arises. Secondly, on grounds of convenience, I do not think that the time of Judges should be wasted filing affidavits in support of their decisions. The place to explain a decision is in a judgment. Once given it is given. Nor should the Court have its time wasted considering invidious applications for leave to sue a judge under S.25 (1) of the Supreme Court Act. Thirdly, and most importantly it is not in the public interest that judges should become embroiled in disputes between parties who have appeared before them. It is a matter of the utmost importance that judges should be seen as impartial and in the kinder sense , aloof." *(underlining has been added).*

[8] It seems that this position has prevailed in this jurisdiction since time immemorial. There does not seem to be any strong reasons why it has to be deviated from in this matter. The significance of this position is to underscore the impartiality of Judges in matters that have been heard by them. It is to say any accounting that a Judge should do, should be expressed in terms of the Judgment or the reasons for the Judgment. There is no need for a Judge to defend his decision *ex post facto*. The reasons given at the conclusion of the matter should do all that.

[9] What should happen in the case of a judge who does not furnish written reasons for orders made on an ex parte basis, particularly where several attempts have been made to get the learned judge to supply such written reasons for the orders he or she repeatedly made, on each such occasion triggering an appeal, asked Applicant's Counsel? In the present matter one can only confirm that whereas several orders were made and appealed against, there is no apparent proof that requests were ever made for the handing down of written reasons or judgments. It is even worse on the lack of proof of numerous or several such requests having been made. I however note that despite these allegations having been made expressly on the papers, none of the respondents in their papers filed of record denied them. The Judge a quo as well did not dispute the applicant's express mention of her having asked for the written reasons in her written judgment. I will for that reason take it that such requests were made and not responded to.

[10] Often there would be nothing sinister in the failure to avail written reasons or a written judgment than there would be some failure to communicate effectively between the parties for such written reasons to be furnished. The communication should normally start at an informal level though the judge's assistant. If not effective, the request on a formal level should start with some correspondence being made to the Registrar. If not responded to, the correspondence would often be followed by a meeting of both counsel with the Judge concerned in chambers requested through the Registrar or her office by the parties' Counsel. Beyond this point it might become an administrative matter for the Chief Justice's involvement and engagement with the Judge concerned. Other than the broad statement that requests for the written

Judgments were made, it is unclear what form they took, including whether or not they did follow the simple but formal procedure referred to above. Short of this information I should conclude that the failure to provide such reasons or judgment was a result of a failure to communicate effectively. I do not want to entertain the view that if all the above avenues were pursued they would have failed to yield positive results. What was said in **National Director of Public Prosecutions vs Zuma case no. 573/08** to the following words is apposite herein:-

> *"In exercising judicial function judges are themselves constrained by law"*

This same statement was echoed by the following words as extracted from the judgment of the South African Constitutional Court in **Strategic Liquor Services vs Murumbi T.N.O. & 2 others case No. CCT 33/08[2009] ZACC17:-**

> *"It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing and when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of a litigants rights and an impediment to the appeal process"*

[11] The Constitutional Court went on to say the following at paragraph 17 of the same judgment which is apposite herein:-

"Judges ordinarily account for their decisions by giving reasons and the rule of law requires that they should not act arbitrarily and that they be accountable"

[12] In the present matter I note that whereas an order was sought directing the Judge a quo to avail a written judgment comprising reasons for the orders she had issued, she on her own, though somewhat belated, prepared such a judgment as the matter was already pending in Court, served it on all the parties and also filed it in Court. It then goes to what I was saying that there would have been a misunderstanding not to file it soonest and I have no doubt that had the steps of engaging the Registrar and even the judge required to avail same starting from an informal position and graduating to a more formal one I am almost certain she would not have hesitated to avail the said written judgment given that it is part of the duties placed on a Judge by law to avail reasons or a judgment particularly where an appeal has been noted or where same is intended to be noted. Accordingly the prayer of the Applicant requiring this court to issue an order compelling the availing of the written Judgment by the Court *a quo* is in the circumstances of the matter overtaken by events and it is not in the interests of justice for this court to issue such an order or even to insist on the same said order. It is a long standing principle of this Court that it does not issue orders that are brutum fulmen (that is, orders that cannot be enforced).

[13] Of course some misdirection or irregularities occur during the hearing of a matter at the High Court but such shortcomings are corrected through either an appeal process or through the utilization of the Supreme Court's

supervisory power as envisaged in Section 148 (1) of the Constitution where an appeal process is not appropriate.

[14] I therefore do not agree that there is nothing wrong in joining or citing a Judge as a party and seeking reliefs on matters she had dealt with in the course of the proceedings. It cannot be done without denting the judges impartiality in a matter which should at all times remain apparent for all to see. It is for that reason I do not think that what was said in **Dups Holding (PTY) LTD and 2 others vs Walter Bennett and 13 others (Civil Appeal No.50/2018)** per M.J. Dlamini JA is being taken in proper context when it is suggested to have approved litigating against a judge as a party qua party in proceedings that had been held before that Judge. It is different, and there may be nothing wrong with the Judge filing an affidavit, where he is required to provide information in a matter in which he is accused of serious misconduct or fraud or where the interests of justice may not be served without the Judge providing the crucial information needed in the particular matter. I therefore doubt that the Honourable Judge was expressing a general rule allowing Judges to file affidavits and to be cited and treated as parties qua in matters where they are being accused of erring or misdirecting themselves during the hearing of matters before them. The Honorable Judge is quoted as having said at paragraph 29:-

> *"In our opinion, a proper application in terms of Section 35 (1) should have included the trial Judge as a party so she could answer for herself. She was after all being accused of violating the rights of the Appellants."*

[15] I want to believe that the Learned Judge was expressing a position distinguishable from that obtaining in the present matter which is that it is not desirable for Judges to be joined as parties in matters they had dealt with in the normal course of adjudication. It is only necessary though that in a matter where the interests of justice may not be served without the Judge having to give some crucial information in advancement of the interests of justice, it may be natural that his or her side be heard on the particular issue. I am however of the view that such matters are more an exception than the general rule. It seems to me that the issues raised in this matter point to some misdirection or erring on the part of the learned Judge. I do not agree that such shortcomings cannot be redressed through the learned Judge availing written reasons for her decision as opposed to her filing affidavits and defending the decision she took and seeking to do so as a litigant qua litigant. I am convinced that to act otherwise in a matter like the present may not enhance the interests of justice. Instead it could help cement some unnecessary suspicions against the Judge's neutrality in the given matter. A salutary rule of practice has always been that Justice must not only be done but it must manifestly and undoubtedly be seen to be done. On the propriety or otherwise of citing a judicial officer for any other reason than formality, the High Court per Hull CJ said the following in the case of the **Director of Public Prosecutions vs Senior Magistrate and Another 1987 - 1995 (4) SLR 17 at 22:-**

> *"Criminal trials, and applications for review, are ofcourse not adversarial contests between (a) judicial officer and (a)prosecutor. It is wrong and unseemly that they should be allowed to acquire that flavor. Ordinarily, on a review, the judicial officer whose decision is*

being called into question is cited as a party for formal purposes only. He will have no need to do anything beyond arranging for the record to be sent up to the High Court including, including any written reasons that he has or may wish to give for his decision.

It may be necessary, very occasionally, for him to make an affidavit as to the record. This is, however, to be avoided as far as possible. It is generally, undesirable for a judicial officer to give evidence relating to proceedings that were taken before him. In principle, there may be a need for a magistrate to be represented by Counsel upon a review, if his personal conduct or reputation is being impugned but this too will only be in exceptional circumstance."

[16] In that matter the High Court emphasized the point that whereas there may not be a problem with the citation of a judicial officer as a party per se and against whom no specific relief of a personal nature is being sought, the same thing may not be said where the learned Judge was being asked to depose to an opposing affidavit in a matter and to there and then advance a position that favours one of the sides, just as it would be controversial for the judge to engage the services of her own specific counsel to defend a certain position in the proceedings. That would be undesirable and is unlikely to happen without compromising the neutrality or impartiality of the Court in a given matter and in the eyes of the public.

[17] The reliefs sought in the matter are all in the backdrop of a situation where the applicant, one Tee Masuku, a male sibling of the 1st Respondent, brought the current proceedings specifically and mainly against his said sister, Lobusuku Grace Masuku, and the second Respondent, a company incorporated by their parents during their lifetime, and sought mainly an order interdicting the 7th Respondent, Judge M. Dlamini, from continuing to hear the matters hitherto pending in Court concerning the two, but emanating from the estate of their late father Christian Gunka Masuku. The interdict sought further to restrain the same Court from hearing any further matters in the future between the two emanating from the same estate. The allegations are that the said Judge M. Dlamini heard the various matters between the parties in an abrupt and unbecoming manner, in circumstances where she even ignored appeals noted by the Applicant against various decisions she had made in the course of adjudicating the dispute between the parties.

I must clarify that for the fuller understanding of the facts and the disputes between the parties I have had to peruse, not only the papers pleaded in the current application, but also what has been stated in the related proceedings between the same parties herein as covered in the record placed before court as well as from the facts set out in the reasons for judgment filed by the judge a quo.

[18] In a nutshell, the dispute between the parties in question emanates from the estate of their late father, one Christian Gunka Masuku, who during his life time and whilst acting jointly with his wife, one Lulu Lizzie Masuku, amassed a sizeable estate, comprising about four or so immovable properties with a

value allegedly amounting to millions of Emalangeni. The properties in question comprised the following:-

(i) Portion 12, a Portion of Farm 9 Peebles Block, Manzini District.

(ii) Portion 13, a Portion of Farm 9, Peebles Block, ManziniDistrict.

(iii) Portion 94, a Portion of Farm 867, Trelawney Park,Manzini District.

(iv) Portion 6, a Portion of Etterick Farm No. 392, Koboyi, Manzini District.

[19] Save that there is no dispute that the farm situate at Trelawney Park was at some point sold for about E700 000.00 at the instance of the First Respondent, who was herself acting as an agent of the Executrix, Lulu Masuku, it appears that only two of the above listed properties are the subject of a heated dispute between the parties. These are portions 12 and 13 of Farm 9, Peebles Block, Manzini. For whatever reason little is said of portion 6 Etterick Farm 392, Koboyi.

[20] The facts reveal that the late Christian Gunka Masuku died interstate on the 23rd August 2001, leaving behind his wife, Lizzie Lulu Masuku and their eight children who allegedly comprised Gcebile Clearance, Franklin Macimeza, Busisiwe Magareth, Charles Ngubo, Lobusuku Grace, Tee Douglas, Zee Catherine and Zanele Nonhlanhla.

[21] At some point the deceased's wife aforesaid (Lulu) was appointed executrix taking over from her son, the initial executor of the same estate, Tee Douglas Masuku, the current Applicant. After some time, and following Lulu's apparent advancement in age, she appointed her daughter, Lobusuku, the First Respondent herein, her agent by means of a Power of Attorney. Disputes surrounding mainly how the estate properties were to be dealt with arose. These disputes resulted in several cases being instituted in Court. These cases include the following:-

(i) Case No.301/2013. This was a Peace Binding matter brought against Franklin, Tee and Busisiwe by their mother Lulu. She complained at the time of abuse at their hands. Though an order had issued against the Respondents, it was eventually abandoned by Lulu contending that she wanted the Masuku extended family or Clan to deal with the matter in that capacity.

(ii) Case No.1114/2013. This was an application for the restoration of Portions 12 and 13 of farm 9, Peebles Block, to Lobusuku as the agent for the executrix. It was instituted by the current First Respondent against the current Applicant, Tee. It was not concluded. It was left hanging with a *rule nisi* that had been issued against the current Applicant. It remained in that state until it was settled together with the other matters as part of those that were later consolidated. The said settlement allegedly happened on the 30th November 2021.

(iii) Case No.696/2014. This was an interdict sought by Tee against inter alia the current First and Second Respondents, restraining the alienation of any of the estate properties unless the Applicant and 1st to 7th Respondents, as beneficiaries, would all have signed a consent to the transfer. An order setting aside the Liquidation and Distribution account was also sought thereat. This matter had not been finalized when it was resolved together with those matters settled on the 30th November 2021 following their being consolidated.

(iv) Case No. 2009/16. This was an Application by Mlondo Housing (PTY) LTD, seeking to have Tee and Busisiwe ejected or evicted from the property situated on the estate property. It was a *rei vindicatio* brought against Tee and Busisiwe by allegedly the company, the 2nd Respondent. It was not finalized on its own in Court. The Order of eviction was allegedly granted by SA. NKosi J on 14/07/2017. Despite that development nothing much happened with regards execution. It was eventually settled as part of the consolidated matters on the 30th November 2021, as shall be seen herein below.

(v) Case No. 786/2017. Initially these were action proceedings instituted by Franklin, Tee and Busisiwe against Lobusuku, and Lulu, for the removal of Lulu as an executrix including setting aside the transfer of the Trelawney Park property. It complained over the sale of the Trelawney Park property for E700 000.00. It was never finalized until it formed part of the consolidated

matters as shall be seen below. As shall be seen below its case number was used as the case number for the matters that were eventually consolidated as set out immediately below.

(vi) Case No.786/2017 (The consolidation of case Numbers 1114/2013, 696/2014, 2009/2016 and the proceedings under those cases lodged in 2017 and that lodged in 2021). In the course of dealing with case (786/2017) all the above cases were consolidated under the above case number. A consent order was prepared and made an order of Court. This was done amicably between the parties on the 30th November 2021.

[22] Owing to the significance of this settlement order in the subsequent developments involving the parties which have lingered to this day, it is important to record the said settlement order in full. It provided as follows:-

"Having read the papers filed of record and heard counsel for the parties and by agreement between the parties; it is hereby ordered that:-

1. *The estate late Christian Gunka Masuku (deceased estate) lodged with the Master of the High Court under number EM 188/2002 is to be finally wound–up in terms of the revised Liquidation and Distribution account (L & D) of the 23rd August 2016, approved by the Master on the 8th June 2016.*

2. *It is declared that the deceased and the executrix dative, Mrs Lulu Lizzie Masuku, in her capacity as the surviving spouse and widow of the deceased, each held 50% in the total shares in respect of the entity, Mlondo Housing (PTY) LTD (Mlondo Housing) and its assets, as at the date of deceased's death on 23rd August 2001.*

3. *The executrix as duly represented by her mandated agent and representative, Ms Lobusuku Grace Masuku, in her capacity as the surviving spouse and widow of the deceased is entitled to 25% shares in the 50% shares as were owned by the deceased in respect of the entity, Mlondo Housing and its assets, over and above the 50% share she individually held as in paragraph 2, above.*

4. *All the 9 heirs or beneficiaries of the deceased's estate, who include the executrix, Ms Lobusuku Grace Masuku, Ms Zanele Nonhlanhla Masuku, Ms Zee Catherine Masuku, Ms Busisiwe Margaret Masuku, Mr Franklin Macimeza Masuku (now deceased), Ms Gcebile Petrie (born Masuku), Mr Tee Douglas Masuku and Ms Gcebile Clearance Masuku, are each entitled to equally have a proportionate share in the remaining 25% of the deceased's 50% half share in the entity, Mlondo Housing where each translates to 2.7 % shares for each heir.*

5. *The ultimate total value to be paid to each of the heirs in respect of their said individual 2.7% share, is subject to a proportionate deduction in respect of the costs in winding up the estate, including the maintenance and upkeep costs of the Mlondo estate which will*

be worked out and calculated by an independent accountant to be appointed by the Master within 7 days of this order.

6. *Save for what is provided for in paragraphs 3 and 4 above, the winding up of the deceased's estate is to be completed and finalized in terms of the L & D account mentioned in paragraph 1, inclusive of orders 1,3 and 4 as well as the proceeds of Trelawney Park.*

7. *The provisions of this order in paragraphs 1 to 5 above and 7 below, apply equally in respect of all of the 4 case numbers 1114/2013, 696/14, 2009/2016, 786/2017 declared finalized.*

8. *The Registrar of Companies is hereby directed to expunge from its records the Form J and Form C filed on 21 July 2006 and 15th July 2009 respectively.*

9. *The executrix as duly represented by Ms Lobusuku Masuku is ordered to complete winding up the estate within 60 days from the date of this Order.''*

[23] Contrary to what was naturally expected to result from the consent order recorded, the disputes did not end. In fact the facts reveal that no sooner had the consent order been recorded on the 30th November 2021, than there ensued a new dispute whose ramifications still confound the parties to this day. On or about the 3rd December 2021, the agent to the executrix, Lobusuku Masuku, the First Respondent in these proceedings, emailed the Applicant's Attorneys and requested permission to enter the family home, the estate property, situated at Portion 12 or 13 Peebles Block Farm in Manzini. The

purpose was to send a qualified person to evaluate or ascertain the value of the property concerned. The obvious goal was to be able to affix a price for the sale of the property concerned so that its proceeds could be distributed in accordance with the liquidation and distribution account covered in the consent order of the 30th November 2021. The Response from the Applicant's Attorneys was allegedly that the Applicant, Tee Masuku, could not be found as he was said to be in Johannesburg at the time.

[24] The First Respondent thereafter wrote directly to the Applicant (Tee) and requested to be allowed access to perform the above mentioned function at the family home, which was also the estate property. This was on the 6thDecember 2021. He is alleged to have responded by saying that the First Respondent was best suggesting another date as he was far away in Johannesburg. She responded by suggesting the 8th December 2021 which he said was at too short a notice. She then suggested Friday the 10th December 2021. To that one the Applicant allegedly said it was not suitable to him as he was meant to be away or words to that effect.

[25] No sooner had the Applicant (Tee) expressed his unavailability for the 10th December 2021, than he, on the same date, wrote to the Master and requested that he ensures that the first Respondent, as the agent of the executrix, together with the executrix herself, were not allowed to continue with the exercise of winding up the estate until or unless they had put up security as required in terms of Section 30 of the Administration of Estates Act of 1902. A lot was said in the letter to justify the demand for security made, including an allegation that Judge M. Dlamini had set aside an order putting in place

a neutral executor as well as insisting that the Master had, this time around, to make sure that she insisted on the security demanded being paid to ensure that the said Respondents are not found in a similar situation as previously when they were asked to open an estate account and deposit in there all proceeds relating to the estate only for the Master not to insist on the request and indirectly permitted the first respondent to pay the estate proceeds into her own account thus compromising accountability for the estate funds.

[26] The First Respondent saw this as an act of resisting the finalization of the winding up of the estate to see through the settlement agreement recorded in the consent order of the 30th November 2021. The First Respondent instituted proceedings on the 15th December 2021, seeking inter alia an order holding the current applicant in contempt of the consent order of the 30th November 2021. She also sought an order evicting the current Applicant (Tee) and those holding under him from the premises.

[27] Although the matter came to court as one of urgency, it would not be heard and finalized immediately or during the month of December 2021 because it was instituted in Court during the recess period. Judge M. Dlamini says in her reasons for Judgment that she only heard it on her return from recess. However as fate would have it, on the 6th January 2022, the executrix in the estate of the Late Christian Gunka Masuku, Lulu Lizzie Masuku, passed on. As the First Respondent had featured in the matter because she was an agent of the hitherto executrix, Lulu Masuku, who had been appointed in terms of a power of Attorney, the Applicant, through his attorneys, wrote to the Master of the High Court and requested that a new and neutral executrix be appointed by

the Master. It was argued that the First Respondent who had hitherto been an agent to the principal, the executrix, no longer had power to continue in her hitherto position as an agent to the executrix given that her principal had passed on. The position of the law is trite that agency terminates if the principal dies. See in this regard what was said by **Robert Sharrock** in his book titled, **Business Transactions Law, 9th Edition, Juta**, at page163. In there the learned author said the following:-

"An agent's authority terminates if any of the following occurs.

The author dies or undergoes a change in status."

[28] The passing on of the said Lizzie Lulu Masuku led to her agent who had brought the urgent proceedings having had to amend her papers with a view to incorporate in there the fact that the executrix on whose behalf she had been acting as an agent, had since passed on.

[29] Although Judge M. Dlamini does not include this aspect in her reasons for Judgment, the facts as pleaded in the other papers filed of record reveal that on the 4th February 2022, the Honourable Judge did hear the application in question in her court and issued certain orders. Owing to the fact that the orders in question formed the genesis of the events which unfolded post the Consent Orders of the 30th November 2021, which have dogged the matter since then, it is important that I capture verbatim, the order of the 4th February 2022. It reads as follows:-

"Whereupon having heard counsel for the Applicants, it is ordered as follows:-

1. *Declaring that the Respondent (Tee) is in contempt of the Order of Court of the 30th November 2021.*

2. *That the Respondent pays a fine of E100,000-00 within 7 days of the Order of the Court, failing which, he be committed to a term of imprisonment of 2 months.*

3. *Ordering and directing the Respondent and/or persons occupying under the authority of the Respondent to forthwith restore possession of the house situated at Peebles Block Farm No.9, portion 13 in the Manzini District, District, together with its locks to the Applicants.*

4. *That the Respondent and/or persons occupying under the authority of the Respondent be forthwith evicted from the property and vacate the house within 7(seven) days of the Court Order and by no later than 15th February 2022.*

5. *That the Deputy Sherriff of the District of Manzini be and is hereby directed and required to forth with serve this Notice of motion and this Order upon the Respondent and to explain the nature and exigency of it.*

6. *That in the event the Respondent and/or persons occupying under the authority of the Respondent do not vacate the property on 15th February 2022, the Deputy Sheriff for the Manzini District is directed to arrest and remove the Respondent and/or the persons occupying under the authority of the Respondent from the house.*

7. *In the event of the Respondent and/or the persons occupying under the authority of the Respondent not cooperating, that the Applicant obtains the services of a locksmith to break the locks in order to gain entry into the house and property.*

8. *In the event that the Applicant finds that the house or any part of the property has been vandalized, that the Respondent be responsible and pay the costs of the repairs.*

9. *In the event the Respondent fails to pay the fine in paragraph 2 above he should forthwith surrender himself to the Zakhele Prison authorities for committal for the term of imprisonment for 2(two) months.*

10. *That the Deputy Sherriff for the District of Manzini forthwith arrests and hands the Respondent over to the Prison authorities for him to serve the said term of imprisonment.*

11. *That prayers 1-10 above operate as an Interim Order with immediate effect.*

12. That a rule nisi returnable on the 18th February 2022 calling upon the Respondent to show cause why the order in paragraph 4 should not be made final.

13. That the Respondent pays the costs of this application personally from his own pocket and on the scale between attorney and client.

14. Further and/or alternative relief.

[30] This order merits an immediate comment. It is by all standards Draconian. It shocks more when one considers that on its preamble it states that only the Applicant had been heard and not the Respondent against whom it is meant to operate. It complicates the situation further that according to its order 5, the Respondents were only going to be served with the said order together with the notice of motion which suggest that they did not even know there was in existence an application seeking such an order against the then Respondent including the grounds upon which that order was being sought, including the grounds on which it was being sought. Worse still, and notwithstanding its Draconian nature and its having orders that sought to limit even the Respondent's right to liberty, it was to operate with interim effect. What is certain on its face though is that it sought to have, at all costs, the Respondents in those proceedings together with all those holding under them out of the premises concerned. If it is such that in law such people should not be in those premises, I do not think the order's being Draconian adds any value. It would be sufficient in law if it favours their being evicted that such is done without the order being Draconian. In terms of the order they had to either vacate on

their own or had to be bundled out or even arrested to do so. This order somewhat foreshadowed what was going to follow in the matter particularly when considering that the issue in question is occupying the Courts to this day and still not wanting to adhere to established procedures or processes.

[31] It is crucial that it sought to ignore the Respondent's fundamental right to a hearing before an adverse order could issue against him. Whatever the Respondent would have done to offend, it remained important that he be heard before an adverse order would have issued against him, particularly if that order touched on the right to liberty which is a constitutionally guaranteed one. The significance of a hearing before an adverse order could issue against one has been a subject of numerous judgments of our courts and has traced its genesis from the Biblical Garden of Eden where the almighty God himself is said to have sought to hear Adam and Eve before issuing befitting punishments for their alleged unbecoming conduct. See in this regard the ancient English case of **R v University of Cambridge (1723) Str.557** as well as the local case of the **Swaziland Federation of Trade Unions vs The President of The Industrial Court and Another Appeal Court Case No. 11/1997.**

[32] It is important to note that when the matter came back to court on the subsequent date, which was after an appeal had been noted on the 14th February 2022, the learned Judge a quo is alleged to have dissociated herself from the order, recording that it differed markedly from the one she had issued. She is shown as having said that she was recalling it and later

postponed the matter. The recalling of the order did not help much if the matter had already been appealed against which means that it was at that point, and loosely speaking, no longer serving before that Court but before a higher structure, the Supreme Court. That it was interim in nature may not have been a matter for the Court *a quo's* consideration but one for the exclusive jurisdiction of the Supreme Court to consider and determine. As authority for this proposition the Court was referred to the judgment in **Jerry Nhlapho And 24 Others vs Lucky Howe Appeal Court Case No. 37/2007** and to that in **Gareth Evans vs Lisa Evans High Court Case No.1470/2009**. In that sense whereas the Judge a quo may have had innocent intentions when she purported to recall that order the effect of it may be different in law. It in fact complicated the situation when one considers that she, without the propriety of that order having been determined, went on to issue numerous orders after that one despite that they, like the one she had purported to recall, were pending determination by the Supreme Court. She therefore kept ignoring noted appeals as shall be seen herein below. In purporting to do so she acted outside her jurisdiction. The reality is that the 'actual order' she had issued when it was allegedly erroneously uplifted, was never revealed and no explanation on how so serious and grievous a mistake had been made including ascertaining who had done that and the motive.

[33] There can be no gainsaying the fact that as soon as an appeal was noted the Court *a quo* had no business trying to correct that order of its own. Whatever explanations it felt it needed to give in that regard, should have been incorporated in its reasons for the order or judgment which it should have prepared and distributed. A question may be asked: what of the fact that there

was some urgency or that the Respondent or any of the parties for that matter did not appear to be committed to have the winding up of the estate concluded? The simple answer is that although such a possibility may exist, the reality is that the law and the rules of court, if properly applied or utilized, do provide a way out of such a situation. Rules to take care of situations including the ones referred to herein do exist. Other rules even take care of an abuse of process where that becomes an issue. All that is required is for such situations to be exposed by practitioners for the court to act accordingly. It never requires anyone to act outside the law and the rules just because he or she is trying to resolve a long standing dispute. The standing principle of law is that one cannot derive a right from a wrong.

[34] That the first order after the consent order of the 30th November 2021 had been appealed against after it had ordered eviction of the current applicant and those holding under him, found the respondent therein (the current applicant), to be in contempt of court and also ordered how they were to be punished among other orders, foreshadowed that it was always going to be legally challenging to proceed with similar prayers in future without the Supreme Court having expressed its views on the issues appealed against. The longstanding position of our law is that an appeal suspends execution of a judgment. See in this regard the South African Judgment in **South Cape Corporation (pty) Ltd vs Management Engineering Consultants (pty) Ltd 1977 (3) SA 534 (A).** The implication of this rule of practice is that short of an agreement on how to proceed with the matter appealed against, it is advisable not to proceed therewith but to await the outcome of the appeal because nobody may be sure how the matter would develop during the appeal hearing nor can anyone be

certain of the ramifications of the appeal order or judgment meant to be issued. I otherwise need to mention that the Notice of Appeal against the order or judgment of the 4th February 2022, was attached to this application as annexure 'NA1' when the Appeal itself was given case number 10/2022.

[35] I note that the reason how or why the matter got to be treated in the foregoing manner is not common cause. Whereas the record clarified ex facie its preamble that the Order was being set aside because it had not accurately captured what the Learned Judge had said, the Applicant herein (Tee Masuku), averred that same came about after the Learned Judge (to whom he referred to as the 7th Respondent at paragraph 24 of his founding affidavit) had allegedly been alerted that the order she had issued on the 4th February 2022 had been appealed against.

[36] A noteworthy issue in this matter is that the judgment or order appealed against under appeal case no.10/2022, entailed the issue of the eviction of the current Appellant from the premises or put differently, the need for the possession of the premises in question to be restored to the Executrix. It unnecessarily complicated the situation to recall or set aside the order concerned by the Court a *quo* as it could not realistically do so in law because it is only the Supreme Court that had the power to correct or confirm an order like that as the matter was then pending before it. We were referred to the cases of **Jerry Nhlapho and 24 Others vs Lucky Howe Appeal Case No. 37/2007** and **Gareth Evans v Lisa Evans High Court Civil Case No 1470/2009** as authority for that proposition. In reality the attempt by the Court *a quo* to unilaterally and *mero mutu* set aside its own order was an exercise in

futility or was a non-act; firstly because the matter was already pending before a Court higher than it and secondly because at that stage it had long done its part in the adjudication process it was therefore *functus officio* at that point.

[37] If the High Court had no power to set aside a matter pending before the Supreme Court, it then means that in law the issues raised in terms of the Notice of Appeal concerned are still alive before the Supreme Court to date until they shall have been dealt with by the Supreme Court.

[38] Given that after purporting to set aside the order in question, the High Court gave another order supposedly in the stead of the one it had set aside, it is important to comment on the legal standing of that latter order. Before doing so however, it is important to understand that once again the current Applicant noted another appeal to that order which was given the Appeal case number as case 26/2022 and the notice of appeal (annexure) was marked as NA2 to the application. Recalling that this matter is currently not about the appeal filed by the current Applicant, but is only an application in terms of section 148 (1) of the Constitution, I would have to try to carefully navigate the delicate balance between the two processes.

[39] It suffices that in her reasons for Judgment or for the order she gave on the 17thMarch 2022, Judge M. Dlamini clarified that the Respondent therein (Tee) had not filed an affidavit dealing with the allegations made by the Applicant therein (Lobusuku). She records that Tee only raised several points of Law.

The order issued by the Court *a quo* therefore was said to be about the adjudication of the points of law as raised.

[40] The points of law in question were the following:-

(i) Lobusuku and the Company, Mlondo Housing (PTY) LTD, had no locus standi in judicio following that:-

(a) The executrix , Lulu Masuku on whose behalf Lobusuku was an agent had died on the 6th January 2022, which meant that in terms of Section 28 of the Administration of Estates Act, a new Executor or executrix had to be appointed.

(b) As regards the company, Mlondo, she was neither director nor shareholder to be entitled to bring or institute the proceedings in question and furthermore, there was no resolution of the said company entitling her to act.

(ii) The Respondent therein (Tee), should have been given 10 days' notice of the amendment of the proceedings to incorporate the aspect of the passing on of the Executrix Lulu.

(iii) The executrix or her agent (Lobusuku), had allegedly failed to pay the security required of the executrix or her agent in terms of section 30 of the Administration of Estates Act, towards safeguarding the interests of the estate. This it was contended, had to be viewed in the context of the failure to insist on an estate account sometime in the past where estate property was sold allegedly controversially and the proceeds therefrom ended up

being paid into the personal account of the Executrix's agent (Lobusuku).

[41] In the context of the current proceedings it is sufficient for me to observe that all the points in question were dismissed and because of the pending appeal I must avoid commenting further on the propriety or otherwise of the Court *a quo* doing so. A comment on the latter is more a matter for the merits of the appeal pending before Court, as the matter was appealed against. As indicated above it is paramount in these proceedings that I maintain the delicate balance between these two distinct processes of the Supreme Court. Perhaps the only issue worth commenting on at this point relating to the decision of the Court *a quo* with regards the points of law is, even on a prima facie basis, whether this Court may, *mero mutu*, interdict the first Respondent from continuing with the purported winding up of the estate pending the outcome of the appeal, if for whatever reason it felt it was in the interests of justice to avoid the confusion in the matter particularly, clarity on whether or not it was lawful for her to carry on with the purported winding up of the estate despite the death of the executrix on whose behalf she was working as an agent in the face of section 28 of the Administration of Estates Act of 1902. This question I will have to resort to herein below when answering all the questions that arise in the matter.

[42] In the merits of the application filed in December 2021 but dealt with in March 2022 in the Court *a quo*, as well as on the points of law referred to above, although the Court *a quo* found the current Applicant to have been in

contempt by allegedly not complying with the consent Order of the 30th November 2021, but instead him having gone on to question the raising of the alleged failure by the then executrix and her agent to pay the security required of them by Section 30 of the Administration of Estates Act of 1902, I am again of the considered view that this is a preserve of the pending appeal and not an issue for the current Court. It was indeed included under Appeal case No. 26/2022. The Court *a quo* has also adjudicated that the current Applicant as a Respondent had been contemptuous of the order of 30th November 2021 by refusing to allow evaluation of the state asset, in the farm of the family home, in his absence. Similarly the Court *a quo* also found it to be an act of contempt for the current Applicant to have insisted that the Master of the High Court should not allow the former agent to the executrix, Lobusuku to continue winding up the estate even though the person for whom she was acting as an agent, was late, having passed on, on the 6th January 2022.

[43] As indicated above, I have to avoid commenting on the correctness or otherwise of the Court *a quo* in deciding the above issues in the manner it did given that they are matters for this court sitting in its appellate capacity. It is currently sitting in its supervisorial capacity as envisaged by section 148(1) of the Constitution of this Kingdom.

[44] What is of relevance herein is that notwithstanding the Appeals noted and given case numbers 10/2022 and 26/2022, the Court *a quo* is shown as having continued to deal with the matters now pending before the Supreme Court.

On the 18th May 2022, there was filed before the Court *a quo* an application in terms of which an extension of the days to wind up the estate now that the 40 days or so within which the High Court had ordered it be wound up had expired. It had ordered this on the day it had directed that the hitherto agent to the executrix continues with her winding up the estate despite protestation by Applicant (Tee) among others, that she could no longer do so for want of compliance with Section 28 of the Administration of Estates Act to the effect that upon the demise of an executor or executrix there had to be appointed a new executor/executrix to take forward the winding up process. The Court *a quo* had also issued an order evicting the current Applicant and those holding under him from the premises concerned.

[45] Worthy of note is that the issue of the executrix's agent being allowed to continue winding up the estate was appealed against under case number 26/2021 just as was the case with the other aspects of the order itself.

[46] Clearly the Court *a quo* no longer had the power to hear the matter under the Notice of Motion dated the 18th May 2022 without the appeal having been heard and concluded. In any event on the 17th March 2022, it had directed per order 6 of the Court Order it issued on that day that it was postponing the matter for the imposition of the penalty for contempt, to the 28th June 2022. Obviously, the noting of an appeal against that order had meant that the matter was not going to be continued with on that date, as the outcome of the noted appeal would have had to be availed first. It worsened it that when it eventually dealt with the matter on the said date, (the 28th June 2022), the

Court *a quo* went on to order that Tee and Busisiwe be evicted from the premises.

[47] The issue of the eviction of the two from the premises had specifically been appealed against previously which had not yet been resolved by the Supreme Court. It was pending in terms of appeal case no. 10/2022. In any event the other appeals including Appeal Case Number 26/2022 had also necessitated that the matter between those parties be not dealt with until the Appeal was resolved. It cannot arise in law that awaiting the determination of an appeal can ever be taken to amount to a delay. It should be a natural consequence of the legal process. In any event law provides a way out of such situations. A party aggrieved and having a legitimate reason to go ahead and execute notwithstanding the appeal is entitled to bring an application for the court to grant him leave to do so.

[48] The Applicant once again reacted to the orders issued on the 28th June 2022 by appealing against them. This was done per the Notice of Appeal annexed to the application as annexure NA3, which bore the Appeal case number as 42/2022. The grounds for appeal were quite informative on that Notice. The first one underscored the fact that it was inappropriate for the Court *a quo* to have entertained a matter that was already pending before the Supreme Court under case no. 26/2022. The second ground stated that it was inappropriate for the Court a quo to have granted an order for eviction of the appellants from the company property without there being a resolution to authorize that eviction. The third ground decried the inappropriateness of the order

extending the winding up period of the estate granted by the Court *a quo* in circumstances where the question of the power or entitlement of the agent to the late executrix to continue with the winding up was pending on appeal. It had been contended to be inappropriate as a result of the death of the principal to the said agent as well as for not being in line with section 28 of the Administration of Estates Act of 1902.

[49] It only completes the puzzle that notwithstanding the pointed grounds of the appeal referred to above, the Respondent purported to execute the eviction order among others when she caused the Applicant (Tee) and his sister (Busisiwe), to be evicted from the premises on the 4th July 2022.

[50] The Applicant reacted thereto by filing an urgent application for an order restoring possession of the premises to him as he claimed to have been despoiled of same because he averred that the order allowing for, or authorizing, his eviction from the premises concerned had been appealed against and that owing to the position of the law in that regard, the purported execution of the order concerned had automatically been suspended. For that reason any attempt at executing the appealed order was an exercise in futility or a nullity and therefore that anyone who purported to execute that order was as good as one who had taken the law into his hands.

[51] That Application served before the then acting judge of the High Court, Judge Z. Magagula. He agreed with the Applicant's argument as advanced and granted an interim order against the Respondent. He ordered that possession

of the premises concerned be forthwith restored to the Applicant. He concluded that an aspect of the matter was serving before Judge M. Dlamini. He then referred the matter to her for finalization with the interim order in place.

[52] Whilst accepting the restoration of the premises to him, the Applicant (Tee) did not accept the referral of the other aspect of the matter to Judge M. Dlamini. He therefore appealed the latter aspect of the order according to his attorneys. I say according to his attorneys because as a matter of fact, we were not shown the related notice of appeal. It is just that I cannot recall an issue being taken with that submission. I am not sure if the law would entitle a party to accept an aspect of a judgment and seek to immediately have it executed or acted upon whilst rejecting the unfavorable one and appealing against it with the view that the aspect not accepted would immediately attract a stay of execution. Like I said that would go to the appropriateness of the appeal which would have to be dealt with by the Supreme Court sitting in its appellate jurisdiction. It suffices that if there is an appeal, it simply suspends execution of the order or judgment.

[53] It would appear that a lot happened thereafter as the Court a quo appears to have gone on to apparently discharge the order of Judge Z. Magagula whilst once again authorizing the eviction of the Applicant once again. It is obvious that the Court a quo had taken a dim view of the Applicant as a person who was bent on delaying the finalization of the winding up of the estate if not one who was allegedly abusing the legal process or litigation process to the

detriment of the estate. All I can say is that whatever the true position of the law following due process will unravel and act accordingly, with the parties being urged to trust the law. Short cuts can only complicate the situation and bring about illegitimacy into an otherwise legitimate field.

[54] It was in the context of this lingering background that when the return date of case no.1339/22 (the matter initially heard by Judge Z. Magagula) arrived, the Court had somehow ordered joint access to the premises by directing that the keys used to enter the said premises were to be kept with the Registrar so as to enable each of the parties to have access to the premises. There are allegations only Lobusku left her keys with the Registrar whilst Tee did not do so after taking the keys left there by Lobusuku. He apparently did that claiming that Lobusuku had no authority going to those premises as an executrix or an agent for the executrix, since the order allowing her to act as such had, following the death of the hitherto executrix, been appealed against. It is contended that the Court a quo per Judge M. Dlamini, had once again set aside the order of Z. Magagula J restoring possession of the house to the current Applicant. Again as it did so it ignored the appeal that had been noted to the said judgment under appeal case number 54/2022.

[55] As the Honorable Judge ordered the discharge of the order by Z. Magagula J, she refused to entertain the Applicant's (that is Tee's) application for her recusal from the matters of the parties serving before her. Her refusal to entertain Tee's application was allegedly based on a need for Tee to purge his contempt; first by returning the keys to the premises as previously ordered.

On the other hand the litigant felt that the Judge had long descended into the arena and was by her conduct making the attainment of Justice by him an impossibility. He noted an appeal against the order setting aside the interim order by Z. Magagula under appeal case number 57/2022.

[56] It was within the context of this background that the current application was instituted to this Court under section 148(1) of the Constitution calling upon this Court to exercise the special jurisdiction offered it by the Constitution under the section concerned which is referred to as the supervisory jurisdiction. As observed, when the matter was mentioned for the first time before this Court, it was to transpire that the application was mainly directed at the Judge in question who was now being turned into a party qua party, and against whom certain specific reliefs were being sought, it not appearing from the papers filed of record and the reliefs sought, that much of a thought was ever spared considering that the person against whom the orders were being sought was a judge of the High Court who had acted in the matter in that capacity.

[57] Primarily and in a nutshell, four specific orders were being sought as prayers 3, 4, 5 and 7. These prayers were for an order interdicting the Honorable Judge from hearing any matters involving the above parties. The other order sought was that interdicting her from entering costs orders against the Applicant (Tee) or from issuing any orders in the matters of the estate of the late Christian Gunka Masuku. There was further sought an order vacating the orders issued by Judge M. Dlamini after notices of appeal had been noted. The

noted appeals in question included the following appeal case numbers, 10/2022; 26/2022, 42/2022, 54/2022 and 57/2022. Lastly there was sought an order directing the Learned Judge M. Dlamini to hand down a written judgment comprising the reasons for all the orders she had issued in relation to the estate of the late Christian Gunka Masuku. The orders are general standard orders which usually feature in proceedings of this nature except that this time around they are directed against judge who had been cast as an interested party, which I think was unnecessary. Otherwise the orders prayed for included that seeking the costs of suit which were meant to include those of counsel.

[58] This application was apparently served on the Respondents on the 23rd August 2022. It was allocated to the current bench on the 30th August 2022 for a call and the giving of directives towards its hearing on the 1st September 2022. We were to give the matter a hearing date when it came to our attention that the Applicant and those holding under him had just been evicted from the premises despite that the order of the Court *a quo* purporting to grant an eviction against him and those holding under him had been appealed against. Owing to the urgency under which the matter was being brought, we, after hearing the parties and particularly upon confirming that the eviction in question had been carried out in total disregard of the noted appeals and the fact that the matter was already before us for hearing when the eviction was executed, ordered an immediate restoration of possession of the premises to the Applicant and those holding under him pending the outcome of these proceedings and clarified that that was going to be the position unless the whole process was done lawfully.

[59] It is clear from the above facts that all the decisions of the Court *a quo* since the application of the 15th December 2021 (that is the application after the consent order of the 30th November 2021), were all appealed against by the current applicant. It is also true that notwithstanding their having been appealed against, the High Court per Justice M. Dlamini dealt with the new applications in a manner that had the effect of ignoring or undermining the noted appeals. Whereas the Applicant says this was done deliberately with her ladyship at some point being alleged to have equated their pleas to observe the noted appeals to a song she had heard earlier, she in her reasons for judgment put her position as follows on the allegations of her having ignored the noted appeals and instead to have dealt with the matters notwithstanding:-

> *"On the 17th August, 2022, both Counsel for the parties appeared before Court. Mr Maziya, on behalf of Tee demanded that the Court should not deal with the matter as there were a series of appeals. He did not hand to Court any document as evidence of what he was submitting on. He then stood up and left the Court while it was in session, not allowing Lobusuku's counsel to respond. The Court proceeded to seat and heard arguments under case no. 1339/2022 which was referred to me by Z. Magagula J. At the end, the Court discharged the rule nisi granted by Z. Magagula J. The reasons were reduced to writing being that it was clear that the prayers sought by Tee were to frustrate the consent order taken on the 30th November 2021. The other reason was that Tee had failed to comply with the order of the 29th July 2022 (key deposit order) and the subsequent order. He is in contempt and therefore he cannot access the fountains of justice. This was so even when the Court gave him a second chance to purge*

his contempt. En passe, this could be the reason Mr L.Mziya walked out of Court while his client's matter was in progress."

[60] What I decipher from the foregoing excerpt is, among other things that the Court *a quo* continued to hear the matters hitherto pending on appeal because there was no proof or evidence placed before it that indeed there was in place the series of appeals she was advised about. The Honorable Court *a quo's* paragraph in question further suggests that had the proof of such pending appeals been produced, she would not have heard the matters appealed against. Again implicit in these assertions is the fact that the learned judge appreciated as a fact that once a decision had been appealed against, the Court that issued it cannot continue to hear that matter unless the applicant had applied for leave to continue to do so and that court on application had ordered that for reasons considered by it sufficient and compelling enough, there was no need to suspend the execution.

[61] Whilst it was unnecessary and unfortunate for counsel Maziya to walk out when it was clear the Court was continuing with the hearing of the matter, I think it was equally unfortunate for the Court *a quo* to continue to hear the matter in circumstances where it had been advised it should not because it had a number of appeals under it. Whilst the Honorable Judge wanted to say she had not been given proof of such appeals there is no proof she ever asked for any or even that she did inquire around the issue to ascertain the true position. There is no doubt that the Respondent's counsel knew about the appeals and should have actually informed the Court of the true position with

regards the appeals concerned because for the court to be led to act in total disregard of the appeals was tantamount to the court embarking on a fruitless exercise.

[62] The reality is that by operation of law, once an appeal had been noted, execution of the judgment concerned had to be automatically stayed. It is not the Court that issued the judgment appealed against that must be convinced of the propriety or competence of the noted appeal. It was submitted that that question is a preserve of the appeal court – that is, the Supreme Court in its appellate jurisdiction. The simple question in such situations is whether an appeal had been filed and if it had been, the order or judgment can only be executed upon if leave to execute had been sought and granted notwithstanding the appeal. This salutary rule of practice has been a subject of numerous judgments of this Court including those from the Republic of South Africa as was the case in **South Cape Corporation (PTY) LTD vs Engineering Management Consultants (PTY) LTD 1977 (3) SA 534.**

[63] In that matter the above position was expressed in the following terms at pages 544H – 545B:-

> *"...[I] It is today the accepted common law rule of practice in our law Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special*

application...The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant..."

[64] The obvious question is what is the status of a decision or order issued in circumstances where a noted appeal was ignored? The answer in my view is that the law does not envisage it happening so much so that if any Court would purport to issue an order in a matter where an appeal had been noted, thus ignoring the automatic stay of execution, the order purporting to have been issued in such circumstances would amount to an exercise in futility and it would thus be a nullity.

[65] In the very first application after the consent order of the 30th November 2021, it is important to note that the eviction of the current applicant from the estate property which doubled up as a family home, became a subject of an appeal under appeal case no.10/2022. Although the Court *a quo mero mutu* tried to recall the order it had made after weeks of its issuance and purported to set it aside, it is a fact that the Supreme Court has not pronounced itself on the appeal in question which is still pending before it and the Appellant under that case number, the current applicant, takes that matter as one that is still pending before the Supreme Court. In fact the grounds of appeal in the subsequent appeal under case no. 26/2022, confirm this position. It could only exacerbate the question of the appeals filed in subsequent matters that the issue of the eviction of the current applicant from the premises has always been kept as a live issue. That being the case, it means that the court a quo in

purporting to deal or endorse the various evictions directed at the current applicant it suffered a jurisdictional defect.

[66] The question becomes how should a short coming like that, where appeals are ignored by the court that made the decisions being appealed against, be dealt with? In other words, is it a matter for a review under section 148 (1) of the Constitution or is it a matter for a normal appeal?

[67] A matter for the exercise of the appellate jurisdiction of the Supreme Court is different from that of exercise of the Supreme Court's supervisory jurisdiction. Clarifying which matters are for which court, the Attorney General to whom this court is greatly indebted for his having joined the matter upon being requested to do so by this court, he there made substantive and crucial submissions on the above questions and also referred this court to the following excerpt from the Ghanaian case of the **Republic V High Court, Kumasi; Exparte Bank of Ghana and Others (Sefa and Asiedu – Interested Parties) (No.1),** consolidated with that of **The Republic V The High Court, Kumasi; Ex-parte Bank of Ghana and Others (Gyamfi and Others – Interested Parties (No.1) [2013-2014] 1 SCGLR 477 at 509 - 511:-**

> *"It is well settled that the Supreme Court would exercise its supervisory jurisdiction on grounds of want or excess of jurisdiction, failure to comply with the rules of natural justice, breach of the Wednesbury principle, namely that an administrative action or decision would be*

subject to judicial review on the grounds that it was illegal, irregular or procedurally improper; and the superior court must have made an error patent on the face of the record. In case of an error not patent on the face of the record the avenue for redress was by way of appeal. Furthermore, an erroneous decision of a High Court within its jurisdiction, would normally be corrected by appeal whether the error was one of fact or law, and that the supervisory powers of the Supreme Court under article 132 of the constitution was wide. Instead of specific orders, the court might issue directions as a means of enforcing its supervisory power." (underlining has been added)

[68] In the present matter the Court *a quo* is shown as having dealt with the matters notwithstanding that same had been appealed against. The noting of the appeals should in law have had the effect of suspending the execution of the order or decision appealed against. To that extent the Court *a quo* has been shown to have suffered the want of jurisdiction to deal with the matters appealed against in the face of such appeals. This court is therefore entitled to hear the current matter on a supervisory basis. The lack of jurisdiction for the Court *a quo* also graphically came out when the Court *a quo mero mutu* purported to recall an order it had made some days previously and set it aside. As it did so it seems to have lost sight of the fact that the said matter was at that stage pending before the Supreme Court. It would not avail the court a quo in my view to say that the order it recalled was not correctly reflecting the one she had issued. If it was already pending before the Supreme Court she could correct that order through filing reasons that explained the true position. It would be a different case if the party who had noted the appeal had

withdrawn or abandoned the appeal. As things stood there could be no doubt that what the Court *a quo* had done it had no power to do which means that what it had purported to do was a nullity in law. The appeal itself remains standing to date as appeal no.10/2022 which awaits a pronouncement by the said Court.

[69] Further still, the Court *a quo* generally ignored about 5 different appeals in the matters that arose between the parties herein which confirms the patent error on the face of the record. Such an error is confirmation of the need by this court to intervene in its supervisory capacity. The Court *a quo* had in that sense proceeded erroneously or irregularly a position that can only be corrected by the Supreme Court.

[70] Similarly, where the Court *a quo* made a judgment or decision in circumstance where it had no power or jurisdiction to make or where it made an order that is irregular because it had no power to issue it, such is a matter for this court to exercise its supervisory power and set aside such a judgment. In **Mosi Bogyina [1993] 1 GLR 337, SC** the Ghananian Court, which is governed by section 132 of their Constitution (which is a section similar to our section 148 (1) of our Constitution), said the following per justice Akufo – Addo JSC, which is instructive:-

> *" Where a Court or Judge gives a judgment or makes an order which it has no jurisdiction to give or which is irregular because it is not warranted by any enactment or rule of procedure, such a judgment or order is void, and the Court has an inherent jurisdiction, either*

suo motu or on the application of the party affected, to set aside the judgment or the order."

[71] On the basis of the foregoing, it seems that all the orders where the Court *a quo* purported to exercise power and issued orders in circumstances where it had, for one reason or there other, no jurisdiction, such judgments or orders cannot be allowed to stand and they deserve to be set aside.

[72] This view was echoed in **Director of Public Prosecutions VS Sipho Shongwe (12/2018) [2018] SZSC 23 (22nd August 2018),** where the following words were uttered:-

"(28) When it is alleged that there is something fundamentally not going right in the proceedings before any Court of Justice, it is the inherent obligation and duty of this Court as the highest Court of the land to protect the independence and effectiveness of the Courts under the Constitution (S141.1). When any Court seems or is alleged to be losing direction, it is the duty of this Court to intervene and bring order. This power is an aspect of the very independence of the judiciary as ordained by the Constitution."

[73] It only becomes clear that all the decisions or even proceedings made or conducted in circumstances where there had been noted appeals, cannot stand

and they deserve to be set aside in observance of the inherent obligation this Court has to supervise the conduct of Courts below it.

[74] Given the apparent breakdown in trust and confidence between the learned judge a quo and the current Applicant it does not seem to me that it would still be healthy and be seen to be in the interests of justice for the judge a quo to continue hearing and presiding over matters involving the two protagonists relating to the estate concerned. The issuance of the contempt of Court order by the Court *a quo* which it later purported to recall and set aside coupled with the various instances of failure to observe the noted appeals contrary to a known position of the law that appeals suspend execution as well as the repetitive nature of the proceedings between the two main protagonists all appearing before the same judge makes the perception that justice may no longer be attained strong. It worsened it that on some other occasion the judge a quo allegedly heard the matter in her chambers virtually with only the first Respondent counsel in attendance. On what should happen in such situations I can do no more than borrow from what was said by the Supreme Court in the matter of ***The Director of Public Prosecutions vs Sipho Shongwe*** *(supra)*,where at paragraph 29 it said:-

> *"There is no doubt that section 141 guarantees the independence of the Courts of law, in the performance of their functions. Accordingly, therefore, so long as Courts perform their duties in accordance with the law and the Constitution, they are masters of their destiny. There is no doubt also that if a Court of law strays outside of the parameters of its Jurisdiction there has got to be some power or authority competent to rein order in that Court. That authority and competence*

vests in this court as the highest Court of justice. Judicial independence in terms of Section 141 cannot mean unfettered freedom. That would be chaos".

[75] That the relationship and the concomitant trust had been broken can obviously be deciphered from the incident, as already stated, where the court a quo found the accused to be in contempt and purported to commit him into goal for two months which it however later *mero mutu* withdrew. The decision of the Court *a quo* to ignore various appeals filed against her decision by the Applicant would be inexplicable were it not for the court *a quo* to contend in its reasons for judgment that it had not been given proof of the said appeals. However this explanation by the Court *a quo* does not sound good enough when it is not shown that the Court *a quo* ever asked for such proof. In any event I note that the role players at that time were not the court and the current applicants counsel only but there was also counsel for the first and second Respondents who had a duty to clarify on so crucial a question. It weakens the clarification of the court in its reasons tremendously that the matters were proceeded with in the face of appeals with no sound reasons being given. It worsened the situation that whereas the Applicant had eventually instituted the current proceedings which controversially sought specified orders against the court a quo, that court still had some contempt proceedings to deal with against that same party which would happen in the face of some apparent acrimony that had developed.

[76] Authority is abound that in a befitting case, it would be appropriate for this court to, where it sees necessary, remove a hearing from one Judge to another or to stay proceedings or to reverse any orders made. In this regard I find it apposite to borrow an excerpt from the **Director of Public Prosecutions vs Sipho Shongwe** (supra) judgment at paragraph 56.

> *"56. That this court has supervisory power as Section 148(1) prescribes is without a doubt. What has been doubtful and uncertain is the scope and content of that power. It must now be clear that this court has power to intervene in any proceedings where there is a complaint or allegation that the proceedings are for any reason seriously in danger of perpetrating injustice or undermining the integrity of judicial administration. Also, this court may intervene of its own notion where it becomes aware of a potential miscarriage of justice in the conduct of any proceedings. By its superintendence over the lower courts and tribunals, this court plays an oversight role to cure deviations from the due performance of their duties. In dealing with any perceived deviation this court may, inter alia, stay proceedings, reverse any order made, or remove a matter from one Judge to another for sufficient cause shown. It would be sufficient cause; to show that the stream of justice has been sufficiently polluted to cause reasonable doubt that justice will be done.'' (Underlining has been added.)*

[77] It should be borne in mind that the supervisory jurisdiction of the Supreme Court is called upon in those exceptional instances where what has happened is beyond the normal appellate jurisdiction of the Supreme Court. Underscoring this observation, the Ghanaian Supreme Court which has so

much persuasive value in this jurisdiction (given that it is where our Section (148) (1) of the Constitution (which is similar to their Section 132) was sourced from), expressed the position in the following words in ***The Republic v Court of Appeal, Exparte Tsatsu Tsikata*** per Wood, JSC at page 619:

> *"The clear thinking of this court is that our supervisory jurisdiction under article 132 of the 1992 Constitution, should be exercised only in those manifestly plain and obvious cases where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason therefore that the errors of law alleged must be fundamental, substantial, material, grave or so serious as to go to the root cause of the matter. The error of law must be one on which the decision depends. A minor, trifling inconsequential or unimportant error or for that matter an error which does not go to the core or root of the decision complained of, or stated differently, one on which the decision does not turn will not attract the court's supervisory intervention.'*

[78] There is no doubt that the matter pending before this court meets all the requirements as are set out herein above. It is manifest, plain and obvious that the Court *a quo* was patently erroneous; firstly in purporting to recall an order it had allegedly made which was already pending before the Supreme Court it having been appealed against. It was further erroneous of it to ignore the various appeals that had been noted to issue the further orders it had made in the matter. There can be no gainsaying the fact that the attempt by the Court *a quo* to make those decisions or orders in the face of the noted appeals

rendered them a complete nullity. It cannot even be argued that such errors of the Court were neither substantial, nor fundamental, nor grave nor so serious as to go to the root cause of the matter.

[79] An aspect that merits mention before finalization of this judgment relates to those matters which are admittedly meant for the Supreme Court sitting in its appellate jurisdiction yet it is apparent that if they were allowed to continue without any intervention by this Court in its current jurisdiction, at least pending the conclusion of the said appeals, could possibly result in some irreparable prejudice occurring to the other interested parties like all the beneficiaries in the estates of the late Christian Gunka Masuku and Lizzie Lulu Masuku. I say this bearing in mind that the relationship of some of the beneficiaries of the estates concerned, who include the siblings born of the two, appears to be irretrievably broken down so much so that it may no longer be seen to be feasible and fair that any executor or executrix other than an independent and neutral one may be expected to carry out such duties.

[80] I am aware that whether the hitherto agent of the late executrix to the estate of the late Christian Gunka Masuku can continue with the duties of winding up that estate is a preserve of the Supreme Court sitting in its appellate jurisdiction. I am however convinced that until it decides that question it is potentially prejudicial to the other beneficiaries of the estate, including the siblings of the late Christian and Lizzie Masuku, to allow one of them to continue winding up the estate without settled authority. The matters of the estates appear to be highly charged and disputed. Allowing one of the siblings,

in whatever capacity, to continue winding up either of the estates might amount to enmeshing her in a conflicting and unpleasant situation.

[81] Consequently it appears that we have to issue an order staying any further winding up of the said estates at the hands of the hitherto agent to the late executrix until the Supreme Court shall have pronounced itself on the question of the propriety or otherwise of her being allowed to continue doing so as it might be fair and proper to allow some neutral person to do so. In other words we have, in these proceedings, been made aware of the disputes between the Applicant and the First Respondent, with the latter having been authorized by the Court *a quo* to continue with the winding up of the Estate despite the objection that a different one be appointed in line with section 28 of the Administration of Estates Act of 1902. We are not sure if the Court *a quo* was correct in allowing the Frist Respondent to continue winding up the said Estate in context of this matter. To ensure that this unresolved issue does not continue to the potential detriment of the other parties as the appeal is awaited, the continued winding up of the estate by the agent of the late executrix ought to be suspended until the Supreme Court shall have pronounced itself appropriately on the relevant question. This order is part of the inherent reliefs the Supreme Court sitting in its current jurisdiction. There is no doubt it has the power to so order in a matter considered befitting by it. See in this regard **The Director of Public Prosecutions vs Sipho Shongwe** (*supra*) at paragraph 56 where it was stated that the Supreme Court may *mero mutu* issue befitting orders including a stay of proceedings in appropriate circumstances.

[82] Consequently, and for the foregoing considerations, this Court makes the following orders:-

1. The Applicant's application succeeds to the extent set out herein below.

2. The further hearing of the matters pending before court involving the parties herein and touching upon the estate of the late Christian Gunka Masuku be and is hereby interdicted until the pending appeals shall have been heard and finalized with pronouncements by the Supreme Court having been made.

3. Owing to the apparent bitter and toxic relationship borne out of the record and as having developed in Court during the various hearings of all the matters involving the parties and touching upon the estate of the late Christian Gunka Masuku, any further hearing of such matters including those that may arise, shall be heard by the High Court constituted differently than before.

4. Until the pending appeals shall have been heard and their results pronounced by the Supreme Court sitting in its appellate jurisdiction, the operation of all the orders issued by the Court *a quo* in disregard of the noted appeals under case numbers 10/2022, 26/2022, 42/2022, 54/2022 and 57/2022, be and is hereby suspended.

5. In order to safeguard the interests of all the interested parties in the estates of both the late Christian Gunka Masuku and Lizzie Lulu Masuku, the continued winding up of the estate of the late Christian Gunka Msuku by the former agent to the then executrix, Lizzie Lulu Masuku, shall remain interdicted until the Supreme Court in its Appellate jurisdiction shall have pronounced itself on the propriety of the continued winding up of the estate by the said former agent notwithstanding the passing on of her principal.

6. In view of the apparent close biological relationship between the main protagonists herein and the apparent need for them to find a more amicable solution to their problems, each party shall bear its costs.

N.J. HLOPHE
JUSTICE OF APPEAL

I Agree.

S.B. MAPHALALA
JUSTICE OF APPEAL

I Agree.

S.J.K. MATSEBULA

JUSTICE OF APPEAL

For the Applicant: Adv. L.M. Maziya; instructed by Hlabangana and Associates.

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