IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 70/2019**

In the matter between

SAMUKELISIWE DLAMINI **APPLICANT**

AND

SIKHUMBUZO DLAMINI **RESPONDENT**

IN RE:

SIKHUMBUZO DLAMINI **APPELLANT**

SAMUKELISIWE DLAMINI **RESPONDENT/CROSS APPELLANT**

Neutral Citation: *SAMUKELISIWE DLAMINI v SIKHUMBUZO DLAMINI (70/2019) [2022] SZSC 03 (14 FEBRUARY 2023)*

Coram : **S. B. MAPHALALA, J. P. ANNANDALE, MAMBA, J. CURRIE JJA et M. J. MANZINI AJA.**

Heard : **15 NOVEMBER, 2022**

Delivered : **14 FEBRUARY, 2023**

MAMBA JA:

[1] *Civil law – Powers of review of its own judgments by Court of Appeal in terms of Section 148 (2) of the Constitution. Grounds for such review limited, for example, fundamental or basic error of law or exceptional circumstances resulting in manifest injustice or miscarriage of justice.*

[2] *Civil law – Jurisdiction of High Court – Section 151 (1) (a) of the Constitution and Section 2 (1) of the High Court Act 20 of 1954. High Court has original inherent and unlimited jurisdiction in all matters falling within its area of operation. Such jurisdiction – where ousted, must be specifically and unambiguously done or by necessary implication from all the relevant terms. There is a presumption against ouster of inherent jurisdiction of the High Court.*

[3] *Civil law – Interpretation of Statute. Children's Protection and Welfare Act 6 of 2012 – Act designates every Magistrate's Court as a Children's Court with power to deal with both custody and maintenance of children. Held: such designation does not oust the inherent jurisdiction of the High Court as a Court of first instance on such issues. Concurrent jurisdiction.*

[4] *Civil law and Procedure – Procedural fairness- substantive fairness. Generally, parties to be afforded same or similar treatment by the Court. Appellant only afforded chance to submit written submissions on issue of jurisdiction whilst Respondent allowed to present both written and oral submissions. No reason offered by the Court for this apparent different treatment. Held: irregular.*

[1] This is an application for the review of the judgment that was handed down by this Court in its appellate jurisdiction on 04 June 2021. This application is in terms of Section 148 (2) of the Constitution. In that

judgment, the Court found in favour of the Respondent and ruled *inter alia,* that

> '(a) The High Court, as a Court of first instance has no jurisdiction to hear and determine custody and maintenance matters respecting children. [And]
>
> (b) All the orders and judgments issued by the High Court respecting custody and maintenance of the children are set aside.'

[2] Following the order referred to above, the Applicant filed this review application wherein she seeks the following prayers:

> '1. Reviewing and setting aside the decision of this Honourable Court (sitting as a Court of Appeal) in favour of the Respondent dated 04 June, 2021.
>
> 2. Prayer 1 above having been granted, dismissing the Respondent's appeal with costs and upholding the Applicant's cross appeal of the High Court decision delivered on 19 September 2019 with costs.

3. Directing the Respondent to pay the Applicant's costs of the application.'

[3] The parties are both emaSwati. They got married to each other in terms of civil rights on 25 February, 2006. There are three children born of the marriage. After marriage, the couple set up or established their matrimonial home at Plot 434, Mbabane Township. The Applicant resides at the said matrimonial home with the children.

[4] The parties experienced serious marital difficulties which culminated in the Respondent deserting their marital home in October 2016. This was followed by him instituting divorce proceedings against the Applicant before the Mbabane Magistrate's Court in May 2017. The Respondent's action was, at the conclusion of the proceedings, dismissed.

[5] It is common ground that in an application between the parties, on 26 July 2018, the High Court granted a consent order whereby *inter alia,* the Respondent was restrained and or interdicted from taking away the children of the marriage without the consent of the Applicant.

Again on 06 February 2019, the High Court held that the Respondent had 'deliberately and maliciously failed to comply with the order of Court and . . . was therefore in contempt of Court.' He was ordered to return, to the Applicant, one of the children of the marriage whom he had removed from their matrimonial home. In addition to this, he was ordered to pay interim maintenance for the children together with the Applicant, in the sum of E3,500.00 per month. This order was issued by the High Court on 28 January, 2019. On 06 February, 2019, this order was confirmed or made final and maintenance was increased to E8,000.00 per month with effect from 01 March, 2019.

[6] I have enumerated the above Court orders to amongst other things, illustrate the chequered Court battles between the parties over the past few years, and also, to underline the fact that in all these Court battles, the issue of the jurisdiction of the High Court as a Court of first instance to hear and determine issues of custody and maintenance of children was apparently never raised by any of the parties or by the Court itself for that matter. I must, however, emphasize that the mere fact that the issue of jurisdiction was never raised by anyone, did not,

of itself clothe that Court with jurisdiction in the event that the said Court did not have such jurisdiction.

[7] When the matter served on appeal on 24 March 2021, the issue of jurisdiction of both this Court and the High Court was raised as a preliminary point by the Court (*mero motu*).

> 'To allow Counsel sufficient time to submit on the question of jurisdiction, the Court ordered a postponement. The order specified that the matter was postponed to 14 April, 2021 at 9.00A.M. for that purpose. While both parties filed documents in support of their suppositions, neither appeared at the allocated time on the date in question.' (Paragraph 9 of Court judgment).

It would appear that the matter was then adjourned for judgment, which was handed down on 04 June, 2021 and the order stated in paragraph 1 above was issued by the Court. It is this order that is the subject of this review.

[8] The Court arrived at the above conclusion solely based on its reading and interpretation of the provisions of the Children's Protection and Welfare Act 6 of 2012 (hereinafter referred to as the Act). The Court reasoned that, because the Act designates every Magistrate's Court as

a Children's Court within its area of jurisdiction, this meant that all issues or matters pertaining to the custody and maintenance of children must be first determined or heard by a Children's Court, which, in terms of Section 132 (1) of the Act is a Magistrate's Court and not the High Court. The Court reasoned further that since the High Court had no jurisdiction on the matter in the first place, it followed that the Supreme Court did not have jurisdiction on the matter. The result was the order already stated above.

[9] The Court also stated that its interpretation of Section 132 (1) of the Act was supported by the provisions of Section 214, 215, 228 and 229 of the Act. First, Section 214 gives a list of the things a Court must consider when making a maintenance order. It is not necessary for me to quote these provisions in this judgment. The significance of this Section, the Court said, for purposes of the issues at hand, was that it refers to maintenance orders before a Children's Court. Similarly, Section 215 of the Act empowers a Children's Court to request for a socio-economic report from a social worker, on the issue of maintenance. The Court also found it significant that because there were divorce proceedings pending at the Magistrate's Court –

between the same parties – the parties ought to have moved the maintenance application in that Court. The Court said that this was permissible in terms of Section 229 of the Act. This section provides that:

> 'The Children's Court shall have powers to make a maintenance order, whether or not proceedings for nullity, judicial separation, divorce or any other matrimonial proceedings have been filed by the parent of a child or during such proceedings or after a final decree is made in such proceedings.'

[10] Finally, this Court, on appeal, emphasized from the outset that the Act

> '. . . is based on and implementing the Constitution of Eswatini and related international instruments such as Conventions and Protocols and therefore no Court in this country should take it lightly or disregard it. The Act is born from and is a direct descendant of the supreme law. . . .'

In the headnote or summary to the judgment, the Court also made the point that '. . . A rule of the High Court is subservient to an Act of parliament.' Whilst this statement is trite law, and has almost attained the status of a

cliché, it is not readily apparent to me what its relevance is in the context of the judgment. It does not appear anywhere in the body of the judgment.

[11] In her grounds for review, the Applicant states that she was denied her right to be heard on the question of jurisdiction. This, she avers, resulted in an erroneous judgment being handed down by the Court. She says that the judgment is patently wrong. It resulted in a manifest injustice inasmuch as she was unsuited on the sole ground that the High Court lacked jurisdiction to hear the matter. She avers that this decision is wrong in law and this court must revisit and set it aside in this review.

[12] The Applicant states, correctly in my view, that when the matter was adjourned on 24 March, 2021, to 14 April, 2021, Counsel for the Respondent had already made his submissions on the question of jurisdiction, but Counsel for the Applicant had not done so. In addition, there was no specific time set for the resumed hearing on 14 April, 2021. (See page 65 line 3 of the transcript. 2020 should obviously read 2021). This is contrary to what is recorded in the Court order and the judgment. (Paragraph 9 at page 25 line 3). When the

matter was stood down on 24 March, 2021 Counsel were encouraged to reach an out of Court settlement, in view of the few areas of apparent consensus. It is common cause that when the matter was called in Court at 9.00A.M. on 14 April, 2021, there was no appearance by either side. The matter was then adjourned by the Court. What followed was the judgment on 04 June, 2021.

[13] The Applicant and her Counsel aver that they expected the matter to resume at 9.30A.M. on 14 April, 2021 at the earliest or so soon thereafter. 9.30A.M., they aver, is the usual time for the Court to conduct its hearings.

[14] The other ground for review by the Applicant is that the Supreme Court failed to address the issue of the Respondent being in contempt of Court. She submits that the said contempt was a stand-alone matter and was not in any way linked to the jurisdictional question. The Applicant makes the point further that the Court did not deal with this issue at all in its judgment. Save for the issue regarding the Respondent's failure to make a full disclosure of the couple's joint estate's assets, it is clear to me that the rest of the issues identified by

the Applicant in the cross-appeal were linked to or dependant on the maintenance and custody proceedings. Therefore, having found that the High Court had no jurisdiction to hear the matter, it logically followed that the Court had no power to issue those orders. Setting aside the orders, automatically set aside anything consequent thereupon. As it is clear from the judgment, the Court set aside all the orders in respect of custody and maintenance. Similarly, the interpretation of the maintenance order had to fall with the rest of the orders. For the record, the issue of disclosure of the couple's assets was made, I believe, as a severable order relevant to the divorce action between them. I shall return to this later in this judgment.

[15] The other ground for review is that the Court committed a patent error of law inasmuch as in referring to the High Court and the Children's Court, the Court failed to take into account the fact that, as a matter of law, the former has unlimited original jurisdiction. It is further averred 'that the interpretation attributed by the Court of Appeal to Section 29 (3) and (7) (a), (b), and (c) of the Constitution is incorrect.' Another ground for review by the Applicant is that the issue of the custody of the minor children was sought under High Court Case 107/2019, as

per N5. Applicant avers that '. . . the fact brought the mater squarely within the provisions of Rule 43 which extends jurisdiction to the High Court.'

[16] I can only assume that the rule referred to in the preceding paragraph is Rule 43 of the High Court rules, which applies '. . . whenever a spouse seeks relief from the Court in respect of one or more of the following matters:

(a) maintenance *pendente lite*;

(b) a contribution towards the costs of a pending matrimonial action;

(c) interim custody of any child;

(d) interim access to any child.'

In N5, the Respondent sought custody of the minor children and also prayed for an order that the social welfare officer must compile and submit to Court a socio-economic report. There was no prayer for interim relief or for maintenance. In any event, that this was an application by the Respondent did not bar him from raising the issue of jurisdiction nor did it bar the Court from doing so *mero motu*. Again, a rule of Court is not law. Therefore, it

cannot confer jurisdiction on a Court if the Court does not, in law, have such jurisdiction. This point, is frankly misguided and cannot be a point for review.

[17] The Applicant also avers that it was disingenuous of the Court to claim that it had *mero motu* raised the issue of jurisdiction, '. . . when it was part of the proceedings already before it: . . . the issue was raised by the Respondent under his rule 33 application.' It is true that the issue on jurisdiction was raised in the rule 33 proceedings. However, in the main appeal the issue was raised by the Court. (See transcript (N2) paragraph 44 from line 10 to 22).

[18] The Applicant avers that if the Court had dealt with the issue of jurisdiction as raised in the rule 33 application, she would have successfully raised the defence of *lis pendens*. Again, I fail to understand the logic in this assertion. The Court was at the time, as confirmed by Counsel at the commencement of the proceedings on 24 March 2021, dealing with the appeal and cross-appeal. There was also the application for leave to file amended pleadings. The other matters were ancillary to the appeal, as it were. When the Court raised the

issue of jurisdiction as being at the front and centre of the appeal, there was no objection by the Applicant. Again, these points of complaint by the Applicant were raised by her in her supplementary heads of argument on jurisdiction dated 09 April 2021. These were filed with the Registrar on the same date and no doubt considered by the Court. That the Applicant would have wanted to make oral submission thereon, is another matter, entirely different.

[19] Another ground for review put forward by the Applicant is that the Court wrongly interpreted Section 221 of the Act by holding that had the matter been instituted in the Children's Court, there would have been no doubt as to when the monthly maintenance payment became due. Applicant, correctly in my view, states that the error in interpretation did not necessarily occur because the matter was heard by the High Court. However, this finding by the Court was clearly *obiter*. It was not the *ratio* on the pertinent issue of jurisdiction. The ratio was simply that the Act stipulated that issues of custody and maintenance must be dealt with before the Children's Court and the High Court was not designated such a Court. Therefore whether the Court was in error on the date on which the monthly maintenance

payments became due and payable, is of no moment in this application.

[20] Lastly, Applicant complains about the various Court proceedings she has had to endure in an endeavour to protect her own rights and those of her children. She says her financial position is 'weak' and the escalation of [her] legal costs is debilitating to [her]. She submits that all the above complaints taken 'individually and jointly do constitute exceptional circumstances and manifests the presence of an unusual element which has occasioned significant injustice calling for the judicial intervention of this Court sitting as a review Court in terms of Section 148 (2) of the Constitution . . ..'

[21] The application is opposed by the Respondent. The first ground of objection is that this application is an appeal under the guise of a review. The Respondent denies that his legal representative made any oral submissions on the question of jurisdiction on 24 March, 2021. He avers that it was because none of the parties were ready to argue that point that the Court adjourned the case to 14 April, 2021 and granted the parties leave to file submissions thereon. Further, it is the

Respondent's contention that on 14 April, 2021, the presiding judge, in his chambers, acknowledged to both Counsel that the matter had not been scheduled to be heard at 9.00A.M. that day and added that '. . . there is no harm as far as he was concerned as both parties had filed their submissions on the point of law raised by the Court and the Court will consider the submissions and make its judgment.' (Per paragraph 22 of Answering affidavit).

[22] The Respondent is plainly mistaken when he says that his legal representative did not make any oral submissions on the point raised by the Court. He did. His submissions are contained at pages 56 to 62 of the transcript. In his submissions, Counsel applied that the matter be remitted to the Children's Court; arguing that the High Court lacked the jurisdiction to deal with it as a Court of first instance. He submitted further that

> '. . . when it comes to issues of this nature custody, maintenance and all of those issues, . . . those orders can be allowed to remain operative. However, not as orders issued by a Court [of] competent jurisdiction but as orders . . . intended to preserve a particular status quo . . . in a consentual manner because those

orders should be set aside strictly speaking because the High Court did not have jurisdiction, but we do not want to recreate a vacuum.' (Page 61 lines 8 to 17).

[23] It must be noted that Counsel for the Respondent was allowed to address the Court after the following exchanges between the bench and Counsel for the Applicant:

Court: '. . . my worry is if we follow this, it only creates bad jurisprudence that we have got a law dealing with these issues but we disregard it. The law was promulgated in 2012, isn't it?

Counsel: I have no difficulty with arguing that aspect of the matter in the context of the challenge by the appellant. Its there, all I'm saying, I would like to be given an opportunity to argue it. That's all. I am not contending that it should not even be discussed. . . . my submission is that, let the cross-appellant be given an opportunity to argue it in the context of the challenge.' (Page 52 to 53 of the transcript).

Later on this transpired:

Court: '. . . In my view, does this Court have jurisdiction to hear anything relating to custody etc.?

Counsel: As the Court pleases my Lord. Let me make my submissions in due course my Lord.' (Page 55 of N2).

So clearly the Applicant insisted on making his submissions later or in the future.

[24] As already stated above, the matter was adjourned to the 14th day of April, 2021 and Counsel were advised that '. . . If there is any written document, which we hope there will be, if we can get it before . . . Give us 3 or 4 days, then we would be ready to hear and find a decision.'

The written document referred to herein is obviously the Deed of Settlement that the parties were encouraged to conclude. What is clear from the events that followed is that when the parties could not submit a deed of settlement and did not appear in Court on 14 April 2021, the Court decided to hand down its judgment on 04 June 2021. This it did without hearing the parties further on the issue of jurisdiction or on any issue at all; bar the meeting the presiding judge had with Counsel in his chambers on 14 April, 2021.

[25] The Respondent submits that the Applicant has failed to show 'that the Court either made a fraudulent decision or patent error of law, or that it was bias, or that there is some presence of any unusual element. . ..' The Respondent submits that both Counsel were granted the opportunity to address the Court on the point of jurisdiction and to submit to Court written heads of argument on the issue.

[26] All in all, the Respondent supports the judgment of the Court and its interpretation of the relevant provisions of the Act.

[27] During argument before us, Counsel for the Respondent candidly conceded that the High Court has jurisdiction to hear issues relating to custody or maintenance as a Court of first instance. In short, he was unable to support the judgment of the Court on the issue of jurisdiction.

[28] The requirements for an application such as the present were restated or adumbrated by this Court in *Sibusiso Kukuza Dlamini v Rex (18/2019) [2019] SZCS 15. (24 May, 2022)* as follows:

'[9] . . . The purpose of section 148 (2) is not to eliminate all errors on appeal. Humans being fallible, that would be impossible. *In casu*, I

cannot find any patent or exceptional circumstances that have occasioned a miscarriage of justice. Further, it will be realized that Section 148 (2) does not impose an obligation on the Court to review its decision. The section states that the Court 'may' review its decision. That in my view means that a case for review must be made out by the Applicant. If grounds for review were not to be exceptional, there would be review of all decisions of the Court: that would be unbearable.

[10] In one of the helpful authorities submitted on behalf of the Applicant but more supportive of the Respondent, Atuba JSC[1] (presiding) stated the following:

> "In view of the principles governing our review jurisdiction the natural question is whether the application is within them. The relevant principles have been stated in several cases and have been forcefully summed up by Dr. Date-Bah JSC in **Chapel Hill Ltd v The Attorney General & Anor.** J7/10/2010 (5/5/2010) as follows:

'I do not consider that this case deserves any lengthy treatment. I think that it represents a classic case of a losing party seeking to re-argue its appeal under the garb of a review application. It is important that this Court should set its face against such endeavor in order to protect the integrity of the review process. This Court has reiterated times without number that the review jurisdiction of this Court is not an appellate jurisdiction, but a special one. Accordingly, an issue of law that has been canvassed before the bench of five and on which the Court has made a determination cannot be revisited in a review application, simply because the losing party does not agree with the determination. This unfortunately is in substance what the current application before this Court is.

. . .

I would like to reiterate the view that I expressed in **Gihoc Refrigeration (No.1) v. Hanna Assi (No.1)** [2007 – 2008] SC GLR I at pp 12 – 13, that 'Even if the unanimous judgment of the Supreme Court on the appeal in this case were wrong, it would not necessarily mean

that the Supreme Court would be entitled to correct that error. This is an inherent incident of the finality of the judgments of the final Court of appeal of the land. The brutal truth is that an error by the final Court of the land cannot ordinarily be remedied by itself, subject to the exception discussed below. In other words, there is no right of appeal against a judgment of the Supreme Court, even if it is erroneous. As pithily explained by Wuaku JSC in **Afrainie v Quarcoo** [1992] 2 GLR 561 at 591 – 592: *"There is only one Supreme Court. A review court is not an appellate court to sit in judgment over the Supreme Court."*

However, in exceptional circumstances and in relation to an exceptional category of its errors, the Supreme Court will give relief through its review jurisdiction. The grounds on which this Court will grant an application for review have been clearly laid out in the case law. Notable in the long line of relevant cases are **Mechanical Lloyd Assembly Plant v. Nartey** [1987 – 88] 2 GLR 598; **Nasali v Addy** [1987 – 88] 2 GLR 286;

Ababio v Mensah (No.2) [1989 – 90] 1 GLR 573; and **Attorney – General (No. 2) v Tsatsu Tsikata (No. 2)** [2001 – 2002] SC GLR 620. The principles established by these cases and others are that *the review jurisdiction of the Supreme Court is a special jurisdiction and is not intended to provide an opportunity for a further appeal. It is a jurisdiction which is to be exercised where the Applicant succeeds in persuading the Court that there has been some fundamental or basic error which the Court inadvertently committed in the course of delivering its judgment and which error has resulted in miscarriage of justice.* This ground of the review jurisdiction is currently exercised by the Court pursuant to rule 54 (a) of the Supreme Court Rules 1996 (CI 16), which refers to 'exceptional circumstances which have resulted in miscarriage of justice.' This is a high hurdle to surmount.

The public interest in avoiding the protraction of litigation requires that this Court should continue to uphold these principles."

See also *Abel Mphile Sibandze v Magagula & Hlophe Attorneys (86/2019) [2022] SZCS 67 (23 December 2022)* at para 19 to 20.

[29] One of the fundamental rules of procedural fairness or natural justice is to hear both sides of a dispute before a decision that adversely affects a party in his personal or property rights is arrived at. A failure to heed or observe this precept would invariably result in a failure of justice. Of course there would be instances where a party would be afforded the opportunity to be heard but he spurns it. In that case, he has himself only to blame. The decision maker is blameless. Again, this rule is not applicable in every situation. There may be instances where the decision maker is not obliged or called upon to hear a party to a dispute, but such cases are indeed rare and generally govern those instances or stations where the decision maker is not conducting an enquiry but is only called upon to make or declare an objective legal position known. Again, the hearing may be oral or written, face to face or by audio visual link, or a combination of these.

[30] In the present case, the Applicant complains that she was denied the right to be heard whilst her adversary was afforded such right. It is clear from the transcript of the proceedings of 24 March, 2021 that Counsel for the Applicant did not make oral submissions on the issue of jurisdiction. He, however, made a plea to the Court to give him the chance to present his submissions 'in due course'. The Court did not disallow this. Accepting that the Court subsequently received written heads of argument from Counsel on the issue, I do not think that this was sufficient substitute for oral submissions. I also doubt that Counsel would have been prevented from addressing this issue had the Court sat with Counsel in attendance on 14 April, 2021. The blame that Counsel were not in Court when the case was called, cannot be laid at their doorstep. Heads of argument are by their very nature, the outline or sketch on the topic under discussion. They are the skeleton. The oral submissions constitute the flesh to complete or complement the body, as it were. Therefore, for the presenter of the argument to present a full or complete picture of the issue under discussion, oral argument is necessary.

[31] Even if this Court were to accept that the Court did afford the Applicant the chance to present her full argument by presenting written submissions, the question would still remain as to why she was treated differently from her adversary who was allowed both avenues, that is oral and written presentation. There is no explanation for this in the papers before this Court.

[32] The question or issue of jurisdiction was central and dispositive of the case before the Court. As it turned out, the Applicant was unsuited on this point. From the outset, the Court had reached a *prima facie* view, as it was entitled to do so, that the High Court did not have jurisdiction in the matter. It specifically put this issue to Counsel. The Applicant had the High Court judgment in her favour. She believed that that Court had jurisdiction to issue that order. She insisted on presenting oral submissions on the matter 'in due course'. For this reason alone, the Court ought to have been more cautious in dealing with it. Regrettably though, the parties were not similarly treated as the Applicant was not afforded the opportunity to present oral submissions. That the Court did approach the issue with a dispassionate, open and unbiased mind, I cannot doubt. However, the issue must always be whether justice was

seen to be done. I cannot give an affirmative answer to this question. I now examine the issue of jurisdiction in the next segment of this judgment.

[33] In terms of Section 151 (1) (a) of the Constitution, '[t]he High Court has unlimited original jurisdiction in civil and criminal matters as the High Court possessed at the date of the commencement of this Constitution.' At the date of the commencement of the Constitution, the jurisdiction of the Court was that which was vested in the Supreme Court of South Africa. (See Section 2 (1) of the High Court Act 20 of 1954). *Herbstein and Van Winsen, THE CIVIL PRACTICE OF THE SUPERIOR COURTS IN SOUTH AFRICA, 3RD Ed. (Juta and Co.) 1979 at 23-24* states as follows:

> 'The word 'jurisdiction' is capable of a number of meanings. Here it would be used as meaning the power or competence of a particular South African superior Court has to hear and determine an issue between parties brought before it, and this would be dealt with from various angles. First, however, it is necessary to examine the nature of superior Court jurisdiction in general.

'The superior Courts, differing in this respect from the inferior Courts, have an inherent jurisdiction to make orders, unlimited as to amount, in respect of matters which come before them subject to certain limitations imposed in some instances by the common law but more often by statute. In other words, while the inferior Courts may do nothing which the law does not permit, the superior Courts 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. The Court has thus an inherent power to order a party to give particulars of an allegation in his pleading, to strike out portions of pleadings, or to add further defendants either on the application of a party or on its own motion.

In addition to powers under any statute or rule of Court which might justify a particular procedure, it has the power to prevent any abuse of its process and to prevent vexatious litigation. In the exercise of this power it can prohibit a litigant from bringing further proceedings without leave of the Court or may order a vexatious litigant to give security for costs of the other side.'

(All footnotes have been omitted by me and the underlining added by me for emphasis).

[34] In its simplest form or definition, jurisdiction refers to the legal power of a Court to hear and determine or dispose of a matter. The power or jurisdiction of the High Court is strictly speaking not unlimited inasmuch as it may be ousted by statute or some other law. For example, the jurisdiction of the High Court is ousted in labour issues in terms of Section 8 (1) of the Industrial Relations Act of 2000 and is also ousted in terms of Section 151 (3) and (8) of the Constitution regarding matters governed by Eswatini Law and Custom. There is, however, a general presumption against legislative ouster or interference with the inherent jurisdiction of the High Court. See *Lenz Township Co. (Pty) Ltd v Lorenz N.O. 1961 (2) SA 450 (A).* Where jurisdiction is ousted, this must be in clear and unambiguous terms or by necessary implication from all the relevant terms.

[35] In *Mkhize Elliot Mhlanga and 2 Others v The Attorney General, Civ. Case 1005/1991 at Page 7 to 8,* with reference to *Liassou v Pretoria City Council 1979 (3) SA 217 (TPD)* Hull CJ stated as follows;

'In *Liassou,* the Applicant had applied to the Court to review a decision by the Pretoria City Council under Section 35 of the Pretoria Town Planning Scheme (1974), refusing its request to use premises for the purposes of entertainment involving pin ball machines. Section 17 (9) of the scheme stated that an Applicant aggrieved by a decision of the council had a right of appeal. Under Section 35, the appeal lay to the Townships Board, and it was common ground that appeals were by way of complete re-hearings. The Applicant approached the Court without having pursued that right of appeal.

In his judgment, at paragraphs E and F on page 219 Preiss J. said:

> "A Court leans against the removal of a person's right to review proceedings of a tribunal in the supreme Court, or of the postponement of such right until his remedies have been exhausted in the form of appeals to which he is entitled. I agree with Mr. Strauss for the Applicant, that the exclusion of the Court's power to entertain a review immediately following upon the alleged irregularity must

flow from the express words of the relevant statute or by necessary implication from all the relevant terms."

He went on to cite the earlier authorities on which he relied for that conclusion, and in particular the summary of South African law by Holmes JA in *Local Road Transportation Board and Another v Durban City Council and Another 1965 (1) SA 586 (A) at 593B* in which that latter judge said;

"In the present case the correct approach is to inquire whether and to what extent the intention of the legislature . . . was to oust the Court's jurisdiction pending exhaustion of the statutory remedy of appeal . . . . There will be an ouster only if that conclusion flows by necessary implication from the particular provisions under consideration and then only to the extent indicated by such necessary implication."

[36] In the present application, I have carefully studied the Act and I have not come across any provision that unambiguously or by necessary implication ousts the inherent jurisdiction of the High Court as a Court of first instance. All that the Act does is to confer jurisdiction to hear and determine the matters therein contained on the Children's Court.

It then designates every Magistrate's Court as a Children's Court within its area of jurisdiction. Custody and maintenance issues are some of the matters that such Court has jurisdiction on. Whilst it is true that Section 132 (1) of the Act refers to the jurisdiction of the Children's Court, it is not entirely true that 'the High Court is excluded.' The High Court is not mentioned at all. (See paragraph 20 of the judgment of the Court). The adage or axiom that the express mention of one person or thing is the exclusion of another (*expressio unius personae vel, est exclusio alterius*) is said to be a valuable servant but a dangerous master in the construction of statutes or documents, finds resonance and application in this case. Regretfully, this Court on appeal, used this principle as a master rather than a servant.

The High Court is not mentioned because, unlike the Magistrate's Court, it enjoys its inherent jurisdiction. It already has the jurisdiction to hear such cases as a Court of first instance. Therefore, the jurisdiction in this case is concurrent. In *Standard Bank of SA Ltd and Others v Thobejane and Others (38/2019 & 47/2019) and The Standard Bank of SA Ltd v Gqirana N.O. and Another (999/2019) [2021] ZASCA 92 (25 June 2021)* the Court had this to say:

'[26] The concurrency of jurisdiction in circumstances in which a claim justiciable in a Magistrate's Court has been brought in a High Court has been recognised for over a century. In *Koch v Realty Corporation of South Africa* the Court held:

> "Now the first question we have to decide is: what is the policy of the Magistrate's Court Act? Is it the policy of the Magistrate's Court Act to take away from this Court the consideration of questions involving an amount of less than R200, or is it the policy of the Act to enable law suits as a general rule to be brought more cheaply than would be the case if they had to be brought before this Court? Was it ever the policy, of the Magistrate's Court Act to deprive this Court of the right of hearing suits involving an amount less than R200? Now there is nothing said in the Magistrate's Court Act that cases under R200 are to be brought exclusively in that Court, therefore, this Court has a concurrent jurisdiction with the Magistrate's Court in all such cases as the Magistrate is entitled to hear."

[37] The general scheme or arrangement of the Act is to confer jurisdiction on a Magistrate's Court on the issues therein stated. Such jurisdiction is, however, not exclusive to that Court. The High Court has original inherent jurisdiction on these matters. Nowhere in the Act is the jurisdiction of the High Court restricted or ousted.

[38] Section 215 of the Act is one of the Sections which the Court relied on for its conclusion that the High Court has no original jurisdiction to hear and determine custody and maintenance disputes. This Section is in the following terms:

> '215. The Children's Court may request that a Social Worker prepares a social enquiry report on the issue of maintenance and submit it to the Children's Court for consideration before the Children's Court makes a maintenance order.'

Again, that reference is made to the Children's Court and not the High Court does not take away the jurisdiction of the latter. It is common cause that such socio-economic reports are often requested and supplied to the High Court whenever needed by the Court. This provision only codifies what is already common practice at the High Court. In any event, the fact that the High Court undeniably has review and appellate jurisdiction on such matters

from the Magistrate's Court is a clear indication in my view that it is well equipped to hear such cases. To argue otherwise would be to claim or postulate that the mentor is less qualified or less equipped than the pupil. This is untenable and illogical.

[39] For the above reasons it is my respectful judgment that the Court made a patent error in its interpretation of the relevant provisions of the Act. The inherent jurisdiction of the High Court has not been ousted by any of the provisions of the Act. The High Court has jurisdiction, as a Court of first instance, to hear and dispose of matters in respect of custody and maintenance.

[40] The erroneous judgment referred to above had the effect of unsuiting the Applicant. An injustice; a manifest injustice for that matter, was visited upon her. The error of law was patent, glaring and profound. It has to be corrected and this review is for that purpose.

[41] I have concluded above that the Applicant was unfairly denied her right to properly present her case before the Court. As a direct consequence of this, she was unsuited and advised to restart her legal

battle to protect her rights in another forum – the Children's Court. She had come to this Court for redress and this Court denied her justice by shutting its doors to her. This, taken individually and cumulatively with the wrong interpretation and application of the Act, qualifies this application as one to be heard in terms of Section 148 (2) of the Constitution.

[42] This Court, sitting as a Court of Appeal did not deal with the merits of the appeal. It only dealt with the issue of jurisdiction as outlined above. This bench is strictly constituted as a review Court. I do not think that it would be legally sound or proper to venture into the merits of the appeal and cross-appeal. Both sides did not address this Court on such appeals. For example, if we were to commit a reviewable error in the appeal, any party aggrieved by that error may find it legally untenable to review a decision of this review Court. Generally, only one review is permissible in each case in terms of Section 148 (2) of the Constitution.

[43] One further point deserves mention in this case and it is this: what is the legal status of Order (c) that was made by the Court on appeal? This order is in the following terms;

> '(c) The Respondent shall, in terms of a undertaking given from the bar, continue to contribute a sum of . . . E8,000.00 per month towards the maintenance of the children subject to any subsequent order by the Children's Court.'

Although this was an order founded on an undertaking made by Counsel for the Respondent (from the bar), once the Court had ruled that it had no jurisdiction to hear the matter, it would appear to me that it equally did not have jurisdiction to enter the said order. The undertaking or consent by Counsel could not confer the requisite jurisdiction on the Court. Immediately a Court endorses an undertaking by any of the parties or a consent order, the order so endorsed becomes an order of the Court as any other order by the Court. It would seem to me, on mere first principles of law, that in order to make a valid order, a Court must in the first place be endowed with the jurisdiction to make such an order; bar the declaration of lack of jurisdiction and orders ancillary to or consequent upon it. This point was, however, not raised or argued before us and therefore my opinion thereon is purely *obiter*.

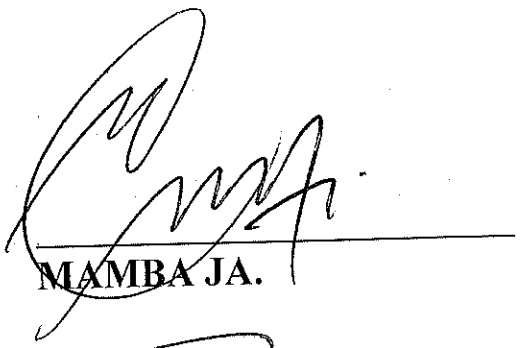
[44] For the above reasons, I would make the following order:

(a) The application for review is granted.

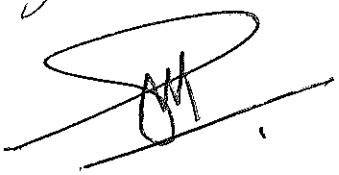
(b) The judgment issued by this Court on 04 June, 2021 is hereby reviewed and set aside.

(c) It is hereby declared that the High Court, as a Court of first Instance, has jurisdiction to hear and determine matters in respect of custody and maintenance.

(d) The Respondent is ordered to pay the costs of this application.

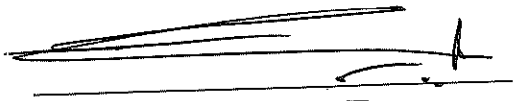


MAMBA JA.



I AGREE

S. B. MAPHALALA
JUSTICE OF APPEAL



I ALSO AGREE

J. P. ANNANDALE
JUSTICE OF APPEAL

I ALSO AGREE

J. CURRIE
JUSTICE OF APPEAL

I AGREE

J. M. MANZINI
ACTING JUSTICE OF APPEAL

FOR THE APPLICANT: MR. S. DLAMINI (MAGAGULA & HLOPHE ATTORNEYS)

FOR THE RESPONDENT: MR. Z. D. JELE (ROBINSON BERTRAM)