IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO. 28/2022**

In the matter between:

The Chief Justice of the Kingdom of ESwatini N.O	**First Applicant**
The Judicial Service Commission	**Second Applicant**

And

The Clerk of Parliament	**First Respondent**
The Speaker of the House of Assembly	**Second Respondent**
The Honourable Sandla Fakudze N.O	**Third Respondent**
The Attorney General	**Fourth Respondent**

Neutral Citation: *The Chief Justice of the Kingdom of ESwatini N.O and other v The Clerk of Parliament and Others (28/2022) [2022] SZSC54 (30th November, 2023)*

Coram: JP Annandale JA

Heard: 8th June 2023

Delivered: 30th November 2023

CASE SUMMARY

Application for leave to appeal – Interlocutory order with final effect. Separate ancillary aspects are applicable. Referral by Court a quo to Principal Judge of the High Court, by virtue of being the most senior Judge of High Court, to empanel a full bench to hear and decide the merits of the matter at hand. Appellants challenge this referral to the Principal Judge instead of the empanelment being done by the Chief Justice due to this referral to a Full Bench. Sections 139 (5), 141 (2) and 142 of the Constitution considered in the absence of delegation of powers under Section 150 (5). Common cause that no such delegation of powers preceded the order sought to be impugned on appeal. – Judicial independence, separation of powers, and Constitutional compliance in issue. – Locus standi in iudicio and doctrine of clean hands raised in limine by Respondents. Held that reasonable prospects of success exist – Supreme Court in its appellate jurisdiction to decide the merits of the intended appeal – Public interest and confidence in an independent judiciary fortifies reasons to obtain finality regarding separation of powers and when inquiries into the office of the Master of the High Court may be instituted by Parliament vis-à-vis the Chief Justice. Leave to appeal granted – Costs in the cause.

JUDGMENT

Annandale JA

[1] The office of the Master of the High Court fulfills an undeniably important function in any society. Each and every day, people in our Kingdom pass on and their deceased estates by necessity have to be dealt with in

accordance with the law, whether testate or intestate. Surviving spouses and children are entitled to have confidence in the Office of the Master of the High Court in the fair and equitable liquidation and distribution of such estates, also that it be done in a timeous and participatory transparent manner with no fear of corruption, side taking or unexplained dissipation of assets.

[2] On the 9th December 2020, a select committee of the House of Assembly passed a resolution to commence with a probe of the Office of the Master to: *"Investigate the reported gross maladministration, abuse of power and embezzlement of estate monies at the Master of the High Court"*. The Parliamentary Committee was mandated:

1) To inquire and report on the alleged maladministration;
2) To inquire and report on the alleged abuse of power;
3) To inquire and report the alleged embezzlement of estate funds;
4) To investigate incidental matters; and
5) To compile a report with findings and recommendations within sixty (60) days.

[3] As far as I am aware, no challenge to the rationale behind the purported need to institute an actual inquiry into these alleged affairs at the Master's office has been raised, but the issue became one of which body, entity, or person is the proper functionary which has the necessary authority to do so. Does it fall within the powers and authority of a Parliamentary Select Committee, or is it to be instituted from within the Judiciary itself?

[4] On the day when the Master was called upon to appear before the Parliamentary Committee, the Applicants brought an urgent application before the High Court to seek a *rule nisi* ordering that:

1) The office of the Master of the High Court, under the Judiciary, in its administrative and financial administration is independent from any organ of the Kingdom but only subject to the Constitution;
2) Parliament has no power to enquire into the administrative and financial operation of the Office of the Master of the High Court;
3) The Select Committee of Parliament is interdicted and/or restrained from investigation (sic) and/or probing the Office of the Master of the High Court with regard to its administrative and financial function;

as well as the usual prayers for costs, interim and immediate effect of the relief.

[5] Interim relief was granted by mutual consent of the litigants, as prayed for, by a single judge of the High Court. There is no issue taken with this relief which was in the form of a *rule nisi* but before the merits of the matter could be heard, a preliminary issue arose as to whether or not it was to be determined by a single judge or by a full bench of the High Court, and also who was to empanel a full bench if so required.

[6] The learned judge *a quo* admirably dealt with the first part of the question in his judgment. He *inter alia* referred to Section 151 (2) of the Constitution of ESwatini which empowers the High Court "... to hear and

determine matters of Constitutional nature". In common parlance, in the absence of a specialised "Constitutional Court" such as which exists in our neighbouring jurisdiction, the High Court of ESwatini is often referred to as our local version of a "Constitutional Court". It is not the Supreme Court that fulfills that function, since it is limited to appeal, review, and supervisory jurisdiction. Section 151 (2) (b) of the Constitution confers jurisdiction on the High Court "...to hear any matter of a constitutional nature..." while Section 150 (2) (a) holds that it shall be duly constituted by a single judge, and with Subsection (2) holding that "A full bench of the High Court shall consist of three justices of the Superior Courts". Section 35 (2) fortifies the jurisdiction of the High Court to hear and determine applications made to it, or referred to it by any subordinate court, where it is alleged that the rights enshrined under Chapter III of the Constitution (the Protection and Promotion of Fundamental Rights and Freedoms) has been, is being or is likely to be contravened.

[7] In view of the aforegoing, with it being clear that the High Court has jurisdiction to hear and determine the matter brought before it, the learned judge *a quo* remarked in paragraphs [19] and [20] of his judgment as follows:-

> "The above provision was enacted, in my view, because the drafters of the Constitution contemplated that some matters will be best suited to be heard by a full bench. The only *lacuna* is the lack of a provision setting out the kind of matters that would warrant a referral to a full bench. As both parties submitted, the decision is made by the judge before whom the matters are, are the ones referred to a full bench. It is for this

reason, in my opinion, that a full bench in our jurisdiction is generally referred to and regarded as a Constitutional Court.

Applicants insist that this matter is best suited to be heard by a full bench whilst the respondents insist, on the other hand, that no law precludes a single Judge from hearing the matter. The respondents' fundamental argument is that the applicants placed the matter before a single Judge and obtained an interim order. There is, therefore, no good reason why they now insist on a full bench when they are the ones who placed the matter before a single Judge and obtained an order that operates in their favour, although operating on an interim basis."

[9] Having said so, the Court then proceeded to deal with what it referred to as a *lacuna*, the absence of legislation or rules of court, or binding precedents from the Supreme Court, as to whether or not the matter was to be dealt with by a single judge of the High Court, or a by full bench of High Court Justices. In my respectful view, the learned Judge admirably dealt with this discretionary exercise of his judicial functions.

[10] Comparatively, the Kingdom of Lesotho has similar Constitutional provisions as to the jurisdiction of the High Court. His Lordship relied upon the Lesotho Court of Appeal judgment in Chief Justice & Others v Law Society, C of A (Civ) No.59/2011) [2012] LSCA 3 (27 April 2012) where

Smalberger JA (Scott JA and Howie JA concurring) stated that although Lesotho has no specially designated Constitutional Court, it has been generally accepted that when the High Court exercises its constitutional jurisdiction it sits as a Constitutional Court. He continued to say that:

> *"...it appears to be generally accepted that when the High Court exercises its constitutional jurisdiction it sits as a Constitutional Court. Importantly, and since both jurisdictions have very similar provisions under our respective Constitutions, the Court then said in paragraph 4:*
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> *"A practice appears to have grown up, at least over the last 12 years, that where the High Court exercises its constitutional jurisdiction, in a matter which involves a challenge to the constitutionally of legislation or delegated legislation, the matter is heard, where possible, by a Bench compromising three judges... litigants will therefore have come to expect that such matters will be heard by three judges of the High Court and, in the event of the matter coming on appeal to this Court, by a Full Bench of five judges of this Court".*

[11] The learned Judge *a quo* considered the position in Namibia under Section 10(3) of its Constitution. There, when a matter is considered to be of "Constitutional and public importance", the High Court bench should consist of a "larger number" of judges, and the Supreme Court to have a full bench of five justices. In South Africa, which has a specialised Constitutional Court, Section 14 of the Superior Courts Act No. 10 of 2013 holds that the High Court may be constituted by three Judges when so

directed by the Judge-President, his/her Deputy, or the most senior available Judge, likewise to be constituted by a larger number of justices when deemed as a matter of importance.

[12] The learned Justice then remarked (in paragraph 33) that:-

> "The dispute between the applicants and the respondents concerns the power and or functions of the Judiciary and the Legislature. It is a matter of great public importance and interest because it concerns organs of the state, and depicts conflicting legal opinions of the Chief Justice and the Attorney General. ...the importance of the matter is not only to the litigants, but to the country and the general public. It is also a matter of fundamental importance for our constitutional law and the development of the country's jurisprudence."

[12] Accordingly, and it is not under any challenge, the Court concluded that:

> "The country thus find itself in a situation where organs of the state have dragged each other to Court over the constitutional status of the powers and functions that each organ has, particularly as against each other. Persuaded by the positions of the other jurisdictions I referred to above, it is my opinion and finding that this matter is best suited to be heard by a full bench of this court. It is a matter of constitutional and public importance".

Because it forms the basis upon which the application for leave to appeal was founded, I have detailed the process which have resulted in this finding. The controversy which is sought to be challenged on appeal is the consequent relief that was ordered, to wit the empanelment of a full bench by the Principal Judge of the High Court and not the Chief Justice. It is the one and only issue in this opposed application for leave to appeal.

[15] The court below considered arguments by the parties based on at least 16 different sections of the Constitution. In the main, it concluded that the Chief Justice is conflicted in the matter for diverse reasons and it then *"involved the inherent jurisdiction conferred [on it] and directed that the Principal Judge, by virtue of being the most senior judge of the High Court ... be and is hereby ordered to empanel a full bench that will hear and decide this application*" (paragraph 42).

[16] It is due to this order, that the full bench be empanelled by the Principal Judge of the High Court and not by the Chief Justice or the most senior of the justices of the Supreme Court in accordance with Section 153 (2) (b) of the Constitution, as well as various other factors, that the applicants now want leave to appeal the impugned order.

[17] The Respondents principally oppose this application on the premise that the applicants are before the court "with dirty hands" and that they lack *locus standi* to seek leave to appeal, moreover that the relief ordered by the High Court was sought and granted at their behest, thus precluded from challenging a judgment in their favour. In any event, it is sought to be argued by the Attorney–General that the entire main case of the Applicants

"*is founded on the erroneous premise that the office of the Master of the High Court is part of the judiciary*", which wrong premise is said to be fatal to their main case *a quo*, thus falling to be dismissed.

[18] The latter argument is clearly not apposite at this stage of the matter. It is premature to raise it now or to say that the applicants seek to "impermissibly extend judicial independence" (sic) in that regard. These are issues that are yet to be determined by the High Court in due course when the merits of the matter are to be decided by a full Bench, empanelled by whoever.

[19] The gist of the argument by the Attorney-General is that there cannot be any prospects of success in that the applicants cannot challenge an order or ruling which they themselves have not sought, similar to litigants who consent to or acquiesce in a judgment. It is said that it is the applicants who argued that the Principal Judge of the High Court can constitute or empanel the full Court and that their argument prevailed, hence they cannot now want to appeal that ruling as being unconstitutional. The Respondents argue that if it was so, it could have been presented as such but that it was chosen not to be pursued in the High Court. It is said that they now want the Supreme Court, in its appellate jurisdiction, to "decide a new point altogether which will not even be dispositive of the case". Furthermore, that this "new point" is not covered by the affidavits filed in the court below, and if the applicants had then argued as they now want to do on appeal, it would have been contradicted by the Respondents and thereby the Supreme Court would have had the benefit of the views by the High

Court to avoid the Supreme Court being a court of first and last instance on a constitutional point.

[20] The applicants counter all of this and say that even if it was true that there was acquiescence by their attorney, which is not admitted, that the principle of estoppel cannot be used to give effect to what is not permitted or recognised by law. Consent to an invalid or unlawful act therefore does not clothe it with validity or legality, it is said, and that it therefore does not fall under the objections as argued by the Respondents. In addition, the court *a quo* did indeed motivate its reasons for ruling as it did in the contentious portion, which is available for scrutiny on appeal.

[21] It must be emphasised that the portion of the order by the High Court only came into being as a result of the finding that the Chief Justice is conflicted, both in his personal and nominal capacities. In turn, it then resulted in an order that is said to be *prima facie* contrary to constitutional provisions relating to the functions and powers of his office, and this is what the applicants want to have determined on appeal. In essence, this is the axis upon which the real issues at stake are intertwined with each other. The complex web of multiple issues at stake is sought to be opened and subjected to critical analysis.

[22] The question to decide is whether leave is to be granted to have the Supreme Court sit in its appellate jurisdiction to hear and determine the appeal for which leave is now sought to be granted, based on the aforestated considerations and then some more, or whether the application

must be refused and that the order currently under Constitutional and other challenges, become executable *de iure*.

[23] That it requires a delicate balance between competing interests bears no argument. It also requires a healthy dose of common sense and the ability to" see the trees for the forest". An underlying sense of duty to dispense justice not only in accordance with both the letter and spirit of the Constitution and Judicial oath but also in line with the Scriptures where judicial processes have been referred to in numerous instances.

[24] During the course of the hearing of this matter, the inimitable advocate M. Vilakati appeared for the fifth respondent. He distinguished himself in the manner in which his argument is well-researched and backed up by relevant authorities, local and from other continental jurisdictions. Perfectly presented and argued commendably. This was all beyond the initial heads of argument from the Legal Office, as was already before the court.

[25] I have applied my mind over some time in reflection on this legal argument on especially the points of law. It concerns the circumstances under which a designated person can or cannot make the decision, and whether a court can exercise its original and inherent jurisdiction in a matter such as this, concluding as it did, and especially if this matter should indeed be allowed to go on appeal, or not.

[26] Authorities that deal with the question of whether the better remedy to seek would have been a rescission application in the High Court due to the

alleged version that counsel for the first application would have made certain concessions, on record, when the Court *a quo* entertained this matter before it, have been extensively referred to.

[27] There is a difference of opinion and interpretation of what was indeed conceded, or not, and to its legality, if indeed so. Whichever manner of precedence, it resulted in an order that the Principal Judge of the High Court shall constitute a full bench to hear the matter. Of course, this is subsequent to a necessary condition precedent wherein it is supposed that the Chief Justice is indeed unable to fulfill his duties, Constitutionally or otherwise.

[28] In MEC for Economic Affairs, Environment and Tourism v Kruizena [2010] 4 All SA 23 (SCA), Cachalla JA with the concurrence of a full bench, dealt with the authority to concede or settle a claim or otherwise compromise his client, it was held that client was estopped from denying the authority of the state attorney [or privately instructed attorney] to enter into the agreement in question.

[29] However, the so-called "agreement" is not cut and dried. There are contesting approaches as to how it all came about and what was actually and factually "conceded to".

[30] Moreover, the functionality of office bearers in the High Court, Supreme Court, and the functions of the Chief Justice has been circumscribed in the

Constitution of the Kingdom of ESwatini. Any order or directive, such as the present one concerning the empanelment of a bench to hear a matter referred to it, and which *prima facie* might be breach of the constitution, takes high precedence when it comes to the decision at hand.

[31] Zooming further away toward the panoramic picture setting, the broader perspectives come into focus. The real underlying cause of this litigation has its foundation in the concept of the Separation of Powers. Our National Constitution makes it very clear that the Legislative, Executive, and Judicial Power of Government is vested in these three "arms" and that they shall operate independently of each other.

[32] In the underlying matter at hand, a decision was taken by the legislative arm of Government, to establish an inquiry into the operations of the Master of the High Court. This followed various publicly published complaints which were considered by the Parliamentary Committee.

[33] Subsequently, the applicants sought to put a stop to such inquiry, but which was eventually sidetracked by the interventions now sought to be challenged on appeal.

[34] When all of the above is placed in the crucible of judicial scrutiny, it remains important to recall that the granting or refusal of leave to appeal potentially may terminate these most important legal proceedings without the benefit of a considered decision on the merits of the appeal itself. It is intertwined with its own history and constitutional dictates, and

Independence of the Judiciary is effectively sought to be settled in the aspect of a decision as to whom it is properly ordering an inquiry into the operations of the Master of the High Court. It also envisages the separation of powers between the Judiciary and the Legislative branch of Government.

[35] To now effectively decide this application for leave to appeal would by necessity require this court, sitting as a designated single judge of the Supreme Court, to also pre-determine all of the issues sought to be raised on appeal. It would also have to include a determination, at this stage of the proceedings, as to whether or not the Chief Justice or the Principal Judge is to empanel the Bench for hearing of the pending application before the High Court, as well as the condition precedent, a judicial finding that the Hon. Chief Justice is indeed and actually unable to perform his [official] functions of office. It further includes argument and a decision on the wording of "for any reason..." in the applicable context.

[37] The Botswana decision in the matter between Gabriel Gadzene Kombani v Chief Justice Terrance Rannowane and 5 others, Case No. UAHMN-000032-22, comprehensively deals with various issues which will become alive during the consideration of the intended appeal. Although there are a number of relevant and possibly persuasive areas of overlapping, it is equally distinguishable in various other areas. Again, it is my well-considered opinion that this matter should indeed be referred to, and considered on appeal.

[38] Furthermore, the constitutional and other ramifications of "... the most senior Judge..." are equally contentious, whether it must indeed be the most senior Judge of the Supreme Court or of the High Court on the other hand. It requires an informed Judicial decision based on all of the available material, facts and applicable legal precedent. Yet again, it can only be decided upon by the Supreme Court in the exercise of its appellate jurisdiction. The hurdle to overcome is to obtain leave to appeal and have it duly decided on appeal. To close the door at this stage of proceedings by declining leave to appeal is not, in my respectful view, the best manner to serve the interests of Justice.

[39] It is with all of these considerations in mind – the importance of the matter, the constitutional ramifications, legal certainty under a Supreme Court Judgment as to exactly who is to empanel a full bench of the High Court to hear a constitutional matter, as well as when and how section 153 (2) of the Constitution is to be interpreted insofar as "...unable to perform the functions of his office..." is concerned. It is abundantly clear that this matter has to be decided on appeal to the Supreme Court.

[40] The reasons to support the applicant's/ prospective appellant's application for condonation of the late filing of their heads of argument and bundle of authorities pass muster. It is well-motivated and adequately deals with legal precedent on this issue.

[41] Accordingly, it is ordered that leave to appeal the second order of the High Court Judgment handed down on the 8th of April 2022 which reads that:

> "The Honourable Principal Judge [of the High Court], by virtue of being the most senior Justice of the High Court, is ordered to empanel a fall bench [of the High Court] to hear and determine this matter", shall be granted as prayed for in the Notice of Motion (for Leave) dated the 6th day of May 2022. No costs order is made.

JP ANNANDALE

Justice of Appeal

For the Appellants:	Advocate M Vilakati, with him Mr. S Hlawe: Attorney–General's Chambers
For the Respondent:	Mr. Z Jele: Robinson Bertram Attorneys