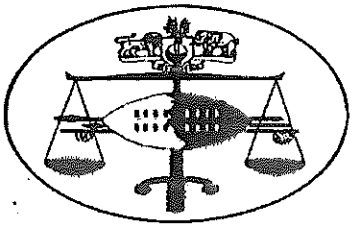

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 7/2022

HELD AT MBABANE
In the matter between:

COMMISSIONER GENERAL OF HIS MAJESTY'S CORRECTIONAL SERVICES **Appellant**

And

SIPHO DUMSANI SHONGWE **Respondent**

Neutral Citation: *Commissioner General of His Majesty's Correctional Services vs Sipho Dumsani Shongwe* (7/2022) [2022] *SZSC 09* (17th March, 2023)

Coram: **S.P. DLAMINI JA; M.J. DLAMINI AND R.J. CLOETE AJA.**

Heard: 21 November, 2022.

Delivered: 17 March, 2023.

SUMMARY: *Civil procedure – Appeal against a dismissal of an Application for Summary Judgment before the High Court – Audi alterum partem. – And compliance with a Court Order – Held that the matter be referred to the High Court for oral evidence before a different Judge – Held further that the Order of the High Court dated 16th June 2021 is held in abeyance pending the outcome of the hearing before the High Court – And held further that no order as to costs is made.*

MAJORITY JUDGMENT

S.P. DLAMINI JA

INTRODUCTION

[1] This is an appeal arising out of a Judgment of the High Court dated 16th June 2021 dismissing an Application for a rescission.

[2] The Appellant was dissatisfied with the impugned Judgment and launched the appeal before this Court.

BACKGROUND AND FACTS

[3] It is not necessary to go into the background and facts of the matter for the following two reasons:

3.1 Firstly, this background and facts are sufficiently covered in the minority Judgment of my Brother Justice M.J. Dlamini and;

3.2 Secondly, in view of the order made to refer the matter back to the High Court, it is in my view prudent to steer away from delving into the background and facts of the matter in order not to fall into the trap of possibly limiting a proper and full hearing before the High Court.

[4] I have carefully read the Judgment penned by my Brother Justice M.J. Dlamini and, in my view he has dealt with the background and facts in a clear and concise manner and as such there is no need to regurgitate same in this Judgment.

[5] The background and facts as set out in Justice Dlamini's judgment, to the extent that they will not limit a proper and full hearing before the High Court are incorporated to this judgment.

THE LAW

[6] It is trite in our law that where in an application it is clear that material disputes of facts will or have arisen, the matter ought to be referred to oral evidence.

[7] In the matter before this Court there are many material disputes in particular relating to the circumstances of the granting of the order dated 16 June 2021 and the compliance or lack thereof. These disputes in my view ought to have been ventilated through oral evidence.

CONCLUSION

[8] The Appeal, as appears from the papers filed of Record, raises fundamentally and far-reaching important issues namely the alleged failure by the Appellant to comply with an Order issued by the High Court and the efficacy and interrogation of the evidence relied upon by the Court *a quo* in formulating the Order which it made.

[9] I must respectfully disagree with the conclusion reached by my Brother Justice Dlamini for the reasons I set out below;

9.1 On the one hand, the Appellant, like all litigants before all of the Courts of Eswatini, is enjoined by law to fully respect Orders issued by the Courts unless and until such Orders have been set aside or rescinded or relaxed by an appropriate Court.

9.2 On the other hand it is trite that the Courts, on adjudicating on any matter, must rely on sufficient evidence to make the ultimate Orders which flow from the proceedings.

9.3 In the circumstances of this matter it appears that various allegations were made by both parties which were not fully ventilated and argued before the Court *a quo*.

9.4 Needless to say that the matter raises very important constitutional rights including the right of an incarcerated person to be held with dignity and not subjected to torture in any form in their place of custody and also the full right of the Commissioner to administer the Correctional Facilities in a manner which is prescribed by the relevant legislation.

[10] In my view the matter should accordingly have been referred to the Court *a quo* for it to hear oral evidence in order for that Court to fully test and interrogate the relevant evidence before making an informed decision and making the correct Order.

[11] In addition it must be noted that this Court, in terms of the Constitution is not a Court of first instance and as such this Court is not in a position to speculate on the relevance of some of the untested facts set out in the papers before the Court *a quo*.

[12] I must most respectfully disagree with the conclusion reached by my brother that in this matter the *audi alterem* principle *"trumps"* the principle of clean hands which, with respect is also firmly ingrained in our law.

COURT ORDER:

[13] In the result the Court makes the following Order:

13.1 The Appeal partially succeeds.

13.2 The matter is referred back to the High Court for oral evidence before a different Judge.

13.3 The Order of the High Court dismissing the rescission application is set aside and substituted with the following Order:

"This matter is referred to oral evidence."

13.4 The Order of the High Court dated 16 June 2021 is held in abeyance pending the outcome of the hearing before the High Court.

13.5 There will be no order as to costs.

S.P. DLAMINI
JUSTICE OF APPEAL

I agree

R.J. CLOETE
ACTING JUSTICE OF APPEAL

Practice: Judgments and orders – Rescission of order granted in absence of affected party – Affected party in alleged contempt of court order – Clean hands doctrine invoked but held not applicable. A party prejudicially affected by an order has a right to be heard before the order is made.

MINORITY JUDGMENT

M.J. Dlamini JA

Introduction

[14] This matter originates from an order issued by the trial Judge (NM Maseko J.) in criminal case, Number 42/18, *Rex versus Sipho Shongwe,* on the 16th June 2021.

[15] Mr. Shongwe, hereinafter called the Respondent, has been on trial over a period extending in excess of two years; he has been kept as an inmate at the Matsapha Correctional Facility for most of that time. When, on 16 June 2021, the case was called and Respondent having taken his place at the dock, and counsel on both sides having acknowledged their presence and respective appearances, the hearing proceeded as follows:

> "Judge : Morning, Mr. Shongwe?
> Accused : Morning, My Lord …
> Judge : Thank you. Mr. Hordes?

AC : My Lord the accused wants to address you, if you may; we believe it is something that (inaudible) him directly to your Lordship ...

Judge : Occurred this morning?

Accused : Pardon, My Lord.

Judge : You are saying he wants to address me?

Accused : Yes, My Lord.

Judge : Yes ....

Accused : My Lord, I am here before court for trial. I am someone who is not well. I have been very much humiliated. There is an incident that took place yesterday, and unfortunately it was not for the first time. There was a routine search yesterday. During that search there is a young man who then pulled me by my private parts. When I enquired as to why he was pulling me with my private parts, they then threatened to assault me...

Judge : He is one of the Correctional Officers?

Accused : That is correct, he is one of the Correctional officers. At the Correctional Facility, My Lord, ever since there has been new management, some inmates are being beaten in front of us. When I was threatened with assault, I then got scared. There have been many incidents, My Lord, which I do not want to burden this court, narrating those incidents. There was a time where I had to spend 3 days without food. I am someone who is using food that is coming from outside. For those three days my food was turned back. My Lord I was very much surprised by yesterday's incident. I reported the previous incidents to one of my attorneys, who in

turn went to meet the Commissioner General who promised to come back to us with a response thereto. Then I was shocked yesterday when I was pulled by my private parts. I sent my grievance to those in charge yesterday or the seniors, but there was no remedy....

. . . My Lord, I am very uncomfortable where I am and the manner in which I am being treated. My Lord, everything relating to me pertaining to treatment is different; I am being treated differently from other inmates. I have requested many times that if maybe I could be treated similarly to those other inmates but those issues couldn't be resolved

My Lord, if I may request that I find an alternative place, wherever it could be.... What scares me a lot is that capital punishment is still available even today under the current Officer in Chief. That is all My Lord....

Judge: Yes, but would you prefer that I adjourn briefly, I consult with your legal team and the Crown in chambers and then come back and continue whilst the matter is being worked on?

Accused : As the court pleases, My Lord.

Judge: Because your health, safety and your welfare is my concern...it is part of the tenets of the principle of a fair trial. If you are at Correctional Services, you have to be there, be comfortable, be able to prepare for your defence; be at a good state of mind so that you can follow and attend to your case. So I will take a short adjournment so I can see counsel in chambers.
Court adjourned."

[16] On resumption, after the short adjournment, the following Court Order was issued:

"COURT ORDER

"Whereupon: Having heard Mr. Sipho D. Shongwe in person about his well - being at the Matsapha Correctional Services and, having consulted with Counsel and the Registrar, Ms. Masuku in Chambers.

I hereby Grant the following Order,

His Majesty's Correctional Services be and is hereby ordered and directed not to detain the accused, Mr Sipho D. Shongwe, at the Matsapha Central Prison, where he is currently detained, but to detain him at another Correctional Services Facility with immediate effect i.e. Mr. Shongwe is not to spend tonight at the Matsapha Central Prison.

By Order of the Court

Given Under My Hand at Mbabane

On this day the 16th Day of June 2021

_____

Registrar of the High Court, Mbabane"

Application *a quo*

[17] Unhappy with the above Court Order – which appears to be final - and the manner in which the Order was obtained, the Appellant/Applicant, on 18 June 2021, launched an urgent application to stay and or to rescind the said Order. Even though the Order was for some unknown reason directed to "His Majesty's Correctional Services" the Appellant understood it to be directed to her as Commissioner General of His Majesty's Correctional Services. In her founding affidavit for the stay and rescission, the Applicant stated *inter alia* that (a) she had not been heard in the

process leading and giving rise to the grant of the order, and (b) the order was served on her after the Correctional facilities were locked down for the day on the 16th June 2021, that is, "the order came after 1830 hours and all the Prisons are locked at 1600 hours".

[18] The Applicant further alleged, *inter alia*:

"13. Amongst my statutory duties is to maintain discipline, security and be the superintendent over all facilities. Further my oversight of inmates commences from the time they are remanded up to the time they are released and this is my exclusive prerogative. I choose where they ought to be kept. With due respect, no one has the right to usurp these powers without affording me a hearing. . . . [T]here are Prison Regulations applicable to me on how I house inmates.

15. I strongly believe that had the Honourable Court heard our evidence at least from the officers who were in court, it would have not granted him the Order.

27. May I submit that I was not made aware of the Court Order in time so I could make means to comply with it. Unfortunately when I became aware of it after 7pm, it was already late to move the first respondent because our Regulatory Statutes do not permit that an inmate should be moved or transported after working hours.

29. I was made aware later on that the Registrar Miss Masuku called some of my officers . . . and advised that His Lordship had ordered that the Respondent be removed from the Matsapha correctional services with immediate effect. She promised to deliver the Court Order forthwith but it never came until the

correctional Centre was locked down. . . . The Order came after 1830 hours and all the Prisons are locked at 1600 hours.

30. He could not be transferred to any other prison then. It is a process to lock a jail since it involves counting the inmates, recording and checking security protocols....

31. The respondent is a grave security risk as evident from the maximum security maintained even in the precincts of the Court whenever he appears. Matsapha Correctional Centre is the only secure facility for an inmate of his caliber. The charges that he is facing and the evidence led thus far makes us believe that he has to be secured properly.

32. Our intelligence shows that there are foreign individuals hired to extract the respondent from prison and I submit that in order to upgrade the other facilities to be on par with the Matsapha Correctional Centre within a short time will need a lot of budget .... which has not been budgeted for.

35. Presently, we have in our classified intelligence files that the first respondent is working with outside forces on a daring escape. We are therefore apprehensive that his transfer from Matsapha would avail him just the opportunity he needs for escape.

41. We have a clear right to enforce discipline at Correctional Centres, to decide where to confine who as an inmate and to ensure the safety and security of all inmates including 1st Respondent. The court Order that we are complaining about interferes with these security responsibilities bestowed upon us without due process as we were never heard before it was issued as

a final order. We have no alternative remedy against the Court Order save for the rescission and stay we seek."

[19] And in paragraph 26 of her replying affidavit, the Applicant emphatically asserted:

"It is my constitutional duty and responsibility to ensure safe custody of the Respondent at all times whether inside or outside of the Correctional Facility whilst incarcerated. The Constitution (section 190) lawfully gives the superintendence of the Correctional Services solely to my office as Commissioner General, hence I have a vested right in the matter before Court."

[20] In light of the foregoing allegations, the Commissioner prayed for an order essentially in terms of Rule 42 (1) (a), which reads: *"The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary an order or judgment erroneously granted in the absence of any party affected thereby."* Because of its apparent urgency, the application was set down on the 19th June 2021, whereupon hearing counsel the court issued an order postponing the matter to 2 July 2021 for argument, without a *rule nisi* granted as prayed for by Applicant. The Respondent was to file his answering affidavit on or before 28 June 2021 and replying affidavit, if any, to be filed on 29 June 2021. It appears that the Respondent did not file his answering affidavit as per the Order of 19 June, thereby making it unnecessary for Applicant to reply.

[21] On 20 July 2021, the Applicant filed notice in terms of High Court Rule 30 (5) in which the Applicant contended that the Respondent's unsworn oral statement of 16 June 2021 breached section 21 (1) of the Constitution as it affected rights of Applicant under section 190 of the Constitution and section 61 of the Correctional Services Act, 2017; that by filing the papers on 13 July 2021, some 15 calendar days

late, Respondent was "coming to court with dirty hands by filing court processes in complete defiance of the Court Order of 19th June 2021 that directed that any court papers he may wish to file must be filed by the 28th June 2021" and had done so "without leave of court or condonation application being sought and granted"; that accordingly, the procedure followed by Respondent in filing his court papers was irregular and Respondent was allowed seven days in which to purge the irregularity.

[22] For reasons not set out on the papers, on 23 July 2021 Applicant filed another notice in terms of Rule 30. Applicant, however, never followed up the notice by going to court when Respondent failed to comply with Rule 30 (5). Respondent filed his answering affidavit, (per the court order of 19 June, 2021?) on 23 July 2021, with Applicant filing her reply on 11 August 2021. Even though it does not appear when the Registrar received the notice, it appears that Respondent had served notice raising points of law dated July 2021 on 12 and 13 July 2021 on the Director of Public Prosecutions and the Attorney-General respectively. Thereafter, on 23 July 2021 Respondent filed his answering affidavit, presumably in terms of the order of court of 19 June 2021. Again, it is not clear on my file when the Registrar received this affidavit. The signature and date stamp of the Registrar are not clear.

Respondent's case

[23] In summary, the points of law raised by the Respondent were that there were foreseeable material disputes of fact which meant that the proceedings should have been by way of action instead of motion; that Applicant had no standing in law as she had no 'material legal interest' in the matter; that a case for a stay had not been made out; the order affects no rights of the Applicant; the application was based on hearsay and the supporting affidavit of the officer in charge was not helpful, and that in any event Applicant was coming to court with dirty hands in that she had not complied with the order of 16 June 2021.

[24] In the opposing affidavit, dated 23 July 2021, the Respondent rehashed the above points of law before answering to the merits and concluded it by begging leave for the delay in filing the affidavit, which he attributed to his erstwhile attorney who *"took ill and could not assist me for more than 26 days"*. Exactly from what date the attorney was indisposed is not stated. Under paragraph 3 the Respondent attacked Applicant's averments as hearsay since she was not there when Respondent was assaulted and denied food; *"the Court must disregard her evidence in this regard and dismiss the application..."* Whilst asserting that the court *a quo "made the order on its own accord,"*[1] Respondent contended that Applicant had *"no legal interest in the matter"* as the law provides. Respondent further alleged that *"Applicant has come to court to try an attempt to set aside the courts order but is embarrassed that the conduct has been exposed and [is] afraid that the other inmates may come forward"*.

[25] In paragraph 4.1 of his points of law, the Respondent states as follows:

> *"It is denied that the Respondent applied to the Court to be removed and or transferred. The Court made the Order on its own accord as it deemed it fit to do so. The Applicant came to court with dirty hands and applied for the stay which was refused by the court on the 17th of June 2021. The Applicant refused to comply with the order hoping that the Court will set aside the order, which it refused"*.

[26] It is noted however that on the Record there is the Court Order of 16 June 2021 and that of 19 June 2021. The inexplicable part of the latter Order is that it is dated and stamped "9th March 2022". Why no contemporaneous record of the order has been served is not explained. It is not clear what Respondent means in above paragraph

[1] **It is worth noting that Respondent insists that the Order of 16 June 2021 was not made at his request but the Court gratuitously issued it on its own. But when Respondent made his oral statement he also said: "My Lord, I am here to make a request before you . . . if only I can be moved from where I am being ill-treated."**

that there was an order of 17 June 2021. We have no copy of that court order. The order of the 19th June 2021 does not dismiss the application but postpones it, and sets timelines. The application of 18th June 2021 was heard on 9 September 2021 and judgment delivered on 14 February 2022. The judgment does not refer to any order made on 17 June 2021dismisssing the stay. The judgment also says nothing about the timelines set out in the Court Order of 19 June 2021 that were never adhered to by the Respondent in the absence of an extension or condonation granted. The judgment says nothing of the fate of Applicant's Notice in terms of Rule 30. Instead, the court *a quo* upheld a point *in limine* based on the doctrine of unclean hands raised on behalf of the Respondent. In the result, the application launched on 18 June 2021 was dismissed with costs on the ordinary scale "inclusive of certified costs of Counsel, Advocate L. Hordes and Mr. L. Howe and Mr. BJ Simelane".

The appeal dated 9 March 2022

[27] The Applicant appealed the judgment of 14 February 2022 which held that the Applicant had approached the court with dirty hands and dismissed the application of 18 June 2021 with costs. The Applicant advanced some eleven grounds of appeal. Some of those grounds are that –

"1. The learned Judge *a quo* erred in law by dismissing the 'stay of execution and rescission application' against *the final and definitive order* based on an application sought *ex parte* on the 16th of June 2021 without giving the Appellant a right to challenge the *ex parte* final Court Order yet she is expected to comply with same.

2. The learned Judge *a quo* erred in law and fact that the Appellant was approaching the High Court with dirty hands without appreciating that Respondent was moved for security reasons after the political unrest [in the country] to a more secure correctional facility . . .

5. The learned Judge *a quo* erred in law when he refused to deal with (the) application for a stay of the *ex parte final order* granted by him on the 16th June 2021 based on unsworn evidence by the Respondent .... pending the rescission application, when the matter first appeared before him on the 19th June 2021 and on the date of arguments of the judgment under appeal.

6. The learned Judge erred in law and fact by ignoring and or refusing to decide the Rule 30 application by allowing the Respondent to be heard through his attorneys and to argue when he had failed to obey a Court Order of the 19th of (June) 2021 setting time lines for him to file his answering affidavit by the 28th of June 2021 but chose to file the same on the 23rd July 2021. . . without a condonation application. The Respondent approached the court with dirty hands but was given an indulgence to be heard.

7. The learned Judge *a quo* erred in law by reasoning that a right to be heard of the (Applicant) in terms of section 21 of the Constitution was trumped by the right of the Respondent to be heard (as he) was in 'a middle of a sensitive criminal trial'.

9. The learned Judge *a quo* erred in law and fact by granting costs yet this matter emanates from criminal proceedings".

[28] Consequently, the Applicant prayed for the following court orders –

"(a) The judgment under appeal be set aside in totality.

(b) The Ruling of the 16th June 2021 be set aside.

(c) Alternatively, the Ruling of the 16th of June 2021 be rescinded and (Applicant) be given leave to rebut the unsworn evidence of the Respondent by calling witnesses.

(d) Alternatively, the Ruling of the 16th June 2021 be set aside and the complaint of the Respondent be referred to another Judge to start *de novo*."

[29] By notice dated 15th March 2022, the Respondent **opposed the notice of appeal** and simultaneously raised points *in limine* contending that –

"1. The Appellant has no right of access to the court because he (sic) does not have leave to appeal the Order of the Court *a quo* in terms and as provided for by Rule 14 (sic) of the Supreme Court Rules. The said Order being appealed is not final and definitive in its nature....

2. The Appellant has approached the Court with dirty hands in that it (sic) has maintained the violation of the Court Order issued by the Court *a quo* on the 14th of February 2022 directing that the Respondent be removed from the Matsapha Central Prison with immediate effect. The violation of the said Court Order continues and the Appellant has shown no remorse, . . . The Appellant has no regard for the Rule of Law and cannot be granted any redress by the Court.

3. The Appellant has no rights of access to the Court....because it (sic) was barred by a judgment of a full bench which has never been set aside in the matter of **The Attorney-General v. Ray Gwebu and Lucky Nhlanhla Bhembe, Case No 3699/2002".**

[30] The reference to "the Court Order issued by the Court a quo on the 14th of February 2022" seems to be misplaced as that Order was not part of the Court Order of 16 June, 2021. And how the Applicant/Appellant was barred by the "judgment of the full bench" in the matter referred to was not explained other than that the judgment was never set aside. The parties in the 'full bench' case and the present case are different. The Respondent needed to elaborate in what sense the 'full bench' case bears on the present. Even the statement of the then Prime Minister in 2002 intimated that the advent of the Constitution (in 2005) would deal with and regularize any misunderstanding the Government may have about court orders. In the result, the 'full-bench' order fell into disuse after the Constitution was promulgated. There was no need for the order to be formally set aside, as Respondent's counsel contended. On the other hand, if by the reference to the **Ray Gwebu** case the Respondent meant that Appellant/Applicant was barred by reason of a defied court order, then the enquiry should consider when the defied court order was issued and when exactly the alleged defiance occurred. In this regard it is noted that the order of 19 June 2021 merely postponed the matter and set timelines. There was no interlocutory order as such binding Appellant. Further, if reference is made to the Order of 16 June 2021, then it seems to me that the argument depends on the timelines set in the Order of 19 June 2021 being observed or non-observance condoned. When the Order of 16 June was challenged on the basis that it was invalid and ought to be set aside or rescinded the Order of 19 June should have dealt with issue one way or the other in light of the alleged prevailing conditions in the country instead of postponing it. As the order of 16 June appears to have been final – which is how the Appellant(s) viewed it – on appeal in terms of Rule 40 of this Court the order of 16 June should have been considered as stayed.

[31] I will bypass the preliminary points touching on material disputes of fact, incompetent order sought and hearsay and consider the preliminary point based on clean hands which the court *a quo* used to anchor its judgment on the application. But before I move on it is apposite to refer to one or two arguments raised by counsel for the Respondent under the point *in limine* "incompetent order sought". In part, paragraph 2.3 reads: *"The Applicant has not made out a case for the stay of the order issued by the Court as they have to do more than make the allegations that they were not heard when the order was issued".*

[32] To the Applicant's averment of not being heard before the Order of 16 June was issued, counsel for Respondent also says *"... look at the Constitution and the functions of the Applicant to note that they have a simple duty towards the 1st Respondent, which is to provide him a safe, healthy and comfortable environment. The Applicant has failed in the Matsapha Correctional facility and has been the one who has perpetuated the said violations through his staff during the scope of their employment with the Applicant".* In short, counsel is contending that the court should ignore the fact that Applicant was not heard and only address the issue of Respondent's alleged ill-treatment which had given rise to the Order of 16 June. It was right, according to counsel, that Applicant be not heard because "a safe, healthy and comfortable environment" for Respondent at Matsapha Correctional facility was more important than the age-old, fundamental right of hearing the other side before an adverse determination is made. In my view, that cannot be. The Order of 16 June 2021 is a serious personal indictment on the competence of the Applicant as the superintendent of His Majesty's Correctional Services. The Constitution [sec. 190] referred to by Respondent's counsel does not say that other equally important rights for others should be ignored in favour of rights affecting the Respondent or any inmate. In my view, counsel's argument in this regard is simply dilatory and fails to address the core issue raised by Applicant – the issue of being heard before making the adverse Order of 16 June.

[33] Under paragraph 2.4. Mr. Howe submits:

"The said Order by the Court falls in the confines of the Constitution in terms of Section 190 (3), which is clear that the said Applicant has to follow the Orders of the said Court. They are subject to superior orders and those can only come from the said Court as it is a superior court in terms of section 151 of the Constitution. The Applicant has no choice in the matter but to follow the Orders of Court as per section 190 (3) of the Constitution".

[34] With respect, the foregoing argument is a complete misunderstanding of the provision, which reads: *"(3) Subject to any lawful superior orders, the Commissioner of Correctional Services shall be responsible for the administration of and the discipline within the Correctional Services".* My underlining. Compare section 57(3) and section 189 (3) of the Constitution. The reference to "superior orders" does not include "court orders". The case so prominently relied upon by counsel in his argument supporting the clean hands doctrine, namely, *Attorney General v. Ray Gwebu and Lucky Nhlanhla Bhembe,* Case Number 3699/2002, is itself an example of 'superior orders' at play, where the Commissioner was instructed by the Prime Minister not to obey the particular court order(s). It is of course common cause that the Prime Minister's directive or order was unlawful. On the last paragraph, on page 10 of his statement, the Prime Minister wrote: *"Therefore the judgment in this regard will not be obeyed. The court agencies responsible for implementing the Court of Appeal judgment have therefore been instructed not to comply with it".* The 'instruction' referred to is an example of a 'superior order' which, as we have said, was not lawful. It is only administrative.

The clean-hands argument.

[35] In paragraph 4 of his points of law, counsel for Respondent submits:

> "4.1 The Applicant has no right to access to the Court of Swaziland (sic) because it was barred by a judgment of the Full Bench which was never set aside in the matter of The *Attorney - General v Ray Gwebu and Lucky Nhlanhla Bhembe* Case 3699/2002. The applicants have not purged themselves in terms of the said judgment and Order of the Court, thus they cannot come to access the court and they are barred in law.
>
> 4.2 The Applicant cannot come before the courts to seek an order as an applicant until it has purged itself and complied with the said order of the Court referred to above. That being the case, the Applicant's application cannot be heard and the matter cannot be enrolled in the courts and must be dismissed with costs prayed for."

[36] In the foregoing two sub-paragraphs, Mr. Howe seems to be arguing that Applicant is bound by the Order in the case of *The Attorney General v. Ray Gwebu and Nhlanhla Bhembe.* This is inferred from his words "the said order of the court referred to above". That order called upon the Prime Minister to withdraw his November 28, 2002 statement within seven days failing which "no application in which the Government as an Applicant, Plaintiff or Petitioner shall be heard.....until a Full Bench of this Court holds that Government has purged its contempt...." Mr. Howe's premise seems to be that Government has never purged its contempt as ordered or a 'Full Bench' of the High Court has not pronounced the Government to have purged its contempt. That was a tall order, best laid to perpetual rest.

[37] The foregoing contention must be rejected. By its express terms, the *Statement* would operate pending the adoption of the Constitution which was then being canvassed. The Prime Minister had stated: "... *It should be acknowledged that we*

are currently in a transitional stage and Government's position on the above issues will be addressed in the new Constitution which the Swazi nation now eagerly awaits". The first preambular clause to the 2005 Constitution says the People of eSwatini *"undertake.....to start afresh under a new framework of constitutional dispensation".* The 'November 28' statement must therefore be considered to have been revoked by the Constitution or to have become obsolete and died a natural death. The 'November 28' statement was unlike the Law of the Medes and Persians. In the result, it seems to me the order of the court in Case No 3699/2002 cannot be expected to be still alive and effective when the subject matter it concerned has been addressed by the Constitution. By the same argument, there is no further need for any apology or withdrawal of the statement. To avoid any doubt in this regard, section 140 (1) of the Constitution provides as follows: *"The judicial power of eSwatini vests in the Judiciary, accordingly, an organ or agency of the Crown shall not have or be conferred with final judicial power."*

[38] Under paragraph 4.3 the Respondent states thus:

"The Applicant has come to court with dirty hands in that it has again violated the Court Order issued by the Court, in that on the 1st of July 2021, the Applicant removed the Respondent from the Manzini Correctional facility at 5am without a Court Order and in direct and full intended violation of the Order of this Court back to Matsapha Central Prison. Applicant has no regard for the Rule of Law and cannot be granted any redress by the Court."

[39] The preliminary point on the doctrine of unclean hands was argued on 9 September 2021. The learned Judge *a quo* observed *inter alia* that –

"[6] It is common cause that the Applicant only complied with the Order of the 16th June 2021 for a few weeks only, and thereafter engaged on a complete

defiance mission of the order, whilst at the same time launched these proceedings.

"[8] Mr. Howe submitted that the Applicant has come to court with dirty hands in that on the 1st July, 2021 the Applicant removed the Respondent from the Manzini Correctional Facility at 0500 am without a Court Order and in direct and full intended violation of the order of this court to Matsapha Central Prison".

[40] The Judge observed that there was part compliance with the Order of 16th June 2021 and the compliance was interrupted when Respondent was on 1st July returned to Matsapha Prison "without any court order either varying or rescinding the original order". But surely one would imagine that the return was meant to ensure that Respondent was kept in a "safe, healthy and comfortable environment" in light of the alleged prevailing conditions in the country. The learned Judge further noted that Mr. Howe had argued that "the Applicant had no regard for the Rule of Law" and should not be granted any redress by the court until she purges her contempt. The learned Judge wrote:

"[11] Mr. Howe submitted that the Applicant must first comply with the Court Order and then move whatever application for redress before this court. Counsel submitted that the Applicant's conduct is gross disobedience of a court which is in effect gross abuse of power and therefore section 164 of the Constitution.... is automatically activated..."

[41] The court *a quo* seems to have proceeded on the premise that breach of a court order can never be justified. That is self-evidently not correct. What, for instance, if a correctional facility caught fire where there was an inmate under court order not to be moved out of the facility.The court *a quo* should have considered and, if need be,

rejected the explanations submitted by the Applicant for the alleged disobedience of the court Order. Applicant had challenged the Order of 16 June by Notice of Application filed in court on 18 June 2021. The issue before court was whether the Order of 16 June should stand or be set aside. The issue before court should not have been overtaken by an event occurring two weeks down the line. The events of the 1st July, 2021 constituted a new matter which if relevant should have been properly introduced into the proceedings. After the Applicant had filed her founding affidavit, Respondent was expected to answer to it by 28 June 2021. That the answer was rightly or wrongly shifted to 8 or 13 July, 2021 did not change the procedural requirements in terms of the Order of 19 June 2021. It is noted that the Applicant did what the court required of her by first complying with the Court Order of 16 June. The application was dated 18 June 2021. There was tendered explanation for any non-compliance on the first day of the Order, that is, that the Order was served on the Applicant rather very late to allow due compliance. Nowhere in the judgment *a quo* were the explanations in respect of the 16th June and 1st July alleged breaches of the Court Order rejected by the Court as inadequate. It is not proper to assume that the court *a quo* must have considered and dismissed the explanations.

[42] In paragraph [10] of the judgment, the learned Judge *a quo* observed: *"...Counsel argued that the Applicant is bound by law to abide by the Order of this court and that if aggrieved for whatever reason it can apply for a variation of that order or even a rescission of that order whilst fully complying with it"*. Other than the reference to 1 July 2021 nowhere in these proceedings was it alleged that Applicant had violated the Order of 16 June when on 18 June Applicant moved the application. There was no basis therefore for Mr. Howe to have submitted that *"the Applicant must purge her contempt first before approaching this court for any redress"*. Applicant was already in court when the alleged breach of 1 July happened. It was therefore mischievous to have submitted, as reflected in the said paragraph [10] that *"the situation in casu is pathetic because the Applicant continues to violate the*

order and at the same time come to court to apply for a rescission of the order which they continually violate with impunity", when in fact the reference was not before but after the date of the application, namely, 18 June. The points of law raised and the answering affidavit should have addressed issues as in the founding affidavit or predating that affidavit and not the 1st July 2021 unless properly introduced into the proceedings. The *answering* affidavit is not for new or intervening matters but is to provide answers to matters raised in the founding affidavit or pre-dating that affidavit. Otherwise there could be endless replying affidavits.

[43] In para 19 of the judgment *a quo*, the learned Judge stated: *"It is common cause that whilst these proceedings were pending, the Applicant then returned the accused back to Matsapha Central Prison in complete violation of the court order issued on the 16th June 2021."* What the court *a quo* did was to abandon the proceedings before it and summarily deal with the then newly arisen matter, the alleged breach of the court order on 1 July. It would seem then that the argument in court *a quo* effectively shifted to the doctrine of clean hands and overlooked all other pertinent factors. That should not have happened. The Applicant was never called upon to show cause in respect of any specific issue before court. However, the learned Judge stated:

"[20] In his arguments, Mr. Howe has in my view rightly approached this matter by raising the doctrine of clean hands wherein he argued that the Applicants have come to court with dirty hands by trying to rescind or stay the order of the 16 June 2021 whereas they are continually defying same and (are) therefore in contempt.

"[21] I agree entirely with Mr. Howe that the Applicant must purge its contempt first before it can approach this court for redress. It is being disrespectful for the Applicant to continually disobey an order of this court and at the same

time apply for its rescission. The defiance of this order was carried out by the Applicant on the very same day, the 16 June 2021 wherein the order was issued. The subsequent occasions of such defiance are only indicative of the complete disregard of the order of this court by a public office whose duty is to uphold the law."

[44] In the present matter how was the breach of the 16th June to be purged? The court did not consider and reject the explanation given by Applicant; and likewise that of the 1st July. In paragraph 21, the learned Judge says that the defiance of the court order was carried out by the Applicant "on the very same day, the 16 June 2021." This is rather unfair on the Applicant. The Judge does not refer to the explanation tendered nor the fact that Applicant purged that contempt when she moved the Respondent out of Matsapha as directed. With the greatest respect, it seems that the court's reasoning is flawed. For the court to hold Applicant in defiance of the Order on 16 June, it must first have rejected the explanation given by the Applicant. That did not happen. I am not aware that there can be no justification for the breach of a court order. In the result, when the application was launched on 18th June, any breach of the Order of 16 June had not been determined. Applicant was not in breach of the Order and cannot fairly be said to have come to court with dirty hands. The similar argument holds in respect of the return of Respondent to Matsapha on 1st July 2021; Applicant gave an explanation which ought to have been considered before being condemned. That did not happen: no consideration of the explanation and the prevailing circumstances was done by the court.

[45] In all fairness then, when Applicant approached the court on 18 June she did so with clean hands; any breach had since been remedied. On that basis and regardless of what might have happened later, the Applicant was entitled to an order in respect of the issue before court, that is, the order of 16 June as having been made in her absence and without her being heard as section 21 (1) of the Constitution requires.

In this regard, it will be recalled that in her founding affidavit Applicant averred that the order of 16 June was served late on her, after the Kingdom's correctional facilities had been locked down, that is: "The Order came after 1830 hours and all the Prisons are locked at 1600 hours". For that reason compliance was not possible for the first night of the Order.

[46] Even though Respondent had purported to argue that Applicant had no interest in the Order of 16th June, that bare contention must be rejected, since the Order is directed to her even as it is indirectly couched. The Order is final; it has no return date. Furthermore, Respondent's complaint has nothing to do with criminal matter against the Respondent. I do not see how Rule 4(2) applies here. In paragraph 2 of his points of law, Respondent contended as follows:

"2.1. The applicant has no legal standing and cannot therefore be granted the said Order they are seeking from the Court. The Applicant has no material legal interest as the law prescribes and has no *locus standi*. They have not shown any prejudice they will and have suffered by the Order which was granted by the court.

"2.2. The Applicant has no material legal interest in the matter which would permit them to be heard by the court as they deem. The court has on its own accord issued an order in line with its powers conferred by the Constitution in terms of section 151....."

These points of law were further continued in the answering affidavit. In the final analysis, these points were not considered as the court *a quo* took the view that the doctrine of clean hands was the way to go to settle the application.

[47] The long and the short of the Respondent's unsworn complaint is that he wanted to move from a secure to a less secure correctional facility. The order did not even allow the Applicant sufficient time to prepare for the move. Surely, the first line of attack should have been to order immediate stop to any ill-treatment of Respondent by the correctional officers. Only when this approach did not work was an order for the Respondent to be moved out of the Matsapha facility probably justified. The fact that the complainant made an unsworn statement, free of cross examination, should have been taken into account in ascribing appropriate weight to the complaint. It is not clear what actually persuaded and satisfied the court *a quo* that the Respondent was telling the truth. In my view, local remedies were not exhausted and the Court Order was not sufficiently informed in light of the prevailing conditions pertaining to the Respondent. In paragraph 42 of her founding affidavit Applicant wrote: *"Had the respondent been candid to those officers he accuses of orchestrating his maltreatment that would have been dealt with internally as I am against the abuse of inmates...."*

The issue before court

[48] At any rate, at all material times, the real issue before court was a stay or rescission, based on Applicant having been absent and not afforded the opportunity to rebut the unsworn oral statement of ill-treatment of the Respondent by the officers of the Applicant at the Matsapha correctional facility resulting in the Order of 16 June. Anything else by whosoever was a frolic of their own and should not have diverted the proceedings to the issue of clean hands which ultimately took centre stage. The regularity of the proceedings after 19 June 2021 leaves a lot to be desired as timelines were informally shifted to allow Respondent the benefit, if at all, of a breach of the Order occurring on 1 July 2021. Had the original time lines been observed and the answering affidavit filed on 28 June, the outcome would most probably have been different. It seems to me that until the 1st July 2021 the Respondent had no serious defence to the application. The court *a quo* needed to

deal with the issues on a first-come first-served basis. Even the points *in limine* should have been limited to matters extant at the time of the launching of the application: that being the time when Applicant can properly be said to have 'approached' the court. In paragraph 26 of her replying affidavit the Applicant pleads: *"When the Respondent made the allegations in Court, I was never given the opportunity to tell my side of the story before the order was made. It is worthy to mention that even the officers present on that day were never asked anything about the allegations . . ."*

[49] *"It is fundamental to fair procedure that both sides should be heard: audi alteram partem, 'hear the other side'. . . .The right to a fair hearing has been used by the courts as a base on which to build a kind of a code of fair administrative procedure, comparable to 'due process of law' under the Constitution of the United States. The courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, . . . Since the courts have been enforcing this rule for centuries, and since it is self-evidently desirable, it might be thought that no trained professional, whether judge or administrator, would be likely to overlook it. But the stream of cases that come before British and Commonwealth courts shows that overlooking it is one of the most common legal errors to which human nature is prone."* [2]

[50] In paragraph 4.5 of his answering affidavit (on the merits), Respondent states – no doubt on the advice of his counsel:

[2] Wade and Forsyth **Administrative Law,** Tenth Edition, 402

"I confirm that I said in court before the court as the transcript clearly states . . . The said right to be heard is where a person is a party to the proceeding and he will suffer adverse effects if he is not heard. The Applicant suffers nothing in this matter as I am in the said facility controlled by the Applicant. No case has been made out for a clear right in this application."

[51] There seems to be a patent contradiction in the foregoing statement. If by being absent Applicant could not be a party to the oral proceeding on 16 June 2021, then it is true as appears on its face that the Court Order of 16 June was directed to no one as 'His Majesty's Correctional Services' could not by itself carry out the Order. On this understanding, the Order was fatally defective from delivery. But Respondent's insinuation that Applicant was not a party cannot be correct. The Order was directed at Applicant even as she was absent from court. The proceedings should have stopped and Applicant called to be present and, in her capacity as the Commissioner General, to respond to the allegations of the Respondent. Respondent's allegations were adverse and prejudicial to the Applicant as was the Order that ensued. It was irregular to proceed with the hearing of Respondent's complaint once it became clear that correctional officers under the supervision on the Applicant were being accused of serious offences. If, as insinuated, the Order was not directed to Applicant, then it was plainly wrong to hold her in contempt for breaching the said Order.

[52] It will be realized that the dismissal of the application of 18 June 2021 was not based on the merits. The dismissal was made a consequence of the holding that Applicant had come to court with dirty hands. In the result the court *a quo* did not deal with issue of stay or rescission. It may then be questioned whether as a result the application should have been dismissed and not held in abeyance pending compliance. There is no court order requiring the Applicant to comply with the order of 16 June 2021. Applicant's application in terms of Rule 30(5) was also dismissed

without any clear reasoning. That was the application which sought to point out that the papers filed by Respondent after failing to meet the time line of 28 June 2021 were irregular in the absence of condonation. The court *a quo* ought to have dealt with and disposed of the matter of rescission.

Conclusion

[53] It is pertinent to realise that when the stay was not granted and the application was postponed on 19th June 2021, the prayer for a stay fell away to all intents and purposes. The prayer for rescission remained. This was the issue for determination. The approach to the application adopted by the court *a quo* in the proceedings confused the true issue for decision. The clean hands approach was with respect misdirected and pushed upfront to circumvent the real issue. The question of dirty hands was not properly before court for the court to entertain ahead of the rescission based on the *audi alteram partem* rule.

[54] Applicant's case then rested on Rule 42 (1) (a) read with section 21 of the Constitution. A rescission could be on either provision. Rule 42 (1) (a) provides that 'the court may ... *mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously granted in the absence of any party affected thereby." And Herbstein and van Winsen say[3]: *"An applicant for an order setting aside a judgment or order of court must show, in order to establish locus standi, that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted"*. The Applicant did not apply to intervene or be joined in the proceedings. The Applicant is the personal embodiment of His Majesty's Correctional Services. Presumably, that is

[3] **The Civil Practice of the Superior Courts in South Africa**, 3rd edition, p. 473. See **United Watch and Diamond Co (Pty) Ltd & Others v. Disa Hotels Ltd and Another** 1972 (4) SA 409 (C) at 415.

why the court did not question Applicant's standing in the matter. To be sure, Applicant has an interest in the subject-matter of the court order sufficiently direct and substantial to have entitled her to be a party in the Respondent's unsworn application upon which the Order was granted. There is no doubt in my mind that Applicant has a legal interest in the subject-matter that could be prejudicially affected by the Order in issue.

[55] All in all, it seems to me that on the consideration of the judgment and pleadings, the court *a quo* ought to have heard the Applicant since the failure to comply with the Order of 16th June 2021 had not occurred on the 18th June 2021 or, if it had occurred, it had been purged by compliance, when the application for the rescission was launched. In my opinion, the *audi alteram partem* rule is so fundamental and ingrained in our system of justice it cannot be trumped by a subsequent clean hands doctrine that was not there at the inception of the proceedings. The Appellant/Applicant had a right to be heard before the Order of 16 June was granted. Not hearing the Applicant flawed the Order thereof.

[56] In the result, the appeal would succeed. The judgment of the court *a quo* and the court Order of 16 June 2021would be set aside. No order as to costs here and below would be granted.

MJ Dlamini JA

For Appellant **Mr. M. Simelane with F. Mhlanga (Ms)**

For Respondent **Mr. L. Howe.**