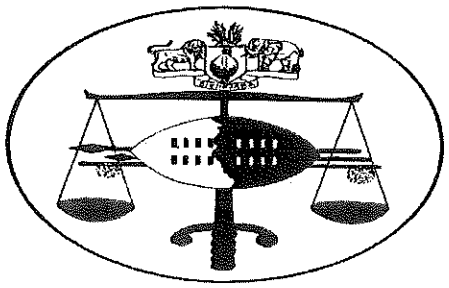

IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE **Case No. 45/2022**

In the matter between: -

MASTER OF THE HIGH COURT **First Applicant**
THE ATTORNEY GENERAL N.O. **Second Applicant**

and

SUN INTERNATIONL MANAGEMENT LIMITED **First Respondent**
NEDBANK SWAZILAND LIMITED **Second Respondent**
ESWATINI NATIONAL PROVIDENT FUND **Third Respondent**
CHICK-FIL-A SWAZILAND (PTY) LTD **Fourth Respondent**

Neutral Citation: ***Master of The High Court N O. & Another v Sun International Management Limited & Others (45/2022) [2024] SZSC 64 (29 February 2024)***

CORAM: M.J. DLAMINI JA; J.M. VAN DER WALT JA; J.M. CURRIE JA

HEARD: 6 October 2023

DELIVERED: 29 February 2024

Summary

Supreme Court - application in terms of ***section 149(3)*** *of the* ***Constitution of the Kingdom of Eswatini, 2005*** *concerning decision refusing leave to appeal in respect of point* in limine *pertaining to peremption - basic principles pertaining to peremption restated – held, that point* in limine *pertaining to peremption stillborn ab initio, not capable of being resuscitated by any application of any nature and not enjoying any prospects of success on appeal or otherwise*

Supreme Court – interpretation of provisions of ***Constitution of the Kingdom of Eswatini, 2005*** *– reliance on Ghanaian authorities – different court structures and powers - English common law and not Roman Dutch law forming some foundations of Ghanian law – reiterated that caution to be exercised when consulting foreign authorities*

Supreme Court – application in terms of ***section 149(3)*** *of the* ***Constitution of the Kingdom of Eswatini, 2005*** *– interpretation –* ***section 149(3)*** *makes provision that any order, direction or decision made by a single Supreme Court Justice may be varied, discharged or reversed by three Justices - nature of remedy and requirements considered but not decided*

Application dismissed with costs

JUDGMENT

Cur adv Vult
(Postea: 29 February 2024)

VAN DER WALT, JA

INTRODUCTION

For ease of reference and throughout this judgment, the Applicants now before Court will be referred to as the "Applicants" and the Respondents now before Court as the "Respondents."

[1] In June 2021 the company Swazispa Limited and its subsidiaries were placed under winding up and a liquidator was appointed. Subsequently thereto the First Applicant (hereinafter referred to as "the Master") appointed the Second Respondent (hereinafter referred to as "Mr Mulindwa") as co-liquidator. This appointment was challenged by the Respondents as applicants by way of a High Court application. The Applicants as respondents raised two points *in limine*, which were dismissed by the High Court. Dissatisfied by the ruling, the

Applicants applied for leave to appeal before this Court. The application for leave to appeal was heard and refused by Mamba JA, sitting as a single Judge. The matter now is again before this Court at the instance of the Applicants in the form of an application which, in terms of the heading of the Notice of Motion, is launched in terms of **section 149(3)** of the **Constitution of the Kingdom of Eswatini, 2005** (hereinafter referred to as the "Constitution.")

[2] The main relief sought in the Notice of Motion herein is an Order in the following terms:-

> *"1. That the Judgment dated 6th December 2022 delivered by the Supreme Court refusing leave to appeal be reversed and or set aside.*
>
> *2. That the applicants be granted leave to appeal the High Court Judgment under High Court case 614/2022 delivered on 20th of June 2022."*

A THE HIGH COURT APPLICATION [1]

[3] The Respondents sought, under Part A of the Notice of Motion, thereof, an *interim* interdict interdicting Mr Mulindwa from executing liquidators' duties and under Part B of the Notice of Motion, an order declaring the appointment by the Master of Mr Mulindwa to be unlawful and/or irrational and invalid and to be reviewed and set aside. The relief sought under Part A ultimately was not pursued.

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[1] Neutral citation ***Sun International Management Limited and Others v Master of The High Court N O. and 3 Others (614/2022) [2022] SZHC (20/06/2022)***

[4] The founding papers were filed on the 4th April 2022, the answering papers on the 14th April 2022 and the replying papers on the 22nd April 2022. Thereafter and on the 6th May 2022 the Applicants filed a document styled "***NOTICE OF MOTION (POINTS IN LIMINE)***" the body of which read:

"TAKE NOTICE THAT the 1st Respondents will on the date of hearing raise the following points of law

1. *The Applicants who also double as members of the creditors committee are estopped from moving this application because they have embraced the 2nd Respondent and are working with him. The matter is now academic.*
2. *The doctrine of peremption is applicable in the matter.*

In the premise may the application be dismissed with costs." [2]

4.1 The document was accompanied by an affidavit titled **"AFFIDAVIT IN SUPPORT OF POINT IN LIMINE"** deposed to by the Deputy Master. After averring that the Respondents were working closely with Mr Mulindwa, the following was stated therein:

"5. I submit that the fear that the 2nd [Applicant] will derail the process of liquidation as founded in the founding affidavit and that his appointment is not to the benefit of creditor has not come to pass.

6. *In fact it was speculation at its best.*
7. *I submit that the matter is now academic and there was no pursuit of **Part A** of the **Notice of Motion** when it was opportune to do so. A turn around now to pursue the same, having filed two sets of Heads of Arguments* [sic] *would be mala fide and an afterthought.*
8. *I submit that I have approved the 25th of May 2022 for the Creditors Meeting to take place and I have also authorized the joint liquidators to advertise the meeting per annexure **B3** and **B4** respectively.*
9. *To proceed with the application will cause untold hardship to the creditors and it is on record that the [Applicants]* [sic] *have stated that they represent the entire creditors. They can be allowed to*

[2] *sic*

approbate and reprobate. [sic]

10. The matter is now academic.

11. In the premise I apply that the application be dismissed with costs."

4.2 Paragraph 7. thereof suggests that the Respondents, already at that stage, had indicated that they would not be pursuing the relief sought under Part B.

4.3 The Respondents did not file any affidavit in response.

[5] There is no indication that the leave of the Court to file any further set/s of affidavits was either sought or obtained by the Applicants. The document also, on the face of it, was not a notice to raise points of law only, as is meant by High Court **Rule 6(12)(c)**. Seeking dismissal of an application by way of notice of motion and affidavit raising points of law also strikes one as most peculiar.

[6] The High Court on the date of the hearing one week later on the 13th May 2022 obliged the Applicants by commencing to hear argument in respect of these points of law. The Respondents at that point clearly had abandoned the *interim* relief sought under Part A of their Notice of Motion.

6.1 Mr B van Zyl SC, appearing on behalf of the Respondents, submitted to the effect that the points of law were too closely linked with the merits of the matter and therefore could rather be heard together with the merits in that, *inter*

alia, an actual act of waiver as contemplated by the doctrine of peremption can only be considered in juxtaposition to the issues as contained in the rest of the papers, and not specifically from an affidavit in support of points of law only.

6.2 Mr M Simelane, on behalf of the Applicants, insisted that these points of law could be divorced from the merits and should be heard in isolation. Further, that if the Court upheld one, or all of these points there would be no need to consider the merits. [3]

[7] The Court proceeded to hear argument on the points of law only. The Applicants, according to the High Court judgment, did not seriously pursue the estoppel point. This point was expressly abandoned when the matter was argued before us and in the circumstances, it has fallen by the wayside and does not require any further consideration.

[8] As regards the peremption point, it was not disputed that the Respondents had co-operated with Mr Mulindwa in the course of the liquidation. Mr Simelane argued that said co-operation constituted peremption, as did the abandonment of relief under Part A. Mr van Zyl SC argued to the effect that the co-operation and abandonment of the *interim* relief sought was merely temporarily pending the outcome of the application and did not constitute peremption of their right to obtain the relief sought under Part B. Whether the

[3] High Court Judgment Paragraphs [12], [15] and [16]

Respondents had waived the right to administrative justice under **section 33** of the Constitution also enjoyed argument, the Applicants contending waiver and the Respondents denying same.

[9] The main conclusions by the High Court were to the effect that:

9.1 The Respondents, in adopting the course of action that they did, did not abandon their constitutional right to fair administrative justice; [4] and

9.2 With reference to **National Union of Metal Workers of South Africa and Others v Fast Freeze,** [5] the Respondents had not been shown to have unequivocally signaled or signified that they had accepted the appointment of Mr Mulindwa. [6]

[10] In the result, both points *in limine* were dismissed and it was ordered that the application proceed on the merits.

B THE APPLICATION FOR LEAVE TO APPEAL[7]

[11] Dissatisfied by the above outcome, the Applicants filed an application for leave

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[4] Judgment Paragraph 19.7

[5] **(1992) ILJ 963(LAC)**; it appears from the judgment that Mr van Zyl SC during the course of argument emphasized that this judgment concerned a judgment already entered.

[6] Judgment Paragraph 19.8

[7] Reported as ***Master of The High Court N O. & Another v Sun International Management Limited & 4 Others (45/2022) [2022] SZSC 63 (06 December 2022)***

to appeal which was refused on the 6th December 2022 by Mamba JA, sitting as a single Justice. The proposed grounds of appeal were formulated as follows:

(a) The learned Judge a quo erred in fact and law by holding that the doctrine of preemption[8] is not applicable against the conduct of the Respondents of abandoning part A of their Notice of Motion and thereafter working closely with the liquidator.
(b) Alternatively that the learned Judge a quo erred in fact and law by not holding that the Respondents are estopped from pursuing the review application based on the instruction they gave the co-liquidator to apply for a creditor's meeting from the Master so that he can introduce the purchaser he and the liquidator obtained.
(c) *The learned Judge a quo erred in fact and law by relying on oral arguments of the Respondents Counsel against a properly sworn affidavit by the 1st Appellant, and who brought to bear his own thoughts without sworn evidence.*
(d) *The learned Judge a quo erred in fact and law by holding that the Respondents Constitutional Right in terms of section 33 was violated and that they could not waive their right even if they so desired.*
(e) The learned Judge a quo erred in fact and law by dismissing the application yet at paragraph 19.8 indirectly noted that by abandoning Part A their actions supported the doctrine of preemption." [9]

*** Ground (b) has since been abandoned

[12] Mamba JA embarked on an in-depth survey of authorities in relation to the test for leave to appeal.[10] As set out by this Court in ***Teaching Service Commission and Another v Timothy Tsabedze*** [11] the requirements to be met are that (a) there must be reasonable prospects of success; (b) the amount, if any, in dispute must not be a trifling;(c) the matter must be of substantial importance to one or both of the parties; and (d) a practical effect or result can be achieved by the appeal. In addition, Mamba JA stated that:

[8] It is assumed that this was intended as a reference to *"peremption"* which pertains to *aquiessence; "preemtion"* or *"pre-emption"* usually refers to a right to buy before others
[9] *sic*
[10] Paragraphs [11] to [13] of the Judgment
[11] ***(61/2019) [2021] SZSC 48 (25 February 2022)***

"...Establishing the existence of reasonable prospects of success, is of itself not decisive of the application. Ultimately, the Court would be guided by what would be in the best interests of justice. (See Land & Agricultural Development Bank of South Africa & Another v Van den Berg & Others [2022] 1 All SA 457 (FB)" and

"...This Court is not being asked to determine whether the Court a quo was correct in its assessment and treatment or analysis of the issues raised by and in the points in limine. That would be an issue in the actual appeal (if leave is granted)." [12]

12.1 In dealing with the proposed grounds of appeal and in respect of ground (c) Mamba JA expressed his views as follows:[13]

"[9] The applicants argue that there was no opposition to their points of law inasmuch as the respondents did not file an answering affidavit. Applicants submit that "an affidavit is opposed by another affidavit." (Paragraph 51 of Founding Affidavit). I do not think that this assertion should burden this judgment. Suffice it to say that a point of law need not be raised by way of an affidavit. That is trite law. Indeed such a point may even be raised mero motu by the Court. If all the material needed for a determination of the legal point raised was already before the Court - in the pleadings - then there was absolutely no need to repeat it in an affidavit. To do so would be surplusage and would unduly burden the pleadings. The legal points raised were based on the facts contained in the pleadings. The 1st applicant has herself characterised these points of law as "arguments". (See paragraph 52 of Founding Affidavit). There is no merit on this challenge or complaint."

12.2 As regards the ground (d) concerning waiver, Mamba JA pointed out that the High Court never made the finding complained of but only held that the respondents had not abandoned or waived their rights.

[13] In Paragraph [16] the following conclusion is arrived at:

"I have already said above that the law on estoppel and peremption is well settled in this jurisdiction. There are no conflicting judgments or exposition of the principles involved in

[12] Paragraph [15] of the Judgment
[13] Paragraph [9] of the Judgment

these doctrines. The central issue in the review application in the Court a quo is the lawfulness or otherwise of the appointment of Mr. Mulindwa. That is the lis between the parties. Both sides are no doubt desirous of finalising that matter and proceeding with the liquidation of the relevant companies. This, by its very nature and the many creditors involved in the whole exercise, demands that the liquidation be done and concluded expeditiously. The monies involved run into Billions of Emalangeni. It is certainly in the public interest that such issues be concluded expeditiously, An appeal in the circumstances of this case; and based on the relevant grounds of appeal herein, would hardly be consonant with treating the issue expeditiously. Nothing of any useful or practical effect would be gained by an appeal based on the applicants' contention. It would be a waste of time and legal costs on the part of the protagonists. In addition, the applicants have dismally failed to satisfy this Court that there are reasonable prospects of success in the appeal. The points of law raised by the applicants are distinctly misguided."

[14] In the result, the application was dismissed with costs.

C THE APPLICATION IN TERMS OF SECTION 149(3) OF THE CONSTITUTION, 2005

[15] **Section 149** reads:

Powers of a single Justice of Supreme Court

149. (1) Subject to the provisions of subsections (2) and (3) a single Justice of the Supreme Court may exercise power vested in the Supreme Court not involving the determination of the cause or matter before the Supreme Court.

(2) *In criminal matters, where a single Justice refuses or grants an application in the exercise of power vesting in the Supreme Court, a person affected by such an exercise is entitled to have the application determined by the Supreme Court constituted by three Justices.*

(3) *In civil matters, any order, direction or decision made by a single Justice may be varied, discharged or reversed by the Supreme Court of three Justices at the instance of either party to that matter."*

[16] The Applicants contended that Mamba JA committed the following *"unreasonable reviewable errors,"* which will be reproduced *verbatim* herein in order to prevent any ambiguity as to what had been averred:

(a) *"He concluded that the point of law was based on material already in the main pleadings thus there was no need for the Respondent* [sic] *to file opposing affidavits."*

(b) *"The learned Judge pre judged the appeal that a point of law cannot be supported by an affidavit, thus crushing the argument that the matter was not opposed because the Respondents could make an oral argument."*

(c) *"... The learned Judge came to the conclusion that this is not a matter that requires the attention of the Honourable Court because the doctrine of peremption is well settled in the country."*

(d) *"Despite the learned Judge being aware at paragraph 15 that his court was not allowed to determine the correctness or analysis of the issues raised in the court a quo, he went ahead to do so at paragraph17 to hold that the Judge did not come to the conclusion, that when the Respondents allowed the co liquidator to finalize the liquidation process, then that amounted to a waiver of their constitutional protected right to review."*

(e) *"The learned Judge came to the conclusion at paragraph 16 that since the liquidation process consisted of monies in excess of E1billion then the matter must be concluded expeditiously, this he sees the appeal as a waste of time."*

C.1 SUMBISSIONS ON BEHALF OF THE PARTIES

C.1.1 ON BEHALF OF THE APPLICANTS

[17] As regards the nature of **section 149(3)**, Mr M Simelane for the Applicants contended that it is a review application, but distinct from review under (the more common) **section 148(2)** review.

17.1 In this respect reliance was placed on the Ghanaian Constitution, 1992 which served as a partial template for the 2005 Eswatini Constitution, and in particular **section 134(b)** thereof, which reads similar to **section 149(3)** and which was held by the Supreme Court of Ghana in ***Zoomlion***

Ghana Ltd v Mersk World Co Ltd[14]to be considered as a special review separate from a **section 133** [Eswatini equivalent **section 148(2)**] review application.

17.2 The Court was also referred to the Ghanian judgment in ***Mensah and Others v Boakye***[15] wherein the principle was restated that it is an extraordinary remedy designed for exceptional circumstances, requiring that the application should satisfy the Court that there had been some fundamental or basic error which has resulted in gross miscarriage of justice.

[18] This Court was urged to hold that the grounds advanced by the Applicants had merit and that the judgment of Mamba JA *"is unreasonable causing injustice to the applicant."*

C.1.2 ON BEHALF OF THE RESPONDENTS

[19] Mr B van Zyl SC emphasized the distinction between appeals and reviews. Where it is averred that the court came to a wrong conclusion on the facts or the law, the appropriate remedy is an appeal and where the real grievance is against the method, it is proper to bring the case on

[14] *(17 of 104) [2014] GHASC 132 (06 February 2014)*
[15] *(8/2021) [2021] GHASC 75 (20 May 2021)*

review. [16] The "*grounds*" advanced by the Applicants, it was submitted, are suited for appeal and not review despite the efforts of the Applicants to disguise same as review grounds.

[20] It was submitted further that Mamba JA correctly identified and dealt with the relevant issues.

[21] As regards the nature of an application under **section 149(3):**

21.1 It was contended that **section 148** requires a full bench of five judges whereas **section 149(3)** requires a panel of three judges only. A review hence is the preserve of **section 148.**

21.2 The terminology employed in **section 149(3)** resembles that of High Court **Rule 42.**

21.3 The Ghanian Supreme Court **Rule 34** provides that the Court shall not review any judgment after it has been delivered unless it is satisfied that the circumstances of the case are exceptional and that in the interest of justice there should be a review. There is no similar Rule in Eswatini.

[16] With reliance on ***President Street Properties (Pty) Limited v Maxwell Uchechukwa and Four Others, Appeal Case No. 11/2014***

D ANALYSIS

D.1 PEREMPTION: Proposed Appeal Grounds (a) and (e); Ground (c) of Instant Application

[22] Leaving aside for the moment the exact nature to be attributed to an application under **section 149(3),** the pure and simple enquiry *in casu*, shorn of all embellishment, is whether or not the *in limine* point pertaining to peremption should have been upheld. The outcome is decisive of the preliminary stage of the matter in the High Court and would determine whether or not the matter is at an end, or should proceed to a hearing on the merits.

[23] A helpful exposition of peremption referencing a series of authorative cases going back more than a century ago, is to be found in **Theodosiou and Others v Schindlers Attorneys And Others:**[17]

"Peremption

*[77] **Peremption (not to be confused with pre-emption) is not a word we hear every day and means at common law that a party must make up his mind and cannot equivocate by acquiescing in a judgment and later on deciding to appeal such judgment.** The general rule is that a litigant who has deliberately abandoned a right to appeal will not be permitted to revive it. Peremption is one aspect of a broader policy that there must be finality in litigation in the interest of the parties and for the proper administration of justice. It is open to a court to overlook the acquiescence if it would not be in the broader interests of justice, bearing in mind the policy underlying the rule. In President of the Republic of South Africa v Public Protector and Others 2018 (2) SA 100 (GP) ([2018] 1 All SA 800; 2018 (5) BCLR 609) the full court held (at 146G – H) that the President's acceptance of and acquiescence in the remedial action amounted to a peremption of his right to review the remedial action, and held:*
'[176] The legal principles pertaining to peremption are well established. In Dabner v South African Railways and Harbours 1920 AD 583 at 594, Innes J stated:
"The rule with regard to peremption is well settled, and has been enunciated on several

[17] **2022 (4) SA 617 (GJ)**, Paragraph [77] and further

occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven. [Own emphasis.]

[177] In Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 600A – B Trollip JA said:

"The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order . . . ."

*[178] **What emerges from these cases is that the common-law doctrine of peremption applies to judgments or orders of Court. Peremption, like waiver, is not lightly presumed, and the onus is upon the party alleging peremption to establish conduct that clearly and unconditionally demonstrates acquiescence in and a decision to abide by the judgment or order.'***

[Own emphasis.]

See also Minister of Defence and Others v South African National Defence Force Union and Another [2012] ZASCA 110 para 23, citing Government of the Republic of South Africa and Others v Von Abo 2011 (5) SA 262 (SCA) ([2011] 3 All SA 261) at 270E – G; South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others 2017 (1) SA 549 (CC) (2017 (2) BCLR 241; [2017] 1 BLLR 8; [2016] ZACC 38) at 563A.

*[78] **The onus would be on the excipients to prove peremption. Accordingly, a plea and evidence are required to decide whether the plaintiffs acquiesced (perempted) their dispute with the defendants, and cannot be decided at the exception stage**"* (Own emphasis and underlining)

[24] In my considered view, the Applicant's point *in limine re* peremption, from the very beginning, was doomed to fail. Further, that there are no prospects of success on appeal taking into account the following:

24.1 The Applicants bore the onus.

24.2 The pronouncement that peremption applies to judgments and orders issued by a court, has been repeatedly restated also by this Court,[18] in unequivocal

[18] See for instance ***Philani Clinic Services (Pty) Ltd v Swaziland Revenue Authority and Another (36 of 2012) [2012] SZSC 74 (30 November 2012); Mpetseni Co-operative Society Limited v L.R. Mamba And Associate (22 of 2016) [2016] SZSC 2 (30 June 2016); Tfwala v Swaziland Development Finance Corporation (71 of 2015) [2016] SZSC 72 (30 June 2016); Tswelokgotso Health (Pty) Ltd v Rivi (Pty) Ltd And Others (7 of 2019) [2019] SZSC 36 (17 September 2019); Kukhanya (Pty) Limited v Maputo Plant Hire (Pty) Limited And Another (11 of 2020) [2022] SZSC 5 (12 April 2022)***

terms.

24.3 The contents of the affidavit purportedly supporting the points *in limine*, do not contain a single factual statement or allegation that establishes even a remote nexus to "*peremption,*" as defined in law.

24.4 Accordingly, the point *in limine* disintegrated at the first hurdle in that *in casu*, no judgment had been entered at the time that the point was raised. All that happened was that a prayer seeking an *interim* interdict pending the main relief sought, was abandoned. The main relief sought was and remains the setting aside of Mr Mulindwa's appointment.

24.5 The Respondents' submissions to the effect that the points of law were too closely linked with the merits of the matter and that the merits too required consideration, are in accordance with the case authorities *supra* to the effect that peremption cannot be decided at the exception (and thus as concerns motion proceedings, at the *in limine)* stage. The Applicants' insistence that the points could be divorced from the merits and should be heard in isolation, also was at the Applicants' own peril.

[25] The review ground advanced by the Applicants that: "*The learned Judge came to the conclusion that this is not a matter that requires the attention of the Honourable Court because the doctrine of peremption is well settled in the country*" is not borne out by the wording of

the Judgment. Paragraph [16] thereof commenced with the observation that the law on estoppel and peremption is well settled in this jurisdiction and after dealing with other aspects, the paragraph ends with the conclusion that the Applicants *"have dismally failed to satisfy this Court that there are reasonable prospects of success in the appeal. The points of law raised by the applicants are distinctly misguided."*

[26] Accordingly, it is held that the High Court's dismissal of the peremption point stands to be confirmed on the above basis and *mutatis mutandis*, taking into account the subsequent absence of any prospects of success on appeal, that the refusal of the application for leave to appeal stands to be confirmed as well.

[27] Any application, of whatever nature, never can resuscitate a case, issue or point *in limine* that had been stillborn *ab initio.* That, proverbially, is the long and short of it and it is for these reasons that I do not deem it necessary, in this matter, that the Court makes any findings on the nature of and/or requirements for an application under **section 149(3)**.

[28] For the sake of completeness, however, the other issues raised will briefly be addressed:

D.2 OTHER GROUNDS

D.2.1 AFFIDAVITS AND LEGAL ARGUMENT: Proposed Appeal Ground (c); Grounds (a) and (b) of Instant Application

[29] These grounds take issue with the non-filing of a further affidavit/s by the Respondents and for the reasons to follow, are devoid of merit:

29.1 It is established law that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided that they arise from the facts alleged and provided further that the Court is satisfied that such procedure will not result in prejudice or unfairness to the other side. [19] This legal position puts paid to the above grounds.

29.2 As pointed out *supra*, the Applicants' affidavit purportedly supporting the points *in limine*, fell short for want of necessary allegations pertaining to peremption. It therefore appears mischievous to suggest, as did the Applicants, that the Respondents' failure to file an affidavit in opposition

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[19] Swissborough Diamond Mines (Pty) Ltd and Others v Government Of The Republic of South Africa and Others 1999 (2) SA 279 (T) at 324-325; this case has been referred to with approval in e.g. ***The Prime Minister of Swaziland and Others v Christopher Vilakati (30/12) [2013] SZSC 34 (31 May 2013).*** See also ***Dumsani Malinga v Nedbank Swaziland Limited and Another [2021] (11/2020) SZICA 2 (10 August 2021),*** Paragraph [12]

thereto should be held against the Respondents.

D.2.2 WAIVER OF RIGHTS UNDER SECTION 33 OF THE CONSTITUTION: Proposed Appeal Ground (d); Ground (d) of Instant Application

[30] A proper reading of the High Court judgment, in particular Paragraph 19.7 thereof, fully supports the finding by Mamba JA that the High Court never made the finding complained of by the Applicants.

D.2.3 *Re* EXPEDITIOUSNESS: Ground (d) of Instant Application

[31] Mamba JA held, *inter alia*, that:

> *"Both sides are no doubt desirous of finalising that matter and proceeding with the liquidation of the relevant companies. This, by its very nature and the many creditors involved in the whole exercise, demands that the liquidation be done and concluded expeditiously. The monies involved run into Billions of Emalangeni. It is certainly in the public interest that such issues be concluded expeditiously, An appeal in the circumstances of this case; and based on the relevant grounds of appeal herein, would hardly be consonant with treating the issue expeditiously. Nothing of any useful or practical effect would be gained by an appeal based on the applicants' contention. It would be a waste of time and legal costs on the part of the protagonists."* [20]

31.1 The Applicants seek to impugn the view of Mamba JA that the matter must be concluded expeditiously and hence the appeal would be a waste of time.

31.2 This evidently overlooks the holistic approach to be adopted in applications for leave

[20] Paragraph [16] of Judgment

to appeal, including the bests interests of justice, and cannot be endorsed.

D.3 THE NATURE OF AN APPLICATION IN TERMS OF SECTION 49(3)

[32] Insofar as it may be necessary to deal with the characteristics to be attributed to **section 149(3)**:

32.1 Since the matter has been argued, the **Supreme Court Rules, 2023** have been promulgated. Under the heading "**REVIEW,**" **Rules 47** and **48** deal with review under **section 148(2)** of the Constitution and **Rule 49** deals with the invocation of the supervisory jurisdiction of the Court under **section 148(1)**.

32.1.1 At this stage there is no Rule yet dealing with **section 149**.

32.1.2 **Rule 47(1)** sets out permissible review grounds being:

> *"(a) exceptional circumstance exists which has resulted in a miscarriage of justice;*
> *(b) the decision of the Court was influenced by fraud; or*
> *(c) the discovery of new and material matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not have been produced by the applicant at the **appeal**."* (own emphasis)

32.1.3 As regard the contents of the affidavit, is it required that prospects of success also have to be set out in addition to the ground/s relied upon.

[33] It is trite that the rules exist for the courts and not the other way around. As emphasised in **Arendsnes Sweefspoor CC v Botha,**[21] considerations of justice and fairness are of prime importance in the interpretation of procedural rules. Where the Rules are silent on an issue, the Court has inherent powers to regulate its own procedures and processes. As was laid down for instance in **Brown Bros. Ltd. v Doise:**[22]

> *"In my view this is a case where the Rules of Court as framed do not provide for one particular set of circumstances which can arise, and I think that the Court has inherent power to read the Rules applicable to the procedure of the Court in a manner which would enable practical justice to be administered and a matter to be handled along practical lines."* [23]

[34] The following observations also come to mind:

34.1 **Section 149(1)** provides that a single Judge "*may* (and not "s*hall*") exercise the power vested in this Court not involving the determination of the cause or matter before the Supreme Court. This therefore excludes determination of an appeal or a review by a single Judge.

34.2 The decision of a single Judge under **section 149** is a decision of this

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[21] **2013 (5) SA 399 (SCA),** Paragraphs [18] and [19] and the authorities cited therein
[22] **1955 (1) SA 75 (W)** at 77, reaffirmed e.g., in **Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A)** and **S v Malindi and Others 1990 (1) SA 57 (A)**
[23] See also ***Sikhumbuzo Matsebula v Mbabane Municipal Council (84/2022) [2023] SZSC 14 (17 May 2023),*** Paragraph [19]

Court. **Section 148(2)** contains a blanket provision for review of "*any decision made or given*" by this Court. "*Any decision*" includes a decision under **section 149.** Had the Legislature intended to exclude **section 149** decisions from the configuration, one may have expected it to be stated thus.

34.3 A **section 148(2)** review is to be heard by a bench of five Justices. A bench of only three Justices is required for purposes of **section 149.** This may denote that the intended remedy or procedure is not the same but on the other hand, may be aimed at practicality in that three Justices reconsider a single Judge decision which is not a decision decisive of an actual appeal, instead of five Justices. The combined manpower as represented by five Justices then rather is reserved for consideration of a decision by at least three Justices and which was decisive of full-blown appeal.

34.4 The Legislature was familiar with the concept and word "*review*" and the election not to employ the word in **section 149** may be a strong indication that any review is confined to a review under **section 148**.

34.5 The wording "*may be varied, discharged or reversed*" employed in **section 149** immediately resonates with the Roman Dutch based common law concepts of rescission or variation which constitute exceptions to the

functus officio rule. It also rings a bell as regards **Rule 42** of the High Court Rules.

34.5.1 **Section 252 (1)** of the Eswatini Constitution stipulates:

> *"Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute."*

34.5.2 At Roman Dutch based common law, and other than on appeal or review, interference with final judgments *contra* the general *functus officio* rule, was limited to cases of a judgment obtained by fraud or, exceptionally, *justus error*; rescission of a default judgment upon good cause being shown; and exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order.[24] As seen above, the new **Rule 47(1)(b)** provides that fraud shall be a ground of review under **section 148(2)**.

34.6 Roman Dutch law never was introduced into Ghana, which used to be a British colony. Its legal system is broadly based on English Common Law and the Ghanian law reports abound with references to English law.

[24] See for instance **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA).** According to **Cape Coast Exploration Ltd v Scholtz 1933 AD 56** a final decision may be revoked with the consent of the person who benefited from the decision, and whose rights will be adversely affected by the revocation

34.6.1 Also, the structure of the Ghanian judiciary is markedly different from the Eswatini structure, as are some procedural aspects.

34.6.2 The apex court in Ghana is the Supreme Court which *inter alia* enjoys original jurisdiction in constitutional matters[25] and appellate jurisdiction over Court of Appeal matters[26]. Then, in descending order, follow the Court of Appeal, the High Court, the Circuit Court and at the bottom rung of the ladder, the District Court. A good of example of the twist and turns that one case can take, can be found in ***Felix vrs Antonelli and Another***[27] involving the High Court, a single Judge of the Court of Appeal, a full bench of the Court of Appeal and then the Supreme Court.

34.7 The above underscores that caution is to be exercised when consulting foreign authorities.

[35] Reverting to the case *in casu*: if **section 149(3)** is to be construed as a form of review to be resorted to in exceptional circumstances where there was a fundamental or basic error which has resulted in gross miscarriage of justice, as contended for by the Applicants, then the Applicants' application still is bound to fail in that there simply had been no error, or any injustice.

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[25] Article 130
[26] Article 131
[27] *(J8 99 of 2017) [2017] GHASC 50 (20 July 2017)*

E CONCLUSIONS AND ORDER

[36] The Applicants' remaining point *in limine* to the effect that there had been peremption was misguided, without merit and stillborn *ab initio.* It is not capable of being resuscitated by any application of any nature and it enjoys no prospects of success on appeal. Accordingly, it fell to be dismissed, and it is so held.

[37] As regards the nature of an application under **section 149(3),** which need not be decided in this matter in view of the above conclusion, an Act of Parliament or Court Rules no doubt would be of great assistance in obtaining conclusive clarity as to what an application under **section 149(3)** entails.

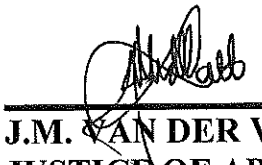
[38] Concerning costs, the Respondents did not seek a punitive costs order herein. Suffice it then for the Court to observe that the applications launched *in casu* in this Court and the attendant consultations, voluminous affidavits, annexures and heads of argument speak of the expenditure of a significant deal of time and money, at the cost and to the prejudice of the taxpayer and the liquidation. This state of affairs perhaps could better have been avoided had the matter proceeded straight to the plumbing of the merits in order to ascertain the true nub of the matter, being whether or not the appointment of Mr Mulindwa by the Master

passes muster.

[39] Accordingly, the following order is made:

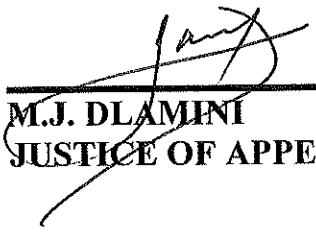
1. The application is dismissed.

2. Costs are awarded to the Respondents including the costs of Senior Counsel.



J.M. VAN DER WALT
JUSTICE OF APPEAL

I agree



M.J. DLAMINI
JUSTICE OF APPEAL

I agree

J.M. CURRIE
JUSTICE OF APPEAL

For the Applicants: Mr M Simelane of the Chambers of the Attorney General
For the Respondent: Mr B van Zyl SC instructed by Robinson Bertram Attorneys