When “straying” courts need to be “reined in"

By Carmel Rickard

HERE is a rare situation: three judges of Swaziland’s highest legal forum, the supreme court, confessing they are at a loss to understand what is happening in the courts below. This after two high court judges issued contradictory orders in relation to a bail hearing and the supreme court was asked to intervene and sort out the mess. Did the supreme court have the power to do so? It was a novel question, testing certain of its constitutional powers for the first time.

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THE highest court in Swaziland has been asked to intervene in a bizarre case testing certain of its constitutional powers for the first time. It was asked to step in after two high court judges made contradictory orders in relation to a contentious bail application. The question was whether section 148 (1) of the constitution of Swaziland [3] gave the supreme court power to exercise “supervisory jurisdiction” over
the two courts and sort out the mess. Concluding that it did, the supreme court set aside both of the two conflicting high court decisions [4].

The background story is not always easy to understand from the judgment of the supreme court. However, it stems from a high court bail application by an accused, Sipho Shongwe, charged with the murder of a prominent local businessman and football administrator. Shongwe is the director of local team Matsapha United while the dead man was the director of Mbabane Swallows.

During an early hearing on the question of bail, the question was raised whether Shongwe had been “lawfully released” from a maximum security jail in Barberton, SA. Judge Sipho Nkosi, who was hearing the bail application, then considered the question of the lawfulness of Shongwe’s release and ruled that the state had not proved that Shongwe fraudulently escaped.

This ruling was followed by an uproar, with confusing reports in the local media of an “outburst” by the judge, threats of impeachment by the Judicial Service Commission and then an “apology” to the Chief Justice, by the judge. These issues were, however, not specifically mentioned in the supreme court decision.

In the middle of the bail hearing, and in response to the ruling by Judge Nkosi on whether the accused had escaped from prison in SA, the state noted an appeal to the supreme court which is still pending.

A few weeks later Shongwe’s legal team applied to another high court judge, Mzwandile Fakudze, to “set aside the appeal and the accompanying application for leave to appeal”, calling the initial judgment “non-existent” because it was not transcribed but delivered off the cuff.

By this stage most readers will be a little confused. So was the Supreme Court. After quoting some remarks of Judge Nkosi, the three judges comment that “it is again quite difficult to follow what the learned Judge is saying”.

Leaving aside all confusion about the facts, the meaning of comments made from the high court bench by the judges and the equally confusing submissions by counsel, the supreme court was left with this problem: how was it to resolve the fact that contradictory orders had been issued by the high court? On the one hand Judge Fakudze had pronounced that Shongwe’s bail hearing would have to wait until the appeal against the Nkosi ruling had been finalized, while some time later, and with the appeal still pending, Judge Nkosi had said that the bail hearing would continue before him, and would take priority.

Shongwe’s legal team argued that the supreme court could not act. Section 148 (1), which has not been considered by the supreme court before, gave that court “supervisory jurisdiction over all courts of judicature and over any adjudicating authority”. But this did not mean the section was designed to “interfere with the judge who is performing his function as a judge,’ they said. “A judge is not accountable to anyone when performing his functions and the court cannot interfere with him.”

The supreme court shot back this response: “The short answer to this argument is that hard times call for hard options.” When it was alleged that there was something “fundamentally not going right” in proceedings before any court the supreme court was obliged to act. “When any court seems or is alleged to be losing direction it is the duty of this court to intervene and bring order.”

So long as courts “perform their duties in accordance with the law and the constitution, they are masters of their destiny.” But, if a court “strays”, then there must be “some power or authority competent to rein order”. “Judicial independence in terms of sec 141 cannot mean unfettered freedom. That would be chaos.”

The supreme court then examined the similar approach and provisions in many other jurisdictions, remarking that while the Swazi supreme court has the constitutional provision (sec 141) the court “still does not have any appropriate … boundary of that power.” Despite no law outlining these powers, the court should not be deterred. It was part of the “self-sufficiency” of the judiciary, that it could deal with its own
problems.

As a “superior court of record”, it clearly had the power to superintend and even interfere with proceedings in lower courts “to maintain pure and keep flowing the stream of justice in the Kingdom”. In appropriate cases this might mean removing a matter from one judge to be heard by another. Though it was “obliged” to intervene, it should do so with “due sensitivity” and in a way that would avoid a chilling effect on the lower courts. Judge Fakudze had contributed to the “troubled situation” in the high court, by way of an order that “should not have been made”. This, in turn, led to the order’s “unceremonious, subtly veiled rejection” by Judge Nkosi. While Judge Fakudze’s order was not necessary, Judge Nkosi’s reaction exacerbated the situation. These “glitches” together prejudiced the proper administration of justice.

In the end the court ordered that the orders of both Judge Fakudze and Judge Nkosi be set aside, and that the bail hearing should continue “with due expedition” before Judge Nkosi.

- The question behind the dispute over Shongwe’s “fraudulent escape” from SA, is really whether Shongwe is the same “Sipho Shongwe” who was convicted 2001 of being involved in a number of serious crimes including murder, attempted murder and cash-in-transit heists, and subsequently given two terms of life imprisonment. That Sipho Shongwe later appealed, unsuccessfully, to the SA constitutional court, citing alleged breaches of his fair trial rights.

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Director of Public Prosecutions v Shongwe (12/2018) [2018] SZSC 23 (22 August 2018) [4]
S v Shongwe (CCT45/02) [2003] ZACC 9; 2003 (8) BCLR 858 ; 2003 (5) SA 276 (CC) (30 May 2003) [6]

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