

IN THE SUPREME COURT OF ESWATINI

Case No.102/2025

In the matter between:

**THE COMMISSIONER GENERAL OF
HIS MAJESTY'S CORRECTIONAL SERVICES N.O. First Appellant**

THE ATTORNEY-GENERAL N.O. Second Appellant

and

SIBUSISO MAGNIFICENT NHLABATSI Respondent

**NEUTRAL CITATION: *The Commissioner General of His Majesty's
Correctional Services N.O. & Another v Sibusiso Magnificent Nhlabatsi
(102/2025) [2026] SZSC 12 (9 April 2026)***

CORAM: S B Maphalala, M D Mamba et J M van der Walt JJA

HEARD: 19 March 2026

DELIVERED: 9 April 2026

Summary

*Civil Procedure - Access to and by legal practitioner constitutionally enshrined -
- mandate by foreign attorneys to local correspondent attorney to consult with their
clients who are detained in the Kingdom – such mandate sufficient to clothe such
correspondent attorney with locus standi to seek access through the courts where
access is denied – appeal against High Court order granting access, dismissed
with costs.*

*Civil Procedure – Hearsay evidence – restated that same may be permissible in urgent
applications, provided that the source of the information and the grounds for belief in
its truth are stated – obiter, where there is a contravention, or likelihood of a
contravention of any constitutional protective provision a more flexible approach in
respect of hearsay evidence, in suitable circumstances, may be called for taking into
account, in particular in case of a detainee, where any other person alleges such
contravention or likelihood in relation to that detained person.*

JUDGMENT

*Cur adv Vult
(Postea: 9 April 2026)*

VAN DER WALT JA

INTRODUCTION AND BACKGROUND

- [1] The essence of this matter concerns access by a legal practitioner to a detained person and *vice versa*.
- [2] It is common cause, at the times relevant to the application in the Court *a quo*, that by virtue of an agreement between the Kingdom of eSwatini and the United States of America, certain foreign nationals had been transported from the United States to Matsapha Correctional Services Centre, where they were being detained. At the hearing of the appeal on the 19th March 2026, the Court was informed by Counsel that the issue has not become academic and that it remains live for purposes of adjudication by this Court.
- [3] It was the case of the Respondent, who was the Applicant *a quo*, a legal practitioner practising in this jurisdiction and an Officer of this Court, that he had been appointed as a correspondent attorney by the detainees' American attorneys and sought to consult with the detainees accordingly but that the First Appellant refused him access to the detainees. This resulted in an urgent application by the Respondent in the High Court seeking the following relief:

- “1. That the Rules of the above Honourable Court relating to time limits, forms and manner of service be dispensed with and that the matter be heard as one of urgency provided for by Rule 6 (25) of the High Court Rules.
2. Condoning Applicant's non-compliance with the Rules of the Court.
3. That the five foreign nationals currently detained at Matsapha Correctional Complex, who were transferred to Eswatini from the United States of America on or around July 16, 2025 be produced before the above Honourable Court for purposes of consultations with Applicant.
4. Alternative to prayer 3 above, the First Respondent and/or any officer or official acting on her command be hereby restrained from refusing the Applicant access to the five foreign nationals referred to above in prayer 3.
5. That the Applicant be hereby granted access at the Correctional Centre for consultation purposes as an attorney to the five foreign nationals currently detained at Matsapha Correctional Complex, who were transferred to Eswatini from the United States of America on or around July 16, 2025.
6. The Respondents should not pay the costs of this application at the Attorney and own client scale, in the event of unsuccessful opposition.
7. Granting the applicant further and/or alternative relief.”

[4] The Appellants as Respondents *a quo* opposed the application and raised certain points *in limine* in the Answering Affidavit, including the issue of *locus standi*. The Court *a quo* dismissed the *locus standi* point and it is this dismissal which forms the sole subject matter of the appeal.

4.1 The point was worded as follows in the Answering Affidavit:

“1. LACK OF LOCUS STANDI IN JUDICIO

1.1 Applicant does not have locus standi to bring the present application.

1.2 Applicant has failed to demonstrate authority from the inmates to institute the proceedings. The inmates were appraised of the Applicant's interest in meeting

them on this e 12th August 2025 but the inmates persistently showed no interest, hence, the Applicant has no interest in the proceedings.

1.2 In the premises, the Applicant has no locus standi to institute the present proceedings.”

4.2 After hearing argument, the Court *a quo* issued an Order that:

‘1. The Applicant is hereby granted access at the Correctional Centre for consultation purposes as an Attorney to the five foreign nationals currently detained at Matsapha Correctional Complex, who were transferred to Eswatini from the United States of America on or around July 16th 2025.

2. The Respondent should pay the costs of this application at ordinary scale.’

4.3 The Order was followed by a Judgment, wherein the point in *limine* was dealt with as follows: ¹

‘[9] On the point relating to Applicant's lack of locus standi to represent the detainees, it was argued on First Respondent's behalf that the mere fact that Applicant received instructions from attorneys based in the United States does not, on its own, establish an attorney and client relationship between Applicant and the detainees. The Applicant therefore does not have the right in law to bring the present application and seek to unlawfully consult with the detainees. Put differently, the detainees did not at any stage instruct Applicant to bring the present application to Court in order to consult with them.... According to the First Respondent;

“[4.2] Applicant has failed to establish any authority from the inmates to bring the present proceedings on their behalf. In the case of *Maziya v Commissioner of Police* (470Z2013) [20J4J SZHC 32, the Court held that a litigant must demonstrate a direct and substantial interest in the relief sought. In the absence of clear instructions from the inmates, Applicant cannot invoke the right to legal representation.

[4.3] Section 16 of the Constitution vests the right to legal representation i. [on the] detainees themselves, not in third parties. The confirmatory affidavits from the US Attorneys have no probative value in establishing a mandate to institute the present proceedings. Section 16 (2) of the Constitution provides as follows; “A person who is arrested or detained shall be informed of the right of that person to a legal representative chosen by that person.”

[9] According to First Respondent's counsel, Applicant was not appointed by the inmates or detainees and therefore cannot seek reliance on Section 16 (2) of the Constitution. To do so would be equal to undermining the rights of the detainees, who have the right in law to make a choice on the person or persons they wish to legally represent them in the country.

¹ Abbreviation and underlining this Court's own

- [10] Section 21 of the Constitution of the Kingdom of Eswatini is, according to the First Respondent, not applicable to the facts of the matter. The detainees are, according to the First Respondent, not facing any criminal charge and therefore the right to legal representation does not apply to them. To use the language of the First Respondent so as not to be misunderstood;
- “[6.5]...The five (5) inmates are neither charged nor arrested for a criminal offence so as to invoke the right to legal representation in terms of section 21 relied upon by Applicant. Applicant's reliance on Section 21 of the Constitution is misplaced.”**
- [12] On the contradictory statements allegedly made by Applicant, First Respondent contends that Applicant on the one hand, argued that he is being denied access to the detainees, whilst on the other hand, the same Applicant alleges that the inmates called him on his mobile phone and instructed him to represent them. Such contradictions amount to fundamental inaccuracies which are not permissible in litigation. The Court was referred to the case of *Khumalo v Auditor General and Others* (132/2013) [2013] SZHC 56 (6 March 2013) in which the Court held that;
- “The Applicants in law are approbating and reprobating. In other words, they are blowing hot and cold. A litigant is not allowed to do so in law. Re is required to then stick to that position.”**

ANALYSIS AND CONCLUSION

- [13] On the first ground of opposition, namely that Applicant lacks the necessary locus standi to institute the present application, the Court is of the view that this point is totally misdirected and misplaced. It appears that the primary component of this ground of opposition is that Applicant has not been properly instructed by the inmates so as to clothe him with the necessary right in law to bring the present application to Court.
- [14] In his Founding Affidavit, the Applicant, who is an attorney of the High Court of Eswatini, states that he personally went to the place of detention of the inmates (Matsapha Maximum Correctional Facility) and was there informed by the officers of the First Respondent that the inmates do not wish to see him or consult with him as they have their own attorneys in the United States of America. It is the Applicant who was blocked from seeing or consulting with the inmates. It is him (Applicant) who was denied access to see the inmates and therefore it can only be him to approach this Court in order to claim the right of access to the inmates. The right to consult with the inmates affords Applicant a substantial and direct interest to the relief sought.
- [15] What is the source of the right enjoyed by Applicant in meeting and consulting with the inmates? Attorneys all over the world work with correspondent attorneys in matters in which they ordinarily have no jurisdiction. The First Respondent has not disputed the fact that the US based attorneys are indeed the attorneys of record for the inmates kept in the country. The position of the law is that the US based attorneys representing the inmates have no right of audience in our Courts and have no jurisdiction to personally come into the country and represent the inmates.’

[The next three paragraphs deal with the position of correspondent attorneys.]

A THE GROUNDS OF APPEAL

[5] The grounds of appeal were worded as follows:

- “1. *The Court a quo [sic] erred in fact and in law in granting the Respondent access to the Correctional Centre for consultation purposes as an attorney to the foreign nationals. The Court a quo ought to have found that the Respondent failed to establish a legally recognized connection with the foreign nationals, and consequently lacking a right to access.*
2. *The Court a quo erred in law and misdirected itself in failing to pronounce itself on the points in limine a quo, inter alia lack of locus standi in judicio. The Court a quo ought to have found that the Respondent failed to demonstrate a legal interest recognized by law in the application a quo.’*

B SUMMARY OF SUBMISSIONS ON BEHALF OF THE PARTIES

[6] Before this Court, the Appellants did not contest a basic constitutionally founded right of right of access of any person to a legal practitioner and by necessary implication, a right that such access shall not be barred or frustrated or otherwise be infringed.

B.1 ON BEHALF OF THE APPELLANTS

[7] Mr S Hlawe commenced with argument in respect of the second Ground of Appeal pertaining to pronouncement on the point *in limine*.

7.1 It was submitted in the Appellants' Heads of Argument *inter alia* that:

"5.4 Appellant submits that the point in limine on lack of locus standi raised an issue that went to the root of the matter, the court a quo was not at liberty to ignore making its pronouncement on it. The failure by the court a quo to pronounce upon the locus standi challenge raised by the Appellants was not merely a procedural oversight but a substantive failure that vitiated the proceedings. Justice required that every point of law that is relevant to the outcome be considered and determined by the Court a quo."

7.2 In the Heads of Argument and in oral argument reliance was placed on the following extracts from case authorities:

7.2.1 *Sithole N.O. and Others v The Prime Minister and Others:*²

'The position therefore is the following:-

- (i) *We are called upon to decide the question of locus standi of the appellants without knowing what the basis was for the decision by the High Court full bench that they had no locus standi. In effect we might be placed in the invidious position of upholding an appeal against that High Court decision without us considering the ratio decidendi of the full court;*' and

² (26 of 2007) [227] SZSC 45 (16 November 2007)

7.2.2 The Nigerian case of *Nyawen v Badon and Others*:³

‘It is the law that in any judgment of a court; (which word includes ruling, and is inclusive of all decisions of a court), all issues placed before a court must be considered and determined. A deliberate failure to do so by a court has been characterized as a failure to perform its statutory duty. The law is settled that a court is at all times required to consider all issues and pronounce on them, save in the clearest of cases. This Court, as well as the Supreme Court has, in a surfeit of cases, drawn the attention of courts below to the undesirability of failing to do so, and frowned at the failure of lower courts to decide all issues placed before them. When a court fails to resolve even one vital issue, it vitiates a Judgment. Thus, a Judgment is flawed, sometimes fatally, if a vital issue in the case is left unresolved. Where a court defaults in this duty, an appeal is sustainable.’

7.3 When Mr Hlawe’s attention was drawn to Paragraphs [9] and [13] and further of the Judgment *a quo* wherein the *locus standi* point expressly was addressed and declared to have been misdirected and misplaced, with reasons stated, Mr Hlawe appeared to accept that this meant a dismissal but explained that by “*failing to pronounce*” was meant that the Court *a quo* failed to record in its Order that the point had been dismissed. Mr Hlawe was unable to refer to any authority in support of this contention, or any authority contrary to the usual position that the *dominus litis* approaches a court for certain relief and that the ensuing Order records what relief had been granted or refused, as the case may be, and not the findings of that court.

[8] As regards the first ground, i.e. a legal *nexus* between the Respondent and the detainees, the argument was condensed into a

³ (CA/YL/82/2014) [2016] NGCA 7 (28 June 2016)

main contention that the American attorneys had no mandate from the detainees or their next of kin to appoint the Respondent as the detainees' correspondent attorney and, in fact, that the detainees did not want to see the local attorney and that the Respondent's case to the contrary was based on hearsay evidence. Mr Hlawe was unable to state who or where these next of kin are.

8.1 Mr Hlawe submitted that the Respondent's Supplementary Affidavit, to which confirmatory affidavits by the American attorneys were attached, had not been properly placed before the Court *a quo*. Mr Hlawe confirmed that no steps to expunge it had been taken in the Court *a quo*.

8.2 Having conceded that the best evidence that the detainees did not want to have anything to do with the Respondent, would be the evidence of the detainees themselves, Mr Hlawe was unable to explain why, the detainees being under the supervision and control of the First Appellant, the First Appellant did not obtain affidavits to that effect from the detainees themselves.

B.2 ON BEHALF OF THE RESPONDENT

[9] As regards the first Ground of Appeal, the Respondent submitted that the *nexus* was the mandate from the American lawyers, all of who made affidavits. Further that:

9.1 The Appellants now were arguing a different case on appeal.

9.2 The Appellants conflated two conceptually different issues being the existence of an attorney-client relationship on the one hand, and the professional mandate of the correspondent attorney on the other.

9.3 One of the American lawyers, a Ms A L David representing two of the detainees,⁴ had a video telephone call with her one client and visible with her client were other detainees and correctional officials, one of whom she believed was the First Appellant. When Ms David pointed out that access to her clients by the local attorney requested by her was refused, she was advised by the person she believed to be the First Appellant that the reason access was denied

⁴ In a second Confirmatory Affidavit, attached to the Replying Affidavit

was because an appropriate application with the United States Embassy had not been filled out.⁵

[10] As for the second ground, it was submitted that the substance of the ruling dismissing the point *in limine* is evident and clear from the judgment.

C ANALYSIS AND CONCLUSIONS

[11] It is noted that the Appellants, in the Court *a quo*, did not seek to expunge or exclude any affidavit filed by the Respondent, including the confirmatory affidavits. Nor did the Appellants seek leave to file any additional affidavits. The Court therefore will have regard to all the affidavits filed *a quo*.

[12] As far as hearsay evidence is concerned, it may be permissible in urgent applications, provided the source of the information and the grounds for belief in its truth are stated.⁶ *Obiter*, where there is a contravention, or likelihood of a contravention of any of the

⁵ It is not necessary for current purposes for the Court to make a finding on whether or not the First Appellant had been present in person

⁶ See for instance *Baartjies v JK Maseko Company (Ltd) and Others (1046 of 2006) [2006] SZHC 126 (22 August 2006)*, Paragraph [7]

constitutional protective provisions,⁷ a more flexible approach in respect of hearsay evidence, in suitable circumstances, may be called for taking into account, in particular in the case of a detainee, where any other person alleges such a contravention or likelihood in relation to that detained person.

C.1 First Ground of Appeal: *Nexus*

[13] The Appellants' case *a quo* was to the effect that the mere fact that the Respondent was mandated by the American attorneys does not on its own establish an attorney-client relationship and that the Respondent failed to establish any authority from the detainees themselves.⁸ The Appellant's case on appeal was to the effect that the American attorneys had no mandate from the detainees or their next of kin to appoint the Respondent as their correspondent attorney.

⁷ Section 35(1) of the Constitution of the Kingdom of Eswatini Act, 2005: "Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

⁸ Judgment *a quo* Paragraph [9]

13.1 These scenarios are mutually destructive and the submission by the Respondent that the same case is not being pursued on appeal, stands to be accepted. The Appellant cannot be permitted to seek to make out a new and contradictory case on appeal.

13.2 In any event, the confirmatory affidavit by Ms Davis referred to *supra* is perfectly consistent with instructions from the detainees to arrange for them to consult with a local attorney.

13.3 Any suggestion that the American attorneys in appointing the Respondent had embarked on a frolic of their own, in the circumstances cannot seriously be entertained.

[14] It then follows that the first Ground of Appeal cannot succeed.

C.2 Second Ground of Appeal: Pronouncement in respect of *locus standi* point

[15] The cases relied on by Mr Hlawe merely state the trite position that a Court has to determine and decide issues and that its judgment should reflect the reasoning, i.e. the applicable *ratio decidendi*. The Court *a quo* did consider and decide the *locus standi* point, and

in so doing devoted several paragraphs to its reasoning for not upholding the point. These cases therefore cannot assist the Appellants in the challenge on appeal.

15.2 The subsequent explanation at the hearing of the appeal that by “*pronouncement*” is meant inclusion of the dismissal of the point in the Order at the end of the judgment, appears to be not only a diversion from what is contained in the Appellants Heads of Argument and to be a trimming of the Appellants’ sails to the prevailing winds, but also, it is without foundation in law.

15.2.1 “*Pronounce*” in legal context is described in Black’s Law Dictionary as: “*To utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a court is said to “pronounce” judgment or a sentence. See Ex parte Crawford, 36 Tex. Cr. R. 180, 36 S. W. 92.*” Similar definitions are to be found in the Oxford Learner’s, Collins and Merriam-Webster dictionaries.

15.2.2 *In casu*, it cannot be gainsaid that judgment had been pronounced.

[16] This ground too therefore cannot be upheld.

[17] The issue of access *per se* is not challenged on appeal but the Court finds itself compelled to comment that ultimately, there can be no real harm in granting the Respondent access to the detainees and the Appellants did not demonstrate any such harm or likelihood of such harm; it then will be up to the detainees, if they do not wish to see the Respondent, to tell this to the Respondent to his face, in which case the Respondent can report back to the American attorneys that he is unable to fulfil his mandate. This would be the best way unequivocally to establish the detainees' wishes, as opposed to cumbersome endeavours to resolve the issue through convoluted points *in limine* and conflicting hearsay evidence, as was the case in the present matter.

D ORDER

[18] Accordingly, the following Order is made:

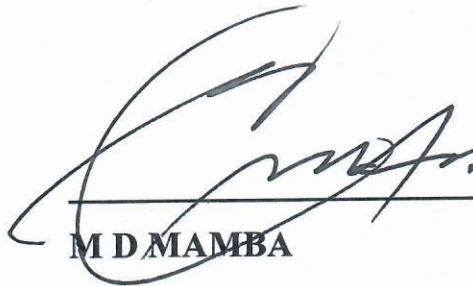
- 1 The appeal is dismissed and the Order of the Court *a quo* is confirmed.
- 2 Costs of the appeal are awarded in favour of the Respondent.



J M VAN DER WALT
JUSTICE OF APPEAL



S. B. MAPHALALA
JUSTICE OF APPEAL



M D MAMBA
JUSTICE OF APPEAL

For the Appellants: Mr S Hlawe of the Chambers of the Attorney - General

For the Respondent: Mr S M Nhlabatsi in Person