THE HIGH COURT OF SWAZILAND

LAW SOCIETY OF SWAZILAND

Applicant

And

SWAZILAND GOVERNMENT

1st Respondent

JUDICIAL SERVICE COMMISSION

2nd Respondent

THE ATTORNEY GENERAL

3 rd Respondent

MR JUSTICE KENNETH NKAMBULE

4th Respondent

MR. JUSTICE ALEX SHABANGU

5th Respondent

MR. JUSTICE JACOBUS ANNANDALE

6th Respondent

Civil Case No. 790/2003

Coram	S.B. MAPHALALA - J
For the Applicant Advocate	L. Maziya
For the Respondents	Mr. P. Msibi (attached to the Attorney General chambers)

RULING ON APPLICATION FOR RECUSATION

(07/08/2003)

Introduction

On the 11th April 2003, the Applicant, referred to as The Law Society, instituted an urgent application for, inter alia the following relief:

2. Calling upon the Respondents jointly and severally to show cause, if any, on a date and time to

be determined by this Honourable Court, why:

2.1. The appointment of the 4th Respondent to be Judge of the High Court of Swaziland in terms of Legal Notice No. 29. of 2003 dated the 3rd April 2003 should not be declared null and void and of no force and effect;

2.2. The appointment of the 5th Respondent to be Acting Judge of the High Court of Swaziland in terms of Legal Notice No. 30 of 3rd April 2003, should not be declared null and void and of no force and effect;

2.3. The appointment of the 6th Respondent to be Acting Chief Justice and Acting Judge President of the Industrial Court of Appeal in terms of Legal Notice No. 28 of 2003 should not be declared null and void and of no force and effect;

3. That paragraphs 2.1 to 2.3 above operate as an interim order with immediate effect pending the return date;

4. Costs of suit, and

5. Further and/or alternative relief.

The founding affidavit of the Secretary General of the Applicant Mr. Sibusiso Kubheka is filed in support thereto. Various annexures are also filed in support of

what is averred in the said founding affidavit, viz annexure "A" an extract of minutes of a meeting of the council of The Law Society of Swaziland held on Friday the 4th April 2003, at the High Court, Mbabane; annexure "LSS1" being Legal Notice No. 127/1999 being the appointment of Kenneth Phumlani Nkambule to the Industrial Court as a Judge on the 17th November 1999, under the hand of His Majesty Mswati III of Swaziland; annexure "LSS2" also a Legal Notice for the appointment of Jacobus P. Annandale to be a Judge of the High Court of Swaziland on the 22nd January 2001; and annexure "LSS3" pertains to the appointment of Jacobus P. Annandale as Acting Chief Justice of Swaziland, the variation of terms and conditions of appointment of a) Justice Thomas Sibusiso Masuku to be a Judge of the Industrial Court and b) Justice Kenneth Phumlani Nkambule to be a Judge of the High Court; and Legal Notice No. 30 of 2003 being the appointment of Alex Shabangu to be an Acting Judge of the High Court of Swaziland.

The Respondents opposes the application and they are represented by the office of the Attorney General. Before the matter came for arguments the Applicant withdrew the application in respect of the 6th Respondent Mr. Justice Jacobus P. Annandale. Therefore no issue lies in respect of the 6 Respondent.

This matter was first served before me on the 14th April 2003, together with Case No. 743/2003 which was argued before me on various points including that of recusal. On that day this matter was postponed to the 17th April 2003, by consent of both parties for the Respondents to file opposing papers. My view of the matter was that the issue of recusal in Case No. 743/2003 would determine the future course of this matter.

On the 17th April 2003, I delivered my ruling in Case No. 743/2003 holding that I ought to recuse myself in that case. Mr. Ntiwane on that day persisted that this matter was different from Case No. 743/2003 and that it be postponed to the 28th April 2003, for arguments before me. Indeed arguments commenced in this matter on that day but were not completed. There have been a number of postponements in this matter for one reason or the other until I finally heard submissions in reply by Mr. Maziya sometime in June. On the 23rd May 2003, I delivered a ruling on whether Rule 33 was applicable. The matter was considerably delayed when the Secretary of the Law Society who was to file an affidavit was indisposed and the matter was in abeyance

for sometime. Mr. Maziya when he argued in reply on the applicability of the doctrine of necessity promised to furnish the court with additional Heads of Argument. I only received the Heads on the 29th July 2003.

The points of law in limine.

On the 14th April 2003, simultaneously with the filing of the notice of intention to oppose the Respondents filed an affidavit by the Acting Principal Secretary for the Ministry of Justice and Constitutional Affairs and also an acting ex officio Secretary of the Judicial Service Commission Mr. Lukhele. In that affidavit he raised legal points purportedly in terms of Rule 33 of the Rules of the High Court. I say purportedly because it was shown in the course of argument that the said Rule was not applicable. However, I condoned Respondents' citation of an incorrect Rule as shown in my ruling delivered on the 23 rd May 2003. For ease of reference, the said ruling forms part of this judgement.

The points of law raised can be summarized as follows:

a) The doctrine of clean hands

The Applicant does not have clean hands to approach this court in view of its resolution to boycott the Judges appointed in terms of the Legal Notices that they now seek to challenge through this court. The resolution in question is being enforced under sanction by the Applicant of its own resolution has taken the law into its own hands and now merely seek the court to rubber-stamp their illegal action which is ultra vires the Legal Practitioners Act.

b) Locus standi

The Applicant does not possess the necessary locus standi to institute the present proceedings in that ex facie the papers has not demonstrated all the necessary requirements in proceedings of this nature.

c) Clear right/Prejudice

The Applicant has not demonstrated that a clear right exists in enabling Applicant to seek an interim relief and the Applicant will suffer irreparable damage if the relief sought is not granted in the normal course.

d) Jurisdiction/Recusal

This court has no jurisdiction to entertain the present application and grant the relief sought in view of the judgment of the Court of Appeal of Swaziland in the case of the Minister of Justice and Constitutional Affairs and Stanley Wilfred Sapire Civil Appeal Case No. 49/2001. The
issues to be decided are essentially similar in the sense that this court is called upon to decide the fate of one of the Judges of Swaziland.

e) Reliance on a defective affidavit.

The affidavit of Stanley Wilfred Sapire is defective for the following reasons:

i) The affidavit seeks to support an application whereby Mr. Justice Thomas Masuku is third Respondent whereas in the affidavit by the former it is Stanley Wilfred Sapire who is a third Respondent; and

ii) It is contended and relied upon that Stanley Wilfred Sapire resigned from Government when as a

matter of fact he retired from Government as clearly set out in the agreement of retirement from service annexed herewith marked "PS2";

iii) The said affidavit is used in the supporting affidavit in Civil Case No. 743/2003.

f) Notice of motion

Notice of motion was issued on 11th April 2003, and served at 14.00hrs yet Respondents were expected to file an appearance to oppose on or before 11th April 2003.

g) Notice

In terms of paragraph (b) of the notice of motion Respondents are expected to file answering affidavits on or before 12noon yet the matter is set down for 14th April 2003, at 9.30am. Therefore, this matter has been set without any form of notice at all.

h) Missing page

Page 9 of the notice of motion is missing; therefore, Respondents are not in a position to understand issues in their entirety due to Applicant's fault.

i) Attachment

Legal Notice No. 29 of 2003 is not annexed to the papers. The Applicant's papers are accordingly not complete.

j) Attestation date.

Annexure "LSS4" was attested to on 9th April 2003, whereas the notice of motion and the affidavit of Sibusiso Kubheka were signed on the 11th April 2003. The contents of paragraph E are hereby reiterated.

When the matter was argued Mr. Msibi made submissions on the points outlined above. Mr. Maziya arguing per contra adopted his Heads of Arguments he advanced in Case No. 743/2003. As Mr. Msibi was not involved in that case it became necessary that he appraised himself of those Heads to fully address the court thus delaying the matter to some degree. He in turn filed additional Heads of Argument on the doctrine of "necessity". The issue in this debate revolved around recusation. I indicated to the parties that it appeared to me that the point of my recusal was the first

hurdle before the other points can be decided. Both parties were in agreement that was so. I will therefore proceed to determine this point.

Whether the court lacks the jurisdiction to adjudicate upon this matter.

It is contended on behalf of the Respondents that this court has no jurisdiction to entertain this application and grant the relief sought in view of the ratio decidendi in the case of the Minister of Justice and Constitutional Affairs vs Stanley Wilfred Sapire Civil Case No. 49/2001 (unreported) and more so in view of what this court concluded in a similar matter that of The Law Society of Swaziland vs Swaziland Government et al Civil Case No. 743/2003 (unreported). In the latter case I found that I ought to recuse myself and recommended that because of the apparent interest the Registrar of this court must advise the relevant authorities to appoint an independent Judge as soon as it is practicable to come and hear that case. It was argued for the Respondents that because of the similarities in this case and Case No. 743/2003 any attempt by this court to hear this one will be defeating the letter and spirit of Case No.

743/2003 and I will indirectly be reviewing my own decision.

On the doctrine of necessity it was contended on behalf of the Respondents that there is no need to raise and to rely on this doctrine at all in this case. This is because for the court to take it into account the court will be forced to make some factual assumptions which are not supported by any evidence whatsoever, as existing and further assumes that those facts are not disputed at all.

Mr. Maziya argued per contra. He submitted that in an application for recusal the onus rests upon the party moving the recusal application to satisfy the requirements of what is known as "the double reasonableness test" the ingredients of this test are the following:

i) The apprehension of bias must be held by a reasonable, objective and informed person, and;

ii) The application itself must in the circumstances be reasonable (see President of the Republic of South Africa vs South African Rugby Football Union (the "SARFU" case; 1999 (4) S.A. 147 (CC) at 177);

S vs Roberts 1999 (4) S.A. 916 (SCA); The South African Commercial Catering and Allied Workers Union and others vs Irvin % Johnson Ltd (Seafood Division Fish Processing) 2000 (3) S.A. 705 (CC) at 713 paragraph 12 and 14 (the "SACCAWU" case).

In the "SARFU" case the Constitutional Court of South Africa held that an application for recusal of a Judge raises a constitutional question and at paragraph 48, formulated the proper approach to recusal as follows:

"The question is whether a reasonably objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submission of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice, without fear or favour and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer for whatever reasons, was not or will not be impartial".

This case was applied and followed in the recent case in the Supreme Court of Appeal of Sager vs Smith 2001 (3) S.A. 1004 (SCA) at paragraph 75 of the "SARFU" judgment it is pointed out that the test of a reasonable apprehension of bias replaces that of a "reasonable suspicion of bias" previously favoured by the court in S vs Roberts (supra). It is suggested in Sager's case (supra) that the difference would appear to be one of semantics rather that substance.

Mr. Maziya argued that there is a presumption that judicial officers are impartial in the adjudication of legal disputes in view of the oath that they take when they assume office. The onus to rebut this presumption is on the person alleging bias or the appearance of it (see "SACCAWU") case (supra).

Mr. Maziya conceded in argument that there is obviously a close relationship between the Judges in the small High Court bench and under normal circumstances this factor

alone would automatically disqualify a Judge from hearing a matter involving one of the other Judges. He directed the court's attention to the case of South African Motor Acceptance Corporation (EDMS) vs

Oberholzer 1974 (4) S.A. 808 (T) and the Sapire case (supra).

In Oberholzer case (supra) it was held as follows:

"Where two judicial officers axe attached to the same Bench as colleagues and one of them is a litigant or an accused then there is a reasonable ground for the other legal officer to be recused from trying the action".

This passage was cited with approval in the Sapire case (supra). Mr. Maziya contended that the latter case is distinguishable from the present in one fundamental respect i.e. the case dealt with a matter in which all the Judges had a manifest interest in that the relief sought affected all of them i.e. a declaration that the legal retirement age of Judges is 75 years and not 65.

He further argued that in any event it was pointed out in the Sapire case (supra) that the judgment was subject to the doctrine of necessity. The learned Judges cited the passage in Halsbury's Law of England (4th ED) 2001 Re-issue Vol (1) at page 102, where the following is stated:

"Necessity and statutory authority - if all members of the only tribunal competent to hear a matter are subject to disqualification, they may be authorised and obliged to hear and determine the matter by virtue of the common law doctrine of necessity. The rationale for the application of this doctrine is to prevent a failure of justice. The doctrine will however, be applied only in clear and compelling circumstances (my emphasis).

Mr. Maziya went further to demonstrate at great length how in casu there exist clear and compelling circumstances to invoke the said doctrine. This is reflected in his Heads of Arguments at paragraph 8 where he submitted the following:

"8.1.1.1. It is submitted that it is now practically impossible for the King to lawfully appoint an Acting Judge to hear the present matter. There is currently no Judicial Service Commission following the resignation of Stanley Sapire on the lst April

2003. According to the Judicial Services Commission Act No. 13 of 1982 the quorum is formed by the presence of the Chairman (who must be the Chief Judge or Judge President of the Court of Appeal or a Judge of the latter court) and at least one other member of the Judicial Service Commission. The Chief Justice resigned on the 1st April 2003. The Judge President and all the other Judges of the Court of Appeal resigned last year following the infamous statement made by the Prime Minister on the 28th November 2002. It is therefore impossible to convene a meeting of the JSC and thus His Majesty cannot lawfully be advised by anyone to appoint a Chief Justice or any Judge of either the High Court or the Court of Appeal.

8.1.1.2. Justice Annandale's purported appointment as Acting Chief Justice is a nullity because there was no JSC at the time of his "appointment". The same applies to Mr. Alex Shabangu and Mr. Kenneth Nkambule.

8.1.1.3. It is therefore impossible for anyone to be appointed an Acting Judge to hear this matter.

8.1.1.4. Even if it were possible for His Majesty to appoint an Acting Judge (and this is denied), it would be impossible for any principled lawyer to accept such appointment in view of the present constitutional crisis in the country. Only spineless and unprincipled lawyers would accept such appointments. Surely it would not be in the interest of the administration of justice if our courts were to be staffed by puppet and pliable Judges who would not discharge their duties according to law but according to the wishes of those who put them into office. This would seriously undermine that dignity, veneration and respectability that should always characterise the noble office of a Judge.

8.1.1.5. A recusal by either Justice Maphalala or Justice Matsebula, it is submitted, would result in a failure of justice within the meaning of that phrase in the Halsbury's report."

In additional Heads of Argument Mr. Maziya traced the said doctrine to our law culminating to its mention by the Court of Appeal in Sapire case (supra).

In the course of arguments the Respondents also filed very comprehensive Heads of Arguments in reply. I shall advert to the salient points of these later in the course of this judgment. In essence it is the Respondent's contention that the doctrine of necessity has been wholly associated with criminal law in that Respondent have failed to come across even a single authority to the effect that its use can be extended to

other branches of law outside the ambit of criminal law and delict. That the only form of incorporation will have to be by means of a statute and this excludes rules of court in the form judicial precedents or any form of judge-made law. Any judgment of court which imports a new and foreign principle into the body of the received Roman - Dutch Law, other than by way of statute is wrong and is against not only the spirit of Section 3 (1) of the General Law and Administration Act No. 4 of 1907 but will also fall outside the letter and spirit of the Court of Appeal judgment in the case of Annah Lokudzinga Matsenjwa 1970 - 76 S. L. R. 25 at 29.

In any event, the Respondent contends that there is no need to raise and rely on the doctrine of necessity at all in this case. This is because for the court to take it into account the court will be forced to make some factual assumptions which are not supported by any evidence whatsoever, as existing and further assumes that those facts are not disputed at all.

The above are the submissions for and against the application before court. I now proceed to determine the issues.

The applicable law.

There are many decisions which deal with circumstances in which a Judge ought to recuse himself in a matter. It is not necessary to deal with these at any great length as the principles have been authoritatively and conveniently, summarised by both the South African Constitutional Court and the Supreme Court of Appeal of South Africa separately in the following respective cases; President of the Republic of South Africa and others vs South African Rugby Football Union and others (supra) and that of S vs Roberts (supra) closer home a full Bench of this court in Minister of Justice and Constitutional Affairs vs Sapire Stanley Wilfred Case No. 1822/2001 (unreported) culminating in the appeal decision in Minister of Justice and Constitutional Affairs vs Sapire Stanley Wilfred (supra) the former was overruled by the latter decision.

A case in point for purposes of this judgement is the South African case of South African Motor Acceptance Corporation (EDMS) BPK vs Oberholzer 1974 (4) S.A.

808 (T). This case was cited with approval in the Appeal Court case of Minister of Justice and Constitutional Affairs vs Stanley Wilfred Sapire (supra). In the Oberholzer case the Appellant sued the Respondent, the Assistant Magistrate of the District in which the action was being tried, for payment of certain sums of money. At the commencement of the hearing the Appellant raised the exceptio suspecti judicio that the Magistrate of the District hearing the matter should recuse himself, as the defendant was a member of the staff of his office. The Magistrate in the court a quo refused the application for recusal. In an Appeal against the recusal of the trial Magistrate to recuse himself it was held:

"a) Where two judicial officers are attached to the same bench as colleagues and one of them is a

litigant or an accused, then there is a reasonable ground for the other legal official to be recused from trying the action;

b) The recusation judicis suspecti applied of all judicial officials irrespective of what their order of rank in the hierarchy of their administration of justice might be;

c) It made no difference whether the action concerned was of a civil or criminal nature;

d) The appellant had completely bona fide and quite correctly invoke an acknowledged, reasonable ground for recusal when he requested the Magistrate to recuse himself;

e) The trial Magistrate should have recused himself.

Jourbert J, in the Oberholzer decision (supra) quoted with approval (with emphasis) Voet 5.1.47, as translated by Gane (at 812 D of the judgment):

"Still I see no reason why, if a whole guild of Judges and not individuals merely have perchance done things which inspire a very just fear, and give rise to a suspicion in one of the litigants that they will not judge according to the dictates of justice and the sense of duty of an upright mind, the whole guild of Judges could not be declined as suspect in such a case on the reasons being laid before a superior Judge or before the Emperor" (my emphasis).

The learned Judge also quoted with approval what was said by the author, Karroo in the article titled Recusation in the 1924 South African Law Journal at page 37 (judgement at 814 B).

"No matter how conscientious a Magistrate or Judge may be, it is better to avoid even a semblance of suspicion and the fountain of justice "pure and undefiled". When, therefore, a bone fide objection is taken by either of the litigants to the person of the Judge or Magistrate, on reasonable grounds, such judicial officer should not lightly overrule the objection. If he

has an interest in the suit of which the parties are ignorant, he should unhesitantly recuse himself.

The rule against bias is derived from the principle of natural justice, often expressed as "nemo judex in sua cause", meaning, no man ought to be a Judge in his own cause and at the same time be a party. The rule disqualifies Judges from acting judicially in a case, in the subject matter which they have any direct pecuniary interest, or some other interest which may cause them to bring an "impartial mind" to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel (see Sarfu case at 177 quoted with approval in Locabial Ltd vs Bay field Properties Ltd 2000 ALL ER (CA) at 76). The nemojudex principle is evidence in Lord Hewart's celebrated dictum that "justice should not only be done but should manifestly and undoubtedly be seen to be done" (see R vs Sussex Justices, ex parte McCarthy [1924] 1 KB 256, 259).

In Zackey vs Magistrate of Benoni 1957 (3) S.A. 12 (w), the Natal Provisional Division held that once a court recused itself it becomes functus officio and cannot then record any verdict.

The objection of recusation in the Roman-Dutch Law was a declinatory exception known to the Roman law as the exceptio judicis suspecti. The subject is fully examined by Voet, 5.1.43 (see also Van Leeuwen, Roman - Dutch Law, 5.17.3, Kotze's Translation, Vol 2 page 456; and Nathan, Common law of South Africa, Vol 4 page 1996, paras 1992 to 1995.

Williamson J in Zackey vs Magistrate of Benoni (supra) commenting on the above-cited authorities said at page 13 in fin 14 said the following, and I quote:

"Although these authorities discuss fully the grounds upon which the exception can be taken. I have been

unable to find any reference to the effect of the exception being successfully taken. But it seems to me that it must amount to a decision that the court has no jurisdiction to hear the matter. Once that is decided the court could not be properly seized of the matter at all, and all the proceedings before the court prior to the recusation being accepted must logically become a nullity. In my view an accused successfully asking for recusation

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cannot demand any more than the court records its recusation - it cannot claim any verdict at all" (my emphasis).

Similar sentiments were expressed by Hathorn JP in the case of Punshow vs Wise
1948 (1) S.A. 81. The learned Judge said the following:

"The Magistrate recused himself at the instance of the accused. As soon as he did so he became functus officio ..." (my emphsis) (see also S vs Bismilla 1972 (4) S.A. 14; S vs Bam 1972 (4) S.A. 41 (E), S vs De Vries 1964 (2) S.A. 110 (E); S vs Anderson 1973 (2) S.A. 502 (o); S vs Mkwanazi 1966 (1) S.A. 125 (T); Bailey vs AG 1962 (4) S.A. 516 and S vs Essa 1964(3)S.A.17(N))."

The above therefore are the legal principles in which this matter ought to be decided. The law vis a vis the facts in the instant case.

It is common cause that the 4th and that 5th Respondents are attached to the same Bench as myself. It is further common cause and this was correctly conceded by Mr. Maziya for the Applicant that the Bench is a small, intimate one and it is reasonable for one to perceive that he may not have a fair trial, in view of the close working relationship that exist on the Bench. Following what was decided in Oberholzer (supra) where two judicial officers are attached to the same Bench as colleagues and one of them is a litigant or an accused, then there is a reasonable ground for the other legal official to be recused from trying the action. The recusatio judicis suspecti applied in respect of all judicial officials irrespective what their order of rank in the hierarchy of their administration of justice might be. It made no difference whether the action concerned was of a civil or criminal nature. The following is clear authority on the case in casu as I have earlier cited in full. Voet 5.1.47, as translated by Gane (at page 812D of the Oberholzer decision (supra). For the sake of emphasis I will repeat them in full: I quote as per Jourbert J:

"Still I see no reason why, if a whole guild of Judges and not individuals merely have perchance done things which inspire a very just fear, and give rise to a suspicion in one of the litigants that they will not judge according to the dictates of justice and the sense of duty of an upright mind, the whole guild of Judges could not be declined as suspect in such a case on the reasons being laid before a superior Judge or before the Emperor".

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The learned Judge also quoted with approval the extract by the author, Karroo in the article titled "Recusation" in the 1924 South African Law Journal at page 37 (judgment 814 B):

"No matter how conscientious a Magistrate of Judge may be, it is better to avoid even a semblance of suspicion and to keep the front of justice "pure and undefiled". When, therefore, a bone fide, objection is taken by either of the litigants to the person of the Judge or Magistrate, on reasonable grounds, such judicial officer should not lightly overrule the objection. If he has an unhesitatingly recuse himself.

In the present case on the basis of the cited authorities, I ought mero motu, to have raised the issue and to have recused myself. Essentially what I have been called upon to do in the present case is to determine the fate of my fellow colleagues. It is clear therefore on the authority of Oberholzer and the Sapire case that I ought to recuse myself in this case. These two cases are firm authorities in this regard. I find myself in an invidious situation where I will have to declare that two of my colleagues' appointments as Judges are unconstitutional and unlawful depending on what I find on the merits. It appears to me also

to be improper purely as a matter of principle.

However, that is not the end of the matter in this case unlike in other South African decided cases I have cited (see Punshon vs Wise (supra) and Zackey vs Magistrate of Benoni) where it was held that once a court has recused itself it becomes functus officio. In the present case I am called upon to invoke the doctrine of necessity. The principle was mentioned by the Judge President in the Sapire case (supra). It is found in Halsbury's Laws of England (Lord Mckay of Clashfer) 4th Edition 2001 re-issue Vol. (l)at page 102.

"Necessity and Statutory Authority - if all members of the only tribunal competent to hear a matter are subject to disqualification, they may be authorised and obliged to hear and determine the matter by virtue of the operation of the common law doctrine of necessity. The rationale for the application of this doctrine is to prevent a failure of justice. The doctrine, however, be applied in clear and compelling circumstances" (my emphasis).

I must say though en passant that it is a debatable issue whether this doctrine is part of our law as it has English law origins. I heard very interesting arguments by both Mr. Maziya and Mr. Msibi in this regard for and against its incorporation in our law.

However, I am not going to go into the nitty gritties of their arguments. But what appears to me to be the case is that the Court of Appeal in the Sapire case (supra) seemed to have adopted its use and it is not for me to question the wisdom of their Lordships in that case. Therefore the principle of stare decisis would have to apply.

Their Lordships in the Sapire case found that there were no clear and compelling circumstances. The Judge President had this to say at page 16 of the judgment: and I quote;

"In my view there are no clear and compelling circumstances. In terms of Section 102 (1) of Act 50/1968 The King, acting accordance with the advise of the Judicial Service Commission, may appoint a person qualified for appointment as a Judge of the High Court to act as inter alia when a Judge is unable to perform the functions of his office.

I see no reason to prevent His Majesty (acting in accordance with the aforesaid advise) from appointing one or more Judges from outside Swaziland to sit in the High Court to hear the matter. In these circumstances I am of the opinion that the argument based on necessity must fail..."

Section 102 (1) of the 1968 Constitution reads as follows:

"If the office of a puisne judge is vacant or if a puisne judge appointed to act as Chief Justice or if for any reason unable to perform the functions of his office or if the Chief Justice advises the King that the state of business in the High Court requires that a number of Judges of the court should be temporarily increased, the King, acting in accordance with the advice of the Judicial Service Commission, may appoint a person qualified for appointment as a Judge of the High Court to act as a puisne judge".

Mr. Maziya for the Applicant argued at great length showing that it is not possible to appoint a Judge in the present circumstances. My view is that one has to overcome this hurdle before the doctrine can be invoked. The requirement of this doctrine as set out in Halsbury's Law of England (supra) in this inter alia.

"... the doctrine will however, be applied only in clear and compelling circumstances".
In the present case after due consideration of the submissions advanced in this regard I cannot invoke the doctrine on the facts. For this court to do so I will be forced to make factual assumptions which are not supported by any evidence whatsoever. It

must be established as a fact and not assumed that the Acting Chief Justice is improperly in office and that none of the persons mentioned in Section 101 of the Constitution capable of chairing meetings of the Judicial Service Commission cannot sit therein

The argument advanced by the Applicant herein is to the effect that because the Judicial Service Commission is chaired by the Acting Chief Justice whose appointment Applicant doubts there cannot be any meeting lawfully convened by the same because the chairman thereof is improperly or unconstitutionally in office. I agree with the Respondent's submission that this argument cannot be sustained if one takes cognisance of Section 29 of the Interpretation Act of 1976 the Section reads as follows;

"The production of a copy of the gazette containing a law or notice, or a copy of a law or notice purporting to be printed by the Government printer, shall be prima facie evidence of the due making and tenor of the law or notice.

The Respondent's argument is further strengthened by the fact that the Acting Chief Justice had originally been cited as the sixth Respondent herein. Applicant's withdrawal of sixth Respondent from the proceedings signified that his appointment to the office of the Acting Chief Justice is not in dispute.

Against the above-mentioned backdrop and the presence of the Acting Chief Justice it cannot be said that as per the authority of Halsbury (supra) the requirement enunciated therein has been satisfied on the facts before me.

In the result, in the circumstances of this case I would recommend that this case be heard by an independent Judge to be appointed in accordance with the Laws of Swaziland. The Registrar of the High Court is to advise the relevant authorities of this recommendation as soon as it is practicable. In this regard I wish to state that it is a fact that the appointments of both the 4th and 5th Respondents are being challenged for being unconstitutional. This fact cannot be wished away. Their appointments will always be viewed in that light at the expense of the integrity of the whole judiciary. It becomes imperative therefore in order to dispel such undignified perceptions attached

to the Judges concerned that such issues be ventilated by an independent Judge to finally put the matter to rest. It may be in the short term expedient for whatever reason not to follow this recommendation but in the long run this country will have to pay dearly for not doing so.

In the meantime the case is postponed sine die.

S.B. MAPHALALA

JUDGE