**IN THE HIGH COURT OF SWAZILAND**

(HELD AT MBABANE)

CASE NO.: 2472/06

In the matter between

**TITUS TWALA** **Applicant**

and

**THE SENIOR MAGISTRATE, MANZINI** **1st Respondent**

**THE DIRECTOR OF PUBLIC PROSECUTIONS** **2nd Respondent**

**THE ATTORNEY GENERAL** **3rd Respondent**

JUDGMENT DELIVERED ON: 18th SEPTEMBER 2006

**CORAM: P.Z. EBERSOHN J.**

**FOR APPLICANT:** **MR. M.M. TWALA**

**FOR RESPONDENTS:** **ME. M. DLAMINI**
**DIRECTOR PUBLIC PROSECUTIONS**

**JUDGMENT**

**EBERSOHN J:**

[1] The applicant brought an urgent application wherein the relief sought is set out as follows (all quotations in this judgment are verbatim):

> **"1. Dispensing with the limits and forms as provided for under the Rules of this Honourable Court and have this matter enrolled as one of urgency.**
>
> **2. An order staying the proceedings currently underway before the Senior Magistrate, Manzini, pending the finalization of this application.**
>
> **3. An order directing that the matter is to proceed before this Honourable Court on the basis of the Appeal that has been noted.**
>
> **4. That prayer 2 above operate as an interim rule**

**returnable on the date to be issued by this Honourable Court.**

**5. That the Respondents pay costs of this application only in the event that same is opposed.**

**6. That this Honourable Court grants such further and/or alternative relief."**

[2] The applicant is a male person of Zornbodze in the Shiselweni Region. He was in the past involved with the Moyeni High School. The documents referred to hereunder apparently were missing when the Department wanted to investigate the affairs of the school and allegations of fraud against the applicant. It was not disputed in these papers by the applicant that the papers were with him.

[3] It is common cause that on the 19th April 2006 the 1st respondent granted an order against the applicant pursuant to an application brought ex parte by the Police which order reads as follows:

> **"Having heard counsel for the applicant the Court orders in terms of the provisions of Section 49(bis) and Section 342 of the Criminal Procedure And Evidence Act no. 67 of 1938 that respondent within 7 days of this Order at Manzini Regional Headquarters Fraud and Commercial Branch:**
>
> **1. Produces to applicant the following documents:**
>
> **a. Moyeni High School receipt books for the year 2002-2003**
> **b. Moyeni High School cheque books for the year 2002-2003**
> **c. Moyeni High School ledger sheets fir Forms I-V for the year 2002-2003**
> **d. Missing pages of the cash and analysis book for all the students in the year 2002-2003.**
>
> **2. Submit handwriting specimen in line with the requirement of respondent to applicant."**

[4] Section 49bis and the heading thereto (added by Act 14 of 1991) of the Act quoted in the magistrate's order ("the Act") reads as follows:

**"Production of account books, documents, etc. to the police for the purpose of criminal investigation.**

**49bis. (1) If upon an application to the court by a police officer the court is satisfied that any books of account, document, records or things which is in the possession of any person including a company, bank or other financial institution is necessarily required in connection with any criminal investigation by the police, *the* Court shall make an order requiring that person, company, bank, or financial institution to produce such book, document, records or thing to the police subject to such conditions as the Court may**

**impose.**

**(2) Any person who without reasonable excuse, proof of which shall be on him, refuses or fails to comply with an order of the Court under subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding ten thousand Emalangeni or to imprisonment not exceeding five years or to both."**

[5] Section 342(1) reads as follows:

**"Any police officer may take or cause to be taken the handwriting specimens.....of any person arrested upon a charge punishable with imprisonment.....**

[6] Section 342(2) reads as follows.

**"A magistrate holding a preparatory examination or a court trying any charge may order that the handwriting specimens.....of the accused be taken."**

[7] No penalty in the event of a failure to comply with the provisions of subsections (1) and (2) of section 342 are prescribed and it is assumed that as far as subsection (1) is concerned the charge would be defeating the ends of justice and as far as subsection (2) is concerned the charge would be contempt of the court.

[8] **"Court"** and **"the court"** are defined in section 2 of the Act which deals with interpretations

> **11 "Court" or "the court" in relation to any matter dealt with under a particular provision of this Act, means the judicial authority which under this Act or any other law has jurisdiction in respect of that matter".**

[9] In paragraph 2(b) of the answering affidavit it was averred that the applicant on several occasions in the past refused to hand to the Police the said documents and to give a specimen of his handwriting. This was not denied by the applicant in his replying affidavit and he stated the following in paragraphs 2.1 and 3 of the replying affidavit:

> **"2.1**
> **It is common cause that the Commissioner of Police requires the said documents and specimen for purposes of criminal investigations that he (Commissioner) is pursuing against me. To that extent it is my contention that the order issued by the Senior Magistrate runs contra to my constitutional right not to be forced to do anything likely to incriminate myself.**
>
> **3.**
> **AD PARAGRAPH 2(b)**
>
> **That the application was moved ex parte renders it liable to be set aside as no clear and cogent reasons were advanced in the founding affidavit of the ex parte application as to why the Commissioner of Police deemed it expedient not to give me notice.**
>
> **3.1**
>
> **That the non-compliance with the time tested principle of audi alteram partem is fatal to any proceedings commenced without due notice to an interested party, is trite law."**

[10] After the order was granted by the magistrate it was served on the applicant on the 21st April 2006.

[11] The applicant in paragraph 8 of the founding affidavit alleged that he then noted an appeal against the magistrate's order. A notice of appeal was attached to the founding affidavit as annexure "TT2" and the grounds of appeal are therein set out as follows:

> **"GROUND OF APPEAL**
>
> **1. To the extent that the order of the 19th April 2006, was issued ex parte, the Honourable Senior Magistrate, Manzini violated the Appellant's constitutional right and guarantee to a fair hearing;**
>
> **2. The Honourable Senior Magistrate acted ultra vires the law in issuing the order of the 19th April 2006 in as much as the order was an invasion of the Applicant's Constitutional Right as enshrined in Section 21 (2) (c) of the Constitution of the Kingdom of Swaziland Act No. 1 of 2005;**
>
> **3. That Section 49(bis) of the Criminal Procedure and Evidence Act, 67/1938 as amended is and be declared unconstitutional to the extent that it seeks to remove the right of Appellant, as a suspect, not to do and/or be forced to do anything likely to incriminate himself and/or render nugatory his Constitutional Right to do anything likely to incriminate himself and/or render nugatory his Constitutional Right to be presumed innocent until proven guilty."**

[12] The notice of appeal bears the respective official stamps of the Registrar of the High Court and of the Director of Public Prosecutions both dated the 5th May 2006.

[13] With regard to the stamp of her office appearing on the notice of appeal, annexure "TT2" the Director of Public Prosecutions stated the following in paragraph 3 of her answering affidavit:

> **" i) Applicant never filed an appeal on the 5th May 2006, all that he did, was to submit what was purported to be an appeal in that his representative came to our office to serve us with such document as in annexure TT2 and then sought the stamp of the Registrar, pretending to file an appeal. Respondent then went away with both the original and copy of the said appeal. He never left any document with the**

**court i.e. High Court nor the Magistrate Court.**

**This is admitted by applicant at page of court a quo's.**

**ii) (a) Following Respondent's non-filling of appeal, on 29th June 2006, the day of trial on contempt charge, Respondent sought to file an appeal. I humbly attach annexure MD1 hereof. Applicant realized that there was no appeal filed on 5th May 2006 and hence attempted to remedy the situation on 29th June 2006.**

[14] It appears to be common cause that the applicant falsely pretended that an appeal was noted. This he did clearly to frustrate the criminal proceedings against him. It was noted that the applicant did not disclose to this Court in the founding papers the existence of the later notice of appeal, annexure MD1", which was filed only after the contempt proceedings were instituted against him and he also did not attach a copy thereof to his founding papers.

[15] The (fresh) notice of appeal was only filed on the 28th June 2006.

[16] The applicant was criminally charged with contempt of court and this case was on the 28th June 2006 postponed to the 3rd July 2006.

[17] In response to the allegations by the Director of Public Prosecutions in paragraph 3 of her answering affidavit as quoted above the applicant stated the following in paragraph 4 of his replying affidavit:

**"4.**

**AD PARAGRAPH 3:**

**The contents of this paragraph are no longer at issue as the Prosecutor consented to the filing of a fresh notice of appeal when the matter appeared before the Magistrate's Court on the 29th June 2006. Besides,**

**the question at issue is whether the Court a quo is competent to hear and dispose of the contempt of court charge on the face of the notice of appeal which is now filed of record with it."**

[18] The criminal case of contempt of court came before the 1st respondent on the 3rd July 2006 where it was conceded by the applicant's legal representative that the notice of appeal was filed with the Clerk of the Court only on the 28th June 2006. He also conceded that the notice of appeal which he showed to the magistrate in court before was the original of the notice of appeal which was to have been left with the Registrar of the High Court.

[19] The magistrate ultimately ruled on the 3rd July 2006 that the matter should proceed on the contempt of court charge on the 12th July 2006.

[20] The urgent application was then brought before this Court on the 12th July 2006 and a rule was granted and the matter came before me on the 18th July 2006. I ordered that a record of the proceedings before the magistrate on the 3rd July 2006 be typed and that heads be filed and that the matter was postponed for argument on the 30th July 2006.

[21] The record was typed and heads of argument were filed and the application was argued and judgment was reserved.

[22] It was common cause that the final order was granted by the magistrate against the applicant without notice to the applicant and without affording the applicant any opportunity to be heard first and it was also argued at length whether it was proper for

the magistrate to grant a final order on an ex parte basis against the applicant without the Commissioner of Police making out a case for such relief in the application and whether it was not fatal for the 1st respondent to grant such an order contrary to the time honoured audi alteram partem rule and behind the back of the applicant.

**[23]** It is clear that the applicant was not afforded his rights in terms of the audi alteram partem rule. It is not necessary to deal with the authorities with regard to the principle of audi alteram partem. They are clear. (See **Administrator, Transvaal, and Others v Traub and Others 1989 (4)** SA **731**(A); **Administrator, Transvaal v Zenzile & Others 1991 (1)** SA **21**(AD) at **34B; Administrator, Natal v Sibiya & Another 1992 (4)** SA **532**(AD) at **537G-5381; Zwelibanzi v University of Transkei 1995** (SA) **407**(Tk); **President of Bophuthatswana v Sefularo 1994 (4)** SA **96**(BA); **Langeni & Others v Minister of Health and Welfare & Others 1988 (4)** SA **93(W); Minister of Health, Kwazulu Natal & Another v Ntozakhe & Others 1993 (1)** SA **442**(AD); **Yates v University of Bophuthatswana 1994 (3)** SA **815**(B) at **836**A-D; **Van Huysteen v Minister of Environmental Affairs & Tourism 1996 (1)** SA **283(C)** at **30C; Fraser v Children's Court, Pretoria North and Others 1996 (8)** BCLR **1085**(T); **Minister of Education and Training & Others v Ndlovu 1993 (1)** SA **89** (AD) at **105A-H; Minister van Onderwys en Kultuur en Andere v Louw 1995 (4)** SA **383**(A); **Yanta & Others v**

**Minister of Education and Culture, KwaZulu Natal & Another** 1992 (3) SA 54(N); **Frans v Groot Brakrivier Munisipaliteit en Andere** 1998 (2) SA 770**(C); Baxter: Administrative Law** at page 540 and **Wiechers: Ad^ninistrative Law** pages 122/125).

[24] It is clear that the order by the magistrate must be set aside under the circumstances.

[25] It was also argued whether the order granted by the magistrate was not an infringement of the applicant's constitutional rights bearing in mind that the applicant was already charged in the past with fraud regarding the said documents and that the matter no longer was basically in the investigating stage as is provided for by section 49bis (1).

[26] With regard to the handwriting specimen the accused at the time of granting the order by the magistrate, was not arrested and the magistrate was not holding a preparatory examination and the magistrate was not trying a charge against the applicant and the magistrate could not have granted the order with regard to the applicant furnishing a specimen of his handwriting.

[27] To summarise, this court is of the view that the order granted by the magistrate against the applicant was not proper, firstly, as the applicant before the magistrate did not make out a case why such a final order should be granted without service of the application on the applicant beforehand and without affording the applicant his rights in terms of the audi alteram partem rule, and, secondly, with regard to the specimen handwriting, as the magistrate was not holding a preparatory investigation and was not trying a case.

[28] As the Court rules in favour of the applicant on the technical grounds set out above it is not necessary, firstly, to decide whether the applicant's constitutional rights were infringed or not, and, secondly, to decide whether the applicant lodged a proper

notice of appeal or not.

[27] The fact that the Court comes to a conclusion on the technical grounds in favour of the applicant does not mean that the Police may not exercise such rights as it may have against the applicant in future.

[28] Ordinarily costs must follow the event. Costs are, however, in the discretion of the Court. In this case the applicant tried to mislead this Court with regard to the proper filing of a notice of appeal, which was not done by him and he in fact falsely pretended before the magistrate at his contempt of court hearing to have lodged a notice of appeal and only lodged, later, a notice of appeal without applying for condonation. There is also the false lodging of a notice of appeal with the Director of Public Prosecutions and the Registrar of this Court but removing the notice after it was stamped by them.

[29] In view of this patent dishonesty on the part of the applicant no order for costs will be made in his favour.

[30] The following order is made:

**1. The order made by the magistrate of Manzini on the 19th April 2006 against the applicant in Manzini Magistrate's Court case no. 1330/2006 is set aside.**

**2. There will be no order as to costs and each party must pay its own costs.**

**P.Z. EBERSOHN**
**JUDGE OF THE HIGH COURT**