IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 161/2014

In the matter between:

THULANI RUDOLPH MASEKO	**1st**	**Applicant**
BHEKI MAKHUBU	**2nd**	**Applicant**

And

THE HONOURABLE CHIEF JUSTICE	**1st**	**Respondent**
THE DIRECTOR OF PUBLIC PROSECUTIIONS	**2nd**	**Respondent**
THE ATTORNEY GENERAL	**3rd**	**Respondent**
THE GOVERNMENT OF SWAZILAND	**4th**	**Respondent**

Neutral citation: ***Thulani Rudolph Maseko& Another v The Honourable Chief Justice& 3Others(161/2014) [2014] SZHC 77 (6thApril 2014)***

Coram: **M. Dlamini J.**

Heard: **4thApril 2014**

Delivered: **6thApril 2014**

Revisionary jurisdiction of the High Court as per section 151(c) of the Constitution – Section 2 of the High Court Act - requirements thereof – full bench, absence of prejudice, expediency, matters which are not res judicata –power to issue warrant of arrest as section 31 of Criminal Procedure and Evidence Act .

Summary: A declaratory order is sought by applicants on the grounds that a warrant of arrest issued by this court is unconstitutional, unlawful and irregular. Respondents are extraneously opposed to the application on the basis that this court lacks jurisdiction to grant the said order.

Chronicles

[1] The following factsare common cause between the parties:

[2] On the 17th March, 2014, a warrant of arrest was issued by this court. The events preceding this warrant of arrest are briefly that one Government employee, heading an anti-abuse section based in the Ministry of Public Works by the name of BhantshanaGwebu was arrested for contempt of court.

[3] Following his arrest and before the said Mr. Gwebu could be brought to trial, the applicants authored or orchestrated what is described as contemptuous statements in a periodical publication known as "*The Nation Magazine*" (The Nation). First applicant is the Editor of the Nation while second applicant is reflected as the author of the said article.

[4] On the 17th March 2014 this court issued a warrant of arrest against the applicants under the respected hand of the first respondent. On the face of this warrant of arrest, the applicants are said to have compared the Judicial officer who issued Mr. Gwebu's warrant of arrest to "*Caiphus who led Jesus*

to his killers", that the said Judicial officer "*massaged the law to suit his own agenda*" and "*collaborated with willing servants to break the law*". The warrant of arrest against applicants further points that the article by the applicants reflects that the "*arrest of Mr. Gwebu" was a demonstration of "corruption, abuse of authority, and lacking in moral authority or was a demonstration of moral bankruptcy," "the proceedings against Mr. Gwebu were a travesity [sic] of justice"*, "*amount to a kangaroo court*" and "*meant at settling personal scores and that the idea behind these proceedings was to ensure that he was dealt with*".

[5] Pursuant to the warrant of arrest dated 17th March 2014 issued by first respondent, the two applicants were arrested on the following date. They were brought before this court which remanded them into custody. They are still in custody. Both filed applications for bail. The first applicant later withdrew his bail application while the application on behalf of second applicantis pending following an application for recusal. In the intervening period, the applicants lodged the present application.

Parties' contentions

[6] *Au contraire* the respondents represented by the 3rd respondent, have relied on a *point in limine*. It is contended that this court lacks the necessary jurisdiction to entertain applicants' application. The respondents have referred this court to Acts of Parliament and case authority. The applicants assert that the warrant of arrest against them is unconstitutional, unlawful,

ultra vires and irregular. In support of their contention, they cite a number of legislative provisions and case law.

Adjudication

Issue

[7] The issue before court is whether this court has jurisdiction to issue the order sought. If this poser is to the negative, it is the end of the matter. However, if the answer is to the affirmative, the next question is whether the warrant of arrest is unconstitutional, unlawful or irregular?

[8] It is apposite to cite *verbatim* from respondents' pleading resisting applicants' application:

> "1. *The High Court has no Revisional Power to review its own Decision*.
> *In terms of section 152 of the Constitution of Swaziland, The High Court has powers to review decisions of all subordinate courts, tribunals and any lower adjudicating authority. However, the High Court has no power to review its own decision*."

[9] The respondents in their next paragraph then scribe:

> "*In terms ofsection 151 (c) of the Constitution, the High Court do have revisional jurisdiction as it possesses at the date of commencement of the Constitution*."

[10] Respondents conclude by stating:

> "*At the commencement of this Constitution, respondent submits that the High Court did not have powers to review its own decision*."

[11] With due respect to learned Counsel for respondents, the basis for the conclusion in view of the clear wording of section 151 (c) of the Constitution of Swaziland, Act No. 001of 2005 is legally unsound. When the legislature enacted the supreme law to the effect that this court possesses revisionary jurisdiction which existed at the commencement of this Constitution, it did so because it was not only fully aware but also certain that there was revisionary powers vested in the High Court before the commencement of the Constitution. To hold as does respondents would be absurdity.It is inconceivable that the legislature would have vested powers which were never available. From the reading of section 151 (c) all that the legislature was doing was clearly dispelling any doubt as to the existence of such authority by stipulating that such powers still exist and are by no means abrogated. All that remains in the light of section 152 which reads:

> "*The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions for the purpose of enforcement of its review or supervisory powers*;

is to interrogate the nature and extent of the revisionary jurisdiction as defined by section 151 (c). In other words, what is this revisionary jurisdiction that existed prior to the 2005 Constitution?

[12] The wording of section 151 (c) is *parimateria* to section 104 (1) (c) of the 1968 Constitution, which historically came in the same package as the

independence of this country from the British. Section 104 of the of Act 50 of 1968 reads:

> "*such revisional jurisdiction as the High Court possesses at the commencement of this Constitution in accordance with the provisions of this Constitution and any other law then in force in Swaziland*;

[13] Before I adjudicate on the nature and the extent of the revisionary powers envisaged under section 151 (c), it is apposite to pause and consider section 151 (d), for reasons that will become apparent later in this judgment. Section 151 (d) stipulates:

> "*Such additional revisional jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland.*"

[14] This section raises another poser; Is there any law conferring revisionary jurisdiction? One cannot refer to Section 151 (c) of the Constitution as "*any law*" by reason of the wording (section 151 (d)) "*such additional*". One is compelled therefore to search for this "*any law*" outside the Constitution itself.

[15] Section 2 (1) of the High Court Act No.20 of 1954 reads:

> "*The High Court shall be a Superior Court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law possesses and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa*."

[16] Consequently what "*jurisdiction, power and authority*" is vested "*in the Supreme Court of South Africa*"? As this case seeks to investigate revisionary jurisdiction, one must therefore find out whether the Supreme Court of South Africa does have such powers. The question should be along similar lines as the one posed in respect of section 151 (c), i.e. to what extent, if any, does the Supreme Court of South Africa exercise revisionary powers horizontally.

[17] It is unnecessary to go beyond this jurisdiction to find an answer by reason that there is a *locus classicus* case on the issue *in casu* which was cited by the respondents. This is the case of **Lindimpi Wilson Ntshangase and 3 Others v Prince Tfohlongwane and 2 Others, Supreme Case No.1 of 2007** (Ntshangase's case). The facts of **Ntshangase's**case are briefly as follows:

- A dispute arose as to the burial place of the deceased,Muzikayise Andreas Ntshangase. The deceased's body lay at the mortuary for a period of four years when this **Ntshangase's**case was heard. The Appellants launched motion proceedings seeking a declaratory order that the deceased should be buried at Mkhwakhweni while respondents contended that he should be burried at Mpuluzi. The matter came before her Ladyship Mabuza J. She ordered that it be referred to trial. Before the trial date, the respondents set the matter before his Lordship Maphalala J**.** as he then was. Respondents from the bar submitted that the matter was "*improperly before court*" by virtue of it pending before the traditional structures. This point was upheld despite resistance from appellants. The effect was a reversal of Mabuza J.'s order. The appellants appealed. In the Supreme Court, their Justices namely **Steyn, Zietzmanand Ramodibedi**

JJA heard the matter and each wrote a judgment but reached the same conclusion. **Steyn JA** stated at page 12 paragraph 3 of the judgment:

"*when the matter was called before us, we raised with the Attorney General's representative the very issue which the appellants' Counsel had raised before Maphalala J. i.e. was it competent for the court to uphold a "point in limine" which resulted in a reversal of the decision of his colleague that the matter should be referred to trial for oral evidence."*

His Lordship proceeded at paragraph 4:

"*In the normal course of events, once a matter has been adjudicated by a Judge of the High Court such decision or ruling is final as between the same parties on the same issue. Such issue becomes res judicata inter parties. ….The question is, should the same principle apply to procedural directions made by a single Judge, such as e.g. in the instant case, a referral to trial. Certainly, and in so far as the Supreme Court is concerned, the Constitution of the Kingdom of Swaziland makes it clear in section 149 (3) that:*

> *"In civil matters, any orders, 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.The High Court Act contains no provision regulating any proceedings, before a single Judge".*"

The learned Judge continues:

"The issue is whether as a matter of good practice such as a constraint which the legislature has enacted in the case of procedural directions of a single Supreme Court Justice should also apply to the Judges of the High Court."

[18] For the reasons that follow, I am of the view that it should.The reasons advanced by his Lordship are substantive *viz*. that no evidence was tendered as to whether it was expected to make the order; whether the suggested course of action was likely to resolve the issue bearing that four years had passed without the deceased being buried; the respondents failed to give notice as per the rules on point of law as raised. Appellants were served a day before the trial, contrary to fourteen days' notice; and the appellants were unfairly prejudiced by respondents' conduct. The learned Judge states at page 20 paragraph 9:

> "*In conclusion I should add that it would be procedurally unacceptable that 'an order, direction or decision' of a single Judge in the Supreme Court can only be discharged or reserved by three Justices, but that a single Judge could do so in respect of his colleague in High Court."*

[19] On similar vein his **Lordship Ramodibedi JA** as he then was, highlights at page 23 paragraph 1:

> "*I agree with the decision of my Brother Steyn that for the reasons set out in his judgment it was irregular for Maphalala J to seek to set aside the order of Mabuza J referring the matter to trial."*

The learned Judge meticulously proceeds:

> "*1.1 Parties to litigation need certainty. When a dispute is submitted to a civil court for a decision on the procedural direction the matter should take, and such court charts the course such litigation has to follow, the parties are entitled, in the absence of an appeal or review, to assume that such decision is final. They would therefore prepare for trial in accordance with the directive. In the case under review, the matter was referred to trial in a civil court of law and it was ripe for hearing …*"

The learned judge cautiously continues:

> "*It is clearly undesirable that a single Judge should be empowered to set aside, vary or reverse such directive, order or decision as it would lead to procedural uncertainty and prejudice the other parties*." (my emphasis)

[20] From the above cited reasoning by their Lordships it is clear that the court was of the view that a single Judge sitting in the High Court was not competent to reverse or alter an order of his colleague. In other words, the question was not so much that the High Court could not exercise revisionary jurisdiction *per se* but that it should do so in a similar fashion as the Supreme Court by constituting as a full bench. Another prerequisite derived from the cited precepts by their Lordships is that where the reversal would result in prejudice to the other party, it should be refused. A third prerequisite was to look at the merits of the order sought. This is gathered from the factors considered by their Lordships such as that the respondents failed to file Notice of *point in limine* within stipulated time and the question as to whether it "*was expedient to make the order*".

[21] I intend adopting the above principles in dealing with the present application. I may digress to consider two cases cited in support of the submissions that there was no revisionary jurisdiction exercisable by this court prior to the commencement of the Constitution. These cases are **Ngcamphalala v The Principal Judge of the High Court and 9 Others, Supreme Court Case No. 24/2012** and **Dlamini v Okonda [2013] SZSC 26**. The reading of these cases show that the appellants sought to review in the Supreme Court orders of the High Court. In both cases, the Supreme

Court held that it did not have the power to review decisions of the High Court. These cases are irrelevant to the present case.

[22] Respondents commenced in their Heads of Argument as submitted in court as follows:

> *"In conclusion, I should add that it would be procedurally unacceptable that an order, direction or decision of a single Judge in the Supreme Court can only be discharged or reversed by three Justices, but that a single Judge could do so in respect of his colleague in the High Court"*(my emphasis) per **Steyn JA** as he then was, in the matter of **Lindimpi Wilson Ntshangase and 3 Others / Prince Tfohlongwane and 2 Others, Civil Appeal: 1/2007** at page **20** thereof."

[23] Advancing *viva voce* submission in support of the above citation, respondents informed, in the alternative, that this court as it sat singularly, had no revisionary authority as endowed to it in terms of section 151 (c) Act No.1 of 2005

[24] In answer, the applicants submitted two correspondences, one authored by them addressed to the office of the Registrar. It partly reads:

> "*Registrar*
> *High Court*
> *Mbabane.*
>
> *Dear Sir,*
>
> ***RE: THULANI MASEKO / THE HONOURABLE CHIEF JUSTICE & OTHERS – HIGH COURT CASE NO. 161/2014***
>
> ---
>
> *Having considered the constitutional issues raised in the Application, our view is that it will be in the interest of Justice, fairness and equity to have the matter referred for hearing by a full bench.*

Kindly place our request before the Honourable Chief Justice for the referral of the matter to a full bench.

Your cooperation is highly appreciated.
Yours faithfully,

Mkhwanazi Attorneys"

[25] Pursuant to this correspondence, the Registrar replied:

"*Mkhwanazi Attorneys*
P. O. Box 5888
MBABANE.

Dear Sir/Madam

RE: THULANI MASEKO / THE HONOURABLE CHIEF JUSTICE & OTHERS – HIGH COURT CASE NO. 161/2014

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2. The office of the Registrar of the High Court is in receipt of your letter dated the 3rd April 2014, your Ref.: MN/kz/M807.

3. *Having communicated your request to His Lordship the Chief Justice, it is His Lordship's view that this matter does not warrant a full bench.*

Yours faithfully

F. NHLABATSI
HIGH COURT REGISTRAR"

[26] Clearly this requirement of a full bench as propounded by their Justices in **Ntshangase's** case *supra* was accordingly dispensed with.

Prejudice

[27] The poser here as per **Ntshangase's**case *op. cit.* is whether the granting of the orders sought would prejudice the other party or any action thereto. Section 35 (1) and (2) (a) of the Constitution stipulate:

> "*Enforcement of protective provisions*
>
> *35 (1) 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.* (my emphasis)
>
> *(2) The High Court shall have original jurisdiction -*
>
> *(a) to hear and determine any application made in pursuant of subsection (1).*

[28] What is the action *in casu* that should not be prejudiced. It is, according to my view, the trial of the applicants. The direct question therefore is, will granting of the orders prejudice the trial of the applicants*? In casu*, the two applicants are facing criminal charges of contempt of court. They have been incarcerated since 18th March 2014. Their criminal charges emanate from an article following a warrant of arrest and subsequent arrest of Mr. Gwebu. Mr. Gwebu's warrant of arrest which was paradventure issued by this court was later discharged by this court when granting bail. Mr. Gwebu awaits his trial out of custody. After the discharge of his warrant of arrest no prejudice has been suffered by the second respondent in so far as Mr. Gwebu's similar charges are concerned. On the principle of our law that like cases should be treated alike, I see no prejudice on the part of the "*other*

action" as envisaged by section 35 (1) of the Constitution that is likely to follow once the applicants *in casu* are treated similarly to their co-accused, Mr. Gwebu.

Expediency

[29] As the honourable justices pointed out in **Ntshangase's** case *op. cit*. the court should enquire whether it is expedient in the circumstances of the case to grant the order sought. In embarking on this enquiry, the court is guided by the circumstances of the case presented before it. It is for this reason that in the **Minister of Housing and Urban Development v SikhatsiDlamini and Ten Others case No.31, 32/2008**, themeticulous words of the honourable**Ramodibedi JA** as he then was ring at page 13 paragraph 20.

> "*I accept at the outset that as long as Maphalala's order remained in force, **in the circumstances of the case,** it was not proper for Mamba J to render it nugatory in any manner. **As a matter of fundamental principle we cannot have two contradictory orders of the High Court subsisting side by side at the same time**. That is a recipe for chaos. Regrettably that is exactly what happened in this case*." (my emphasis)

[30] My duty is therefore to avoid "*chaos*". What then guides me in this endeavour? The answer lies in the *locus classicus* case of**Ntshanganse's***supra*. His Lordship **Zietsman JA** hit the nail on the head when he expounded at page 28.

> "*Such a directive will in my opinion, be binding if the relevant issues to be considered by the second Judge were dealt with by the first Judge.If the issue raised before the second Judge were not considered with or considered by the first Judge then, in my opinion, there is no reason why the second judge cannot deal*

with those issues, even if the resolution of these issues will have the effect of nullifying the directive given by the first Judge." (my emphasis)

The learned judge wisely continued:

"*If the point in limine which was dealt with by Maphalala J had been argued before Mabuza J and rejected by her, I have no doubt that the same point could not again have been raised before Maphalala J. The issue would then have been res judicata. If Mabuza J had rejected the point in limine and had ordered that the matter be referred to trial, Maphalala J would have had no option but to proceed with the hearing of oral evidence. In the present case the point in limine was not argued before Mabuza J and no ruling or order was made on that issue by her. In the circumstances, I cannot see why the present appellant would be precluded from raising the point before Maphalala J. How can res judicata arise in respect of an issue which has not been dealt with or determined by another judge?*"(my emphasis)

The learned judge then illustrated the position of law as follows at page 29-30:

"*Let me assume that a judge dealing with an application refers the matter for the hearing of oral evidence on disputed facts. The matter subsequently comes before the same judge. One of the Counsel then applies to raise a point in limine namely that the court has no jurisdiction to hear the matter, for example because the Supreme Court has now ruled that such matters can only be dealt with by the Labour Court and not by the High Court. If the point in limine is a good one and must be upheld, is the judge obliged, because of his earlier directive, to hear oral evidence and in effect go to the lengths of a full scale trial before he can deal with the jurisdiction issue? This clearly cannot be the case. Logic and common sense dictate that the judge in such a case can initially deal with the point in limine. If the point is upheld the necessary costs of full scale trial will be avoided.*

If a judge different from the judge who gave the directive is seized with the matter, why can he not follow the same procedure i.e. deal with and decide the point in limine before deciding whether the hearing of oral evidence will be necessary?"

[31] The basis for his Lordship's conclusion is very sound following our trite principle of law that no new matter will be taken up on appeal by any aggrieved party unless it was fully adjudicated upon in the court *a quo*.

[32] Turning to the present case, the enquiry is whether the presentations made by applicants were deliberated upon before the honourable Chief Justice?The first applicant deposed:

> *"10.1 On Tuesday the 18th March, 2014 I appeared before the High Court in the 1st Respondent's Chambers for my first remand whereupon I was summarily remanded into custody until the 25th March 2014.*
>
> *11. I must explain that in the 1st Respondent's Chambers, the prosecution never applied that I be remanded in custody but the 1st Respondent meromotu remanded me into custody*."

[33] The second applicant averred:

> "*17 … The representative of the Crown did not apply for our incarceration but 1st Respondent did it meromotu*"

[34] From the above assertions by the applicants, it is clear that no arguments or submissions were presented before his Lordship in Chambers. It is my considered view that had the applicants informed the honourable Chief Justice as they did before me the following:

(i) That section 2 (2) of the High Court Act No.20 1954 prescribes:

"*The jurisdiction vested in the High Court in relation to* ***procedure, practice*** *and evidence in criminal cases, shall be exercised in the manner* ***provided by the Criminal Procedure and Evidence Act No.67/1938 (C.P.& E.)***"

and that the Criminal Procedure and Evidence Act as per section 31 (1) dictates:

"*Warrant of apprehension by Magistrate*

31.(1) *Any* ***Magistrate*** *may issue a warrant for the arrest of any person or for the further detention of a person arrested without a warrant* ***on a written application*** *subscribed by the Attorney General or by the local public prosecutor or any commissioned officer of police setting forth the offence alleged to have been committed and that, from information taken upon oath, there are reasonable grounds of suspicion against such person, or upon information to the like effect of any person made on oath before the magistrate issuing the warrant."*(my emphasis)

The above in short vests the power to issue warrants of arrest to the Magistrates;

(ii) That there ought to have been a written application for the warrant ofarrest of the applicants as per section 31 of the CP & E;

(iii) That the affidavits used in support of the warrant of arrest were incompetent in law following that they were commissioned by an officer of this court who is directly under the honourable first respondent's administration whereas first respondent is the victim of

the article under which the warrants of arrest relate thereby rendering her commissioning partial(see … "*a person attesting an affidavit must be completely objective and have no interest of any kind in the contents or input of that affidavit*") as per **Browde JA**, **Director of Public Prosecutions v The Law Society of Swaziland, Appeal Court Case No. 28/1995** page 13 where an attorney's clerk had commissioned an affidavit; and

(iv) that a matter of such magnitude *viz*. incarceration of persons ought to have been deliberated fully in an open court;

It is my considered view that the honourable first respondent would not have issued the warrant of arrest had the above been brought to his attention.

[35] Again in the **Director of Public Prosecutions'** case *supra* where the appellants directed the Commissioner of Police to arrest members of respondent, the learned **Browde JA** held at page 17:

> *"… his direction to the police to arrest members of the Respondent Society were uncalled for* ***since it would have been the simplest matter to call upon the members of the Society to appear in Court and show cause why they should not be found guilty of contempt of court****."* (my emphasis)

[36] Similarly the second respondent ought to have adopted this simple procedure of calling upon the applicants "*to show cause why they should not be found guilty of contempt*" as per **Browde JA***supra*rather than apply before the 1st respondent for a warrant of arrest. In the totality of the above it would be expedient for the orders to be granted.

[37] In the foregoing, the following orders are entered:

1. Applicants' application succeeds;
2. Applicants' warrant of arrest is set aside;
3. No order as to costs.

M. DLAMINI
JUDGE

For 1st Applicant	**:**	**M. Mkhwanazi**
For 2nd Applicant	**:**	**Advocate L. Maziya instructed by Sigwane& Partners**
For Respondents	**:**	**V. Kunene**