Case No.11/2002

In the matter between:

GEORGE GWEBU **1st Applicant**
RAY GWEBU **2nd Applicant**

And

REX **Respondent**

Case No.20 of 2002

LUCKY NHLANHLA DAVID BHEMBE **Applicant**

And

THE KING **Respondent**

CORAM : MATSEBULA J. MAPHALALA J. MASUKU J.

For Applicants : Mr T.R. Maseko and Adv. L.M. Maziya
For Respondent : Mr Sabela Dlamini (Attorney-General's Chambers)

JUDGEMENT
4th February 2003

The Court

The above Applicants were successful Appellants in the Court of Appeal wherein they had challenged the validity of Decree No.3 of 2001, whose effect was to preclude persons charged with certain offences listed in a schedule thereto, from applying for bail. In upholding their appeal, the Court of Appeal remitted the matter back to this Court for purposes of determining, on the ordinary principles applicable to bail, whether or not the

Appellants ought to be so admitted to bail.

At the hearing of the bail applications before us, as directed by the Court of Appeal, the Attorney-General, who then appeared in person, raised a legal point from the bar, to the effect that notwithstanding the nullification of Decree No.3 by the Appeal Court, the Applicants cannot be admitted to bail due to the fact that the nullification of Decree No.3 automatically revived Decree No.2. The Court of Appeal judgement we may add, was heavily criticised and disparaged by the Government, albeit unwisely and unfairly. The latter Decree, it will be remembered, raised a serious uproar in this country as it went far beyond addressing the question of the Non-Bailable law which it was supremely intended to. It had far-reaching negative implications for the independence of the Courts and the proper administration of justice in general.

Due to the similarity of the question raised in both matters, we decided to hear argument thereon simultaneously, hence we have issued one judgement, which will apply to both applications.

The nub of the Respondent's submission was that once an enactment, whether a Decree, Act of Parliament or Order-in-Council is nullified, the legislation which was in force previously to the enactment of that nullified, results in the repealed one automatically coming to life. This, it was argued, was to avoid a *lacuna* in the law whilst the matter is receiving the attention of the Legislature. It was therefor contended *in casu* that the nullification of Decree No.3 by the Court of Appeal resulted in the automatic revival and operation of Decree No.2, at least, so the argument ran, in so far as that enactment made provisions relating to the refusal to admit persons charged with specified offences to bail. No legal authority in support of this proposition was however cited to us.

Per contra, the Applicants chiefly relied on the provisions of Section 23 (a) of the Interpretation Act, No.21 of 1970, in arguing that once a law is repealed, it is not revived by the invalidation of the law that succeeded it. In further support of this contention, the Court was referred to the learned author G.E. Devenish, "Interpretation of Statutes", Juta & Co. Ltd 1st Ed, 1992. These and other authorities shall be examined closely later in this judgement.

Section 23 (a) of the Interpretation Act reads as follows: -

> "*Where a law repeals another law in whole or in part, then, unless the contrary intention appears, the repeal shall not –*
>
> (a) *revive anything not in force or existing at the time at which the repeal takes effect;*
>
> (b) …..
>
> (c) ……

(d) ……

The language employed in this Act is in *pari materia* with the provisions of The Interpretation Act 33 of 1957 of South Africa (as amended), particularly Section 12 (2) thereof. G.E. Devenish *(supra)* at page 255 states the effect of the above section to be the following and this was heavily relied upon by the Applicants, namely: -

> *"It is thus clear that S12 (2) is not restricted to express repeals only. Where a repealed statute nullifies or changes another statutory instrument the repeal of of the repealing Act does not automatically revive the nullified statute."*

At page 254 of Devenish, *(supra)*, the following appears, regarding the proper construction of the equivalent of our Section 23 (a) :-

> *"This subsection means, for example, that where an Act which made the doing of certain things unlawful is repealed, the repeal does not retrospectively make lawful what was unlawful before the date of the repeal. It also has this meaning: a statute, which is repealed, is not revived when the repealing statute is in turn repealed."* (our emphasis)

We agree entirely with the correctness of learned author's opinion and conclusion on this question as quoted above. It is however opportune to consider and closely examine Mr Dlamini's brain-teasing argument that whereas the position stated above obtains in relation to repeals, it cannot however be held to obtain in respect of nullification of legislation by the Courts for the reason that the concepts and effects of repeal and nullification on enactments which were in existence immediately before repeal or nullification differ.

It therefor becomes necessary for us to closely scrutinise the two concepts and to decide whether their effect on previously existing legislation is or is not the same. Claasen, in his work entitled "Dictionary of Legal Words and Phrases Vol.3, Butterworths, 1976, at page 301 defines repeal in the following language:-

> *"To revoke or abrogate law or statute by another"*

Unfortunately the Interpretation Act 1970 does not define the word " repeal" but it is clear that it is an act of the Legislature by which a law or enactment is revoked or abrogated by another enactment. In the case of a repeal, the question of a *lacuna*, as argued by Mr Dlamini does not arise because more often than not, there is a transitional provision in the repealing enactment, to provide for the interregnum i.e. the period between the repeal and

the commencement of the new law. This will be in the case where some new law or statute must be promulgated in the place of the one that has been repealed. It is important to however mention that repeal does in effect nullify a law or part thereof as the case may be.

"Nullification" on the other hand and in this context, would refer to a process by which the Court declares some legislation invalid for a variety of reasons e.g. that it is *ultra vires* or unconstitutional. In many jurisdictions, this is referred to as "striking down" legislation. The question to be now determined is whether the striking down of an enactment by the Court does result in the revival of the repealed law which preceded the enactment that has been struck down.

It is customary for the Courts, in such instances to afford the Legislature some time to attend to whatever deficiencies or improprieties are in the law before it is struck down. This is normally done to ensure that there is no *lacuna* in the law between the striking down of the enactment and the promulgation and commencement of the new enactment and which takes into account the Court's observations.

We find it unnecessary to decide this point for the reason that *in casu*, the declaration by the Appeal Court that Decree No.3 is invalid does not leave a *lacuna*. This is so because the Court of Appeal held that the provisions of Section 104 of the 1968 Constitution as saved and re-enacted in the 1973 Proclamation appertaining to this Court's unlimited jurisdiction were not affected by the provisions of Decree No.3. There is *in casu* no *lacuna* and no need therefor (if that is lawful, and we have doubts on this) for Decree No.2 to be revived. For that reason, it is our considered view that the Respondent's contention should fail.

It is liable to fail for other reasons as well. Firstly, the *ratio decidendi* of the Court of Appeal judgement which set aside Decree No.3 i.e. **RAY GWEBU, LUCKY NHLANHLA BHEMBE CRIM APP. NO.19 AND 20/2002** by Browde J.A. is at page 24 to 25, where the following appears:-

> *"It may be thought that there is no longer a requirement that a King's Decree can only be made after a new Constitution is in place. This is because the* ***proviso*** *to Section 80 (2) of the Establishment of the Parliament Order, 1978, containing that requirement, was purportedly repealed by King's Decree No.1 of 1980. However, the latter Decree is itself invalid as it was made prior to the new Constitution being in place. That a King's Decree can, as the legislation presently stands, only be made once the new Constitution is in place therefor remains an essential requirement… The new Constitution has not yet been put in place; and, therefore, counsel's submission that it does not affect the High Court's unlimited jurisdiction as defined in the King's Proclamation, in my Judgement is sound and must be upheld."*

It is clear, having due regard to the foregoing, that at the time that Decree No.2 was

promulgated, there was no new Constitution which had been accepted by people and King of this country. For that reason, the invalidity that attached to Decree No.2, as found by the Appeal Court, must also equally attach to Decree No.2. As both suffer from the same deficiency, they cannot but be condemned to the same fate. It must be recalled that we, sitting in this Court, are in law bound to follow the decisions of the Court of Appeal. Decree No.2 cannot, in our finding be revived for it is also invalid for the same reason as Decree No.3.

Secondly, we cannot act in oblivion to the facts and circumstances in which Decree No.2 was repealed. These are facts which we are, by virtue of **THE SWAZILAND FEDERATION OF TRADE UNIONS VS PRESIDENT OF THE INDUSTRIAL COURT AND ANOTHER APPEAL CASE NO.11** of **97**, entitled to take judicial notice of. Decree No.2 was a draconian instrument which seriously assailed the independence of the Judiciary, the independence of the office of the Director of Public Prosecutions, emasculated the Judicial Services Commission, prescribed the retirement age for Judges of the High Court contrary to existing legislation, properly promulgated by Parliament as envisaged by the Constitution, and also seriously infringed upon press freedom. As a result, there was a furore within and without this country for its immediate repeal.

It is a mater of public record that His Majesty the King publicly declared that he had not fully considered its wide ranging calamitous consequences and that he had been ill-advised in appending his signature thereto. It was pursuant to those circumstances that Decree No.2 was repealed some thirty-one days later. This Decree was not an instrument that was repealed in the ordinary course but it was hastily and intentionally put to bed. In human terms, Decree No.2 cannot be said to have lived a “full life of three score and ten”, or be said to have died prematurely out of natural causes. An apt description would be that it was killed, execution style, even before it could crawl, in the sense that the effects of its provisions were not even allowed to take root, when it was repealed without any further ceremony. An instrument so consciously killed with a clear and settled intention evinced cannot be said to automatically come to life. A positive legitimate act of the Legislative to revive it is in our view necessary and critical to show a change of heart.

It would therefor be highly irregular to afford such a piece of legislation, with nefarious effects of such a magnitude a new lease of life, however short. It would be a sorry day for the Courts to allow an avowed mistake, which was corrected partially, to be reinstated in its avowed erroneous state. The Country cannot be allowed to continue to be the object of censure and opprobrium of the international community by allowing such an instrument to be revived and allowed to guide the affairs and conduct of important institutions in this country. It would be a serious retrogressive step.

When taxed about the fact that this instrument did not solely deal with non-bailable offences but other disconcerting issues as well, Mr Dlamini submitted that the Court could hold that Decree No.2 is automatically revived in so far as it reinstated the non-bailable law, the other excess baggage as it were, expressly excluded.

Attractive as this suggestion may have seemed to be, it has but one serious flaw. It would lead to the dangerous and unwanted situation in which this Court would breach Montesquieu's hallowed doctrine of the separation of powers, resulting in this Court usurping the functions of the Legislature. If the Decree would automatically be revived, a position that we have rejected, then the Decree would have to be revived in its entirety. It would not be for the Courts to apply the doctrine of severance by stating which portions thereof are revived and which are not. The question is what policy considerations would guide the Court in reviving certain portions of the enactment short of arrogating upon itself powers which are exclusively the domain of the Legislature.

In the premises, it is our considered view that the Respondent's point *in limine* must be dismissed. There is in the premises no law, properly promulgated that would serve to preclude this Court from exercising its inherent jurisdiction as enshrined in Section 104 of the 1968 Constitution, and as adopted in the 1973 Decree, from determining whether or not these and other Applicants for bail should be so admitted.

One issue deserves mention though. The unsuspecting and uninformed members of the public have been deliberately misled, into believing that in the absence of the non-bailable law, all accused persons awaiting trial will automatically go home regardless of the peculiar circumstances attendant to their cases. This is not so. The High Court still has to exercise its Constitutionally enshrined discretion, in accordance with the interests of justice whether or not a bail applicant should be admitted to bail. This Courts, in proper exercise of its discretion, to be exercised judicially, may and will, even in the absence of the non-bailable law refuse bail if the interests of justices so require.

The other false argument used to mislead the public is that the members of the community, to which the accused belongs, will take the law in their own hands and mete "<u>mob justice</u>" to those admitted to bail as happened in the case of one Mbayiyane Mnisi. The correct position is that Mbayiyane Mnisi was not admitted to bail. He was acquitted and discharged at the close of the Crown's case on a charge of ritual murder. The members of the community where he lived believed that he was guilty and killed him after his acquittal and discharge. In a bid to address that situation, Parliament, in its wisdom, amended the provisions of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938 to give the Court a discretion at the end of the Crown's case, whereas previous to that amendment, the Court was mandatorily called upon to acquit an accused person if the evidence against him was shaky or insufficient.

The non-bailable law it must be mentioned, offends against the internationally recognised presumption of innocence. It also constitutes, in respect of the offences listed and in respect of which the Courts are precluded from granting bail, a vote of no confidence in the Judicial Officers. In many cases, it results in irreparable harm to accused persons who are either acquitted or convicted of lesser and bailable offences, more often than not, two years after their arrest.

If Parliament is of the view that this law must be enacted and properly we may add, and we cannot prevent that, all infrastructural and man power requirements must be put in place in order to accelerate the presently exceedingly slow wheels of justice. This would include the appointment of more Judicial Officers, employment of more prosecutors, more Court staff, construction of more spacious remand centres and more Courtrooms. The delay

occasioned by the non-bailable legislation has other less considered but calamitous effects, which either lead to acquittals or withdrawal of charges. This is because during the long wait for trial dates, key witnesses, including complainants and investigating officers die in large numbers probably due to the prevalent diseases these days. In others, the accused themselves die in custody, leaving hurting complainants who never witness justice meted to those they perceive wronged them. Another aspect is that due to the long time whilst awaiting trial, the witnesses, some of whom are of tender age, tend to forget the chronicle of or the events themselves, thus detracting materially from the reliability and credibility of their evidence given the high standard of proof imposed on the Crown in criminal matters. This often leads to inconsistencies in the Crown's case, acquittals being the only logical conclusion. Once that happens, the Courts, who rely on cogent and compelling evidence, and nothing less, become the pariah for acquitting "well known criminals" who obviously committed the offences, according to lay people.

It is our hope that all the persons and institutions concerned will take note of our concerns and observations in this regard and act upon them without delay.

In sum, the Respondent's legal point be and is hereby dismissed. The bail applications herein be and are hereby referred for determination before a single Judge of this Court.

We also record our indebtedness to Counsel on both sides for their industry in assisting the Court. We particularly wish to commend Mr Dlamini for the Respondents for his well articulated arguments despite being assigned to handle the matter outside Court at the eleventh hour.

J.M. MATSEBULA
JUDGE

S.B. MAPHALALA
JUDGE

T.S. MASUKU
JUDGE