IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO. 59/14

HELD AT MBABANE

In the matter between:

THE ATTORNEY GENERAL **APPELLANT**

v

NKOSINATHI SIMELANE **1ST RESPONDENT**

NCAMSILE SIMELANE **2ND RESPONDENT**

SIBONGILE SIMELANE **3RD RESPONDENT**

Neutral Citation : The Attorney General v Nkosinathi Simelane & Others (59/14) [2014] SZSC 77 (03 DECEMBER 2014)

Coram : A.M. EBRAHIM J.A., S.A. MOORE J.A., P. LEVINSOHN J.A., DR. B.J. ODOKI J.A., and J.P. ANNANDALE J.A. (AG)

Heard : 6 NOVEMBER 2014

Delivered : 3 DECEMBER 2014

Summary : Applications for Postponement: applicable principles – Applications for Recusal: applicable principles restated - The Principal Secretary Ministry of Finance not authorized by the Constitution or by any other law to issue Legal Notice No. 177 of 2013 – Legal Notice No. 177 of 2013 is accordingly a nullity, void, and of no legal effect except as declared in the Order of this Court at iii., paragraph [50] *infra*. – Salaries, allowances, terms, conditions and benefits of all judicial officers concerned not adversely affected by Legal Notice No. 177 of 2013 – Salaries, allowances, terms, conditions and benefits of all judicial officers concerned remain as they were immediately before the unlawful issue of Legal Notice No. 177 of 2013 – Judicial and financial independence of the Judiciary as guaranteed by several sections of the Constitution restated and reaffirmed – Incompetence of any other person or authority to interfere in any matter which lies within the province of the Chief Justice restated – Only the Chief Justice is empowered by the Constitution and other laws to determine the number and times of sittings of the Supreme Court in any given year or years – Appeal dismissed with costs.

JUDGMENT

MOORE J.A.

[1] INTRODUCTION

This is a classic case of bureaucratic overreach. The Principal Secretary Ministry of Finance swore that:

> *"His Majesty King Mswati lll had ordered and commanded the dissolution of the Cabinet of Ministers with effect from 16 September 2013. There would be no Cabinet until about mid-November 2013. It was impossible for the Minister to exercise the power personally. It was expedient and in the public interest for me to make subordinate legislation. . . . Legal Notice No. 177 of 2013 is subsidiary legislation made under section 208 of the Constitution. The Constitution does not say who must make the legislation, subsidiary or otherwise."*

The Principal Secretary also swore that:

> *"In this affidavit, I make submissions of law on the advice of the Attorney General which advice I accept as being the correct position in law."*

Not unnaturally, the "making of subordinate legislation" by a Principal Secretary caused consternation in legal and constitutional circles. She has not given any details of the practical necessity - of any calamity or national emergency - which could possibly have suggested to her such an extraordinary course of action. As will emerge in the course of this judgment, the action taken by the Principal Secretary Ministry of Finance did extreme violence to both the letter and spirit of our Constitution. That action sought to frustrate the clear intent of the framers who went to such elaborate lengths to protect the rights and interests which she so casually disregarded.

THE APPEAL

[2] The appellant's Notice of Appeal was filed on the 13th October 2014. Two days later, the appellant produced "supplementary grounds of appeal" which incorporated some 17 grounds spread over 18 foolscap sized pages. Counsel for the respondents raised a number of procedural objections both to the filing of "supplementary grounds of appeal" and also to the content of those grounds.

[3] This Court has bypassed the objections of counsel for the respondent, not because they were lacking in substance, but rather because the issues raised in the appeal warranted the urgent adjudication of this Court. Those issues concerned the action taken by the Principal Secretary in the Ministry of Finance and its potential impact upon the Judiciary, the public, and most important, because of the constitutional questions arising out of the conduct of the Principal Secretary.

[4] The salient matters set out in the supplementary grounds of appeal were intermingled with several pages of fluff which are irrelevant to the core

issues in this case and which have been put to one side. The key issues demanding this Court's adjudication are:

i. The interpretation of the relevant constitutional provisions.
ii. The validity and constitutionality of Legal Notice No. 177 of 2013.
iii. The protection of the salaries and terms of office of judges of the superior courts from being altered to their disadvantage while being holders of those offices.
iv. The financial and judicial independence of the Judiciary.
v. The powers, duties, and responsibilities of The Chief Justice under the Constitution.
vi. The powers, or lack thereof, of the Principal Secretary Ministry of Finance.
vii. The conduct of the Principal Secretary Ministry of Finance in the circumstances of this case.

APPLICATION FOR POSTPONEMENT

[5] The appellant's application for postponement was dated the 23rd October 2014. The application was founded upon the affidavit of James Dlamini who described himself as the nominal applicant and the nominal appellant in the appeal. The prayer was for a postponement of the appeal - enrolled for hearing on the 6 November 2014 - to the next session of the Court which would, in all probability, take place in May 2015.

[6] The appellant did not seek a postponement to a date later in the present session although the published roll disclosed that the appeal could have been heard between Monday the 24th November and Tuesday the 2nd December. No appeals were enrolled for hearing on those days.

[7] The judgment of the High Court was delivered on the 30th September 2014. The appellant has not said why the judgment was made available to the appellant on the 1st October 2014. He noted his appeal on the 13th October 2014. However, perhaps because they were clairvoyant, or because the appellant may have telegraphed his intent on appealing, the respondents had already prepared the record by the 10th October 2014, and had informed the appellant that they had done so.

[8] By the 15th October 2014 the 1st, 2nd and 3rd respondents had filed a record on appeal that they prepared unilaterally. The appellant objected on the ground that the record was incomplete and invited his adversaries to a meeting so that the parties could agree on the composition of the record. The respondents then suggested that the appellant - whose duty it was to do so -

prepare the record by 1400 hours on 17th October 2014. The urgency of this appeal stems from the precipitate action of the Principal Secretary in the Ministry of Finance who swore that "it was expedient and in the public interest for me to make subordinate legislation." The respondents submitted that the challenge to the lawfulness of that action by the Principal Secretary is a matter of public urgency. This Court agrees.

[9] The appellant submitted that:

> *"The appeal raises unprecedented questions, in this jurisdiction, of among other things, independence of the judiciary, the setting of remunerative benefits of Superior Court Judges and the High Court's remedial powers in constitutional matters. These issues are of the utmost importance to the constitutional development of Swaziland and hence the appellant has briefed Senior Counsel from the Kwa Zulu-Natal Bar to argue the appeal."*

The name of Senior Counsel was not disclosed.

[10] The relevant riposte of the respondents argued that:

"1.6 The Applicant has failed to appreciate that the Rules of the Honourable Supreme Court are for the Court and not that the court is for the Rules. In any event the Applicant is the one who filed the appeal and must be ready to argue it when given a chance in order to arrest the extreme urgent situation he complains about at paragraph 32. Hearing of the appeal on an earlier date curbs a backlog."

The respondents also submitted that:

"48. The principles governing an application for the postponement are found in ***Swaziland National Association of Civil Servants v Swaziland Government*** *(20/11) [2014] SZSC 53 at para 12 where Moore JA citing the case of* ***McCarthy Retail Ltd v Shortstance Carriers*** *cc 2001 (3) SA 482 at 494 D-H held that;*

"A party opposing an application to postpone an appeal has a procedural right that the appeal should proceed on the appointed day. It is also in the public interest that there should be an end to litigation. Accordingly, in order for an applicant for a postponement to succeed, he must show a 'good and strong reason' for the grant of such relief. ***Centirugo AG v Firestone SA (Pty) Ltd*** *1969 (3) SA 318 [T.P.D.] at 320C and 321A - 321B. The more detailed principles governing the grant and refusal of postponements have recently been summarized by the Constitutional Court in* ***National Police Service Union and Others v Minister of Safety and Security and Others*** *2000 (4) SA 1110 (CC) AT 1112C – F as follows;*

The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed."

[11] This Court considered the competing submission carefully. Applying the principles enunciated above, and satisfied that the record was in a condition which allowed for a hearing of the appeal which was fair and just to the parties and to the public, we hold that it is in the public interest that the hearing of this appeal should not be delayed. The appellant's Heads of Argument were fulsome. The appellant had readied himself to prosecute the appeal. There was, therefore, no good reason for this Court to grant a postponement.

THE RECUSAL APPLICATION

[12] The following references to the record are relevant to the matter of recusal.

i. *On the 22nd September 2014 the 1st Applicant Ncamsile Simelane, and the 3rd Applicant Sibongile Simelane who are the second and third respondents in this appeal, filed a Notice of Withdrawal of Applications Against Judge Ahmed Moosa Ebrahim, Judge Stanley Alfred Moore, Judge Dr. Seth Twum, Judge Emmanuel Agim, Judge Philip Levinsohn and Judge Dr. Benjamin Odoki. That Notice was properly served upon the appellant herein.*

ii. *The judgment of the Full Court of the High Court in Civil Case No. 1177/14, delivered on the 30th September 2014, records that:*

> *"It is also common cause that the 9th to 14th Respondents were struck off as parties in the cause. Hence they do not feature in the matter. The 9th, 10th, 11th, 12th, 13th and 14th respondents were Judges Ahmed Moosa Ebrahim, Stanley Alfred Moore, Dr. Seth Twum, Emmanuel Agim, Philip Levinsohn, and Benjamin Odoki respectively. The Attorney General was the 4th Respondent in that cause which is under appeal before us."*

[13] The judges in this appeal are Ebrahim J.A., Moore J.A., Levinsohn J.A., Odoki J.A. and Annandale J.A. (AG). In these circumstances, the five sitting

members of the Court are not disqualified from sitting because they are not parties to the lis. I turn now to the parties' submissions on recusal.

[14] The Appellant's grounds for recusal as can be gleaned from the Heads of Argument and the Affidavit of Mr. James Dlamini are:

i. The judges hearing the appeal have a personal interest in the subject matter of the appeal.

ii. Judges of the Supreme Court, with whom the sitting judges have a close professional relationship, have a direct pecuniary interest in the outcome of the appeal.

iii. Judges who are not immediately interested in the instant appeal might be entitled "to approach the courts again concerning the same subject-matter and possibly obtaining an order irreconcilable with the order made in the first instance."

iv. The order sought by the appellant cannot be sustained and carried into effect without necessarily prejudicing the interests of the justices of this Court.

v. The average reasonable person ought reasonably to apprehend that the judges might be biased because of the foregoing reasons.

vi. The Honourable Chief Justice and the other 2 salaried Supreme Court Judges have a direct pecuniary interest in paragraph (a) (i) of the court *a quo's* order.

vii. There is a close professional relationship between the 3 salaried Supreme Court Justices and the 5 part-time Justices who have been assigned to determine this appeal.

[15] The appellant's list of Authorities contains a solitary unreported item from Swaziland dated 2001. It is not possible to determine whether the latest judgment of this Court on the matter of recusal was left out by inadvertence, or design, or both, on the part of the appellant and his legal advisors. Suffice it to say that **African Echo [Pty] Ltd v Simelane** [2013] SZSC 7, which deals with the topic of recusal exhaustively with reference to the latest academic and judicial expositions on the subject in the Common Law world, has been cited in learned publications abroad and before several courts. Counsel for the respondent was kind enough to provide us with the full text of our judgment in that case.

[16] Counsel for the Respondents submitted that by reference to the principles so elaborately articulated in **African Echo v Simelane** *supra* the appellant had

not made out a case for the recusal of the judges sitting on the bench. Further he went on to make the following common sense submissions in his Heads of Argument:

i. Every judge appointed to the superior courts of Swaziland,

ii. "Shall be appointed by the King on the advice of the Judicial Service Commission." See section 153 (1) of the Constitution.

iii. The Chief Justice is The Chairman of the Judicial Service Commission. See section 159 (2) (a) of the Constitution.

iv. According to the appellant's submission, every judge appointed to the Superior Courts of Swaziland would be beholden to the Chief Justice and therefore incapable of independent and unbiased judgment in any case where the Chief Justice is a party or has an interest, or is a member of the bench in any given case, or has appointed the judges to hear any given case.

v. By the appellant's reasoning, every judge of the Superior Courts of Swaziland would have to be recused in such cases.

[17] Two cases serve to illustrate that judges of Superior Courts, true to the oaths they have taken, do dispense justice fairly and fearlessly. In the Swaziland case of *Minister of Housing and Urban Development v Dlamini and Others*

(Consolidated with 2 Others) [2003] SZSC 7, three judges of this Court ordered that:

> *"For the avoidance of doubt, the interim order made by the learned Chief Justice on the 9 September 2008 is set aside."*

That order which Judges of this Court set aside had been made by the Honourable Chief Justice sitting as a single Justice of the Supreme Court under section 149 (3) of the Constitution.

[18] The other case is the well-known judgment of the House of Lords in **Pinochet, Re** [1999] at KHL 52 15th January 1999 where their Lordships of the House of Lords unanimously decided that their esteemed colleague Lord Hoffmann was ineligible to sit in a previous case where Senator Pinochet was a party because of his connection with Amnesty International which had an interest in the proceedings. The orders of the Court in which Lord Hoffmann had sat were set aside and the matter heard afresh by a differently constituted Court.

[19] Their Lordships of the House of Lords in England, who undoubtedly enjoyed a collegiate relationship with Lord Hoffmann were nevertheless able to declare the law in the case before them where the recusal of a brother judge was in issue. Lord Brown-Wilkinson who delivered the leading judgment declared at pages 11 and 12:

> *"Since, in my judgment, the relationship between AI, AICL and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal, it is unnecessary to consider the other factors which were relied on by Miss Montgomery, viz. the position of Lady Hoffmann as an employee of AI and the fact that Lord Hoffmann was involved in the recent appeal for funds for Amnesty. Those factors might have been relevant if Senator Pinochet had been required to show a real danger or reasonable suspicion of bias. But since the disqualification is automatic and does not depend in any way on an implication of bias, it is unnecessary to consider these factors. I do, however, wish to make it clear (if I have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his Directorship of AICL, a company controlled by a party, AI. . . . "It was for these reasons and the reasons given by my noble and learned friend Lord Goff of Chievley that I reluctantly felt bound to set aside the order of 25 November 1998. It was appropriate to direct a re-hearing of the appeal before a differently constituted Committee, so that on the re-hearing the parties were not faced with a*

Committee four of whom had already expressed their conclusion on the points at issue."

[20] Chiming in tune with Lord Brown-Wilkinson, Lord Goff of Chieveley wrote at page 14:

"It follows that AI, AIL and AICL can together be described as being, in practical terms, one organization, of which AICL forms part. The effect for present purposes is that Lord Hoffmann, as chairperson of one member of that organization, AICL, is so closely associated with another member of that organization, AI, that he can properly be said to have an interest in the outcome of proceedings to which AI has become party. This conclusion is reinforced, so far as the present case is concerned, by the evidence of AICL commissioning a report by AI relating to breaches of human rights in Chile, and calling for those responsible to be brought to justice. If follows that Lord Hoffmann had an interest in the outcome of the present proceedings and so was disqualified from sitting as a judge in those proceedings."

Writing in concurrence with his brethren Lord Hope of Craighead expressed himself in this way at page 18:

"*I think that the connections which existed between Lord Hoffmann and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. In view*

of his links with Amnesty International as the chairman and a director of Amnesty International Charity Limited he could not be seen to be impartial. There has been no suggestion that he was actually biased. He had no financial or pecuniary interest in the outcome. But his relationship with Amnesty International was such that he was, in effect, acting as judge in his own cause. I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set aside."

The last words of agreement flowed from the pen of Lord Hutton and were recorded at page 21 thus:

"I have already stated that there was no allegation made against Lord Hoffmann that he was actually guilty of bias in coming to his decision, and I wish to make it clear that I am making no finding of actual bias against him. But I consider that the links described in the judgment of Lord Browne-Wilkinson, between Lord Hoffmann and Amnesty International, which had campaigned strongly against General Pinochet and which intervened in the earlier hearing to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand. It was this reason and the other reasons given by Lord Browne-Wilkinson which led me to agree reluctantly in the decision of the Appeal Committee on 17 December 1998 that the order of 25 November 1998 should be set aside."

It is less than fitting for the appellant to submit that the judges of this Court are incapable of the same judicial detachment in this - indeed and in all cases - as was exhibited and applied by their Lordships of the House of Lords.

THE PRAYER

[21] The prayer which lies at the heart of the appeal is prayer 2.7 in the Notice of Motion filed by the 1st to 3rd respondents on the 26th August 2014. It is one of several alternative prayers and reads:

> *"Alternative to the above, the Second Schedule of Legal Notice No. 177 of 2013 be read as including the permanent Justices of the Supreme Court and/or Appeal Courts of the Kingdom of Swaziland."*

[22] That prayer was granted with modifications by the learned Judges of the Full Court of the High Court comprising J.M. Mavuso A.J, M.J. Simelane A.J., and B. J. Dlamini A.J. The order appealed against reads as follows:

> *(a) "The application is granted as prayed in terms of prayer 2.7 of the Notice of Motion, with the following alterations to the Second Schedule of Legal Notice No. 177 of 2013.*

(i) The following words shall be read-in in the Second Schedule under the heading "Office":-

"The Chief Justice," "Salaried Supreme Court Judges who have been earning sitting allowances" and "the Industrial Court of Appeal Judges."

(ii) Under the last column to the Second Schedule the following words are hereby severed, namely, "sessions per annum" and the figure "2".

(b) There shall be no order as to costs."

[23] Legal Notice No. 177 of 2013 is the subject of fierce debate between the parties. It is of such far-reaching effect and importance that it must be set out here in full.

"LEGAL NOTICE NO. 177 OF 2013

THE CONSTITUTION OF SWAZILAND ACT 2005

THE PRESCRIPTION OF SALARIES AND ALLOWANCES OF OFFICERS OF THE SUPERIOR COURTS NOTICE, 2013

(Under Section 208)

In exercise of the powers conferred by Section 208 of the Constitution of Swaziland Act, 2005, the Minister for Finance issues the following Notice –

Citation and Commencement

1. (1) This Notice may be cited as the Prescription of Salaries and Allowances of Officers of the Superior Courts Notice, 2013

(2) This Notice shall come into force on the date of publication.

Prescription of Salaries and Allowances

2. Without prejudice to any other benefits conferred by any law, the holder of an office specified in the First and Second Schedule shall be paid not less than the salary or allowance or both (as the case may be) specified in relation to the holder, in the First or Second Schedule.

Pension

3. (1) A holder of an office specified in the First Schedule who is employed on permanent basis shall join the existing contributory pension scheme at prevailing Government rates.
(2) A holder of an office specified in the First Schedule who is on contract shall be paid a gratuity of twenty-five percent (25%) of the basic salary at the end of the contract.

Revocation of Legal Notice

3. (sic) Legal Notice No. 171 of 2000 is revoked.

FIRST SCHEDULE

	Salary per Annum	Entertainment allowance	Inducement allowance	Communication gadget value and communication limiot	Contributory medical aid	Housing allowances (If not housed in Government houses)	Household assistants and other support staff	Commuted car allowances	Security
Chief Justice	584,473	5% of basic salary payable at the end of each month	10% of basic salary payable at the end of each month	No limit	100%	Official Residence provided by Government	2 Domestic workers. 1 Gardener	2 Governmen t cars	24 hour personal and s security by Swaziland service 24 hour home security security firm or two se
Judge of the Supreme Court (Permanent)	528,568	5% of basic salary payable at the end of each month	10% of basic salary payable at the end of each month	6,999 gadget limit and 6,000 monthly communication limit.	100%	Official residence provided by Government	1 Domestic worker. 1 Gardener	102,860 per annum	24 hour home security security firm or two se
Principal Judge	508,238	5% of basic salary payable at the end of each month	10% of basic salary payable at the end of each month	6,999 gadget limit and 6,000 monthly communication limit.	50%	15% of basic salary payable at the end of each month	1 Domestic worker. 1 Gardener	102,860 per annum	24 hour home security by security firm or 2 security
Judge of the High Court	482,826	5% of basic salary payable at the end of each month	10% of basic salary payable at the end of each month	6,999 gadget limit and 6,000 monthly communication limit.	50%	15% of basic salary payable at the end of each month	1 Domestic worker. 1 Gardener	102,860 per annum	24 hour home security private security firm o guards
Judge President of the Industrial Court	482,826	5% of basic salary payable at the end of each month	10% of basic salary payable at the end of each month	6,999 gadget limit and 6,000 monthly communication limit.	50%	15% of basic salary payable at the end of each month	1 Domestic worker. 1 Gardener	102,860 per annum	24 hour home security private security firm o guards
Judge of the Industrial Court	472,661	5% of basic salary payable at the end of each month	10% of basic salary payable at the end of each month	6,999 gadget limit and 6,000 monthly communication limit.	50%	15% of basic salary payable at the end of each month	1 Domestic worker. 1 Gardener	102,860 per annum	24 hour home security private security firm o guards

SECOND SCHEDULE

Office	Sitting Allowance	Allowance Pre-session and Others (10) days per session	Retention/Retainer Allowance	Sessions per annum
Non- salaried (Ad-hoc) Judges of the Supreme Court	8,000	6,879	5,970	2

K.B. MABUZA

PRINCIPAL SECRETARY

MINISTRY OF FINANCE

Mbabane

October, 2013”

[24] The following characteristics of LEGAL NOTICE NO. 77 OF 2013 must at once be identified and highlighted:

i. It announced that it was issued under THE CONSTITUTION OF SWAZILAND ACT, 2005 (ACT NO. 1 OF 2005).

ii. It demanded to be cited as THE PRESCRIPTION OF SALARIES AND ALLOWANCES OF OFFICERS OF THE SUPERIOR COURTS NOTICE 2013 (under section 208).

iii. It declared that "In exercise of the powers conferred by section 208 of the Constitution of Swaziland Act 2005, the **Minister for Finance** issues the following Notice. (Emphasis added).

iv. It purported to revoke "Legal Notice No. 171 of 2007".

v. It appeared upon its face to have been issued by:

K.B. MABUZA
PRINCIPAL SECRETARY
MINISTRY OF FINANCE

vi. It did not, upon its face, profess to have been issued by any person who was the Minister for Finance in October 2013."

THE ORDER OF THE TRIAL COURT

[25] The effect of the order of the trial court - if it did have legal validity - would have been that the Chief Justice, salaried Supreme Court Judges who have been earning allowances, and the Industrial Court of Appeal Judges, would have been entitled to the Sitting Allowances, Allowances Pre-session and others, and to the Pretention/Retainer Allowances which they were enjoying before the illegal Legal Notice 177 of 2013 was unlawfully issued. The restriction of the number of sessions per annum to 2, including 10 days per session, would have been removed.

[26] Following upon the issue of the so-called Legal Notice No. 177 of 2013 by the then Principal Secretary Ministry of Finance, the question which arose starkly concerned the constitutionality of that action taken by the Principal Secretary. In the 1st and 2nd Respondents' Opposing Affidavit, the Principal Secretary swore that Legal Notice No. 177 of 2013 was not imposed on the judiciary by the executive but that it was a product of consultation and shared decision making.

[27] That affidavit made reference to attachment "KM5" and "KM6". KM5 is a letter from the Honourable Chief Justice to the Principal Secretary, Ministry

of Justice. It is a plaintive reference to a discussion between the Chief Justice and the Principal Secretary, Ministry of Justice, in which the Head of the Judiciary drew attention to the fact "that the allowances of Supreme Court Judges have not been increased since 2004, a shocking period spanning six years." The letter noted that within that period High Court Judges had received an increase. The Chief Justice referred to allowances obtaining in Botswana and Lesotho to support the case for a similar increase in Swaziland.

[28] KM6, to which the Principal Secretary Finance referred, is a Memorandum addressed to her from the Registrar of the Supreme Court captioned REVISED PROPOSED TERMS AND CONDITIONS FOR THE JUDICIARY. The relevant portion of the Memorandum reads:

> *"We have also included the current salary structure for all the officers listed above for your urgent attention."*

The Principal Secretary has not exhibited any response to KM6 or any reaction to KM5. Her admitted awareness of KM5 and KM6 can hardly be described as "consultation and shared decision making."

[29] As indicated in paragraph [22] above, the trial court, in granting the prayer in 2.7 of the Notice of Motion, made certain alterations to the "Second Schedule of Legal Notice No. 177 of 2013." The Court did so in a commendable effort to "save" Notice No. 77 by correcting its manifest imperfections. But the Court *a quo* had already found correctly in paragraph [31] of its judgment that:

> *"The 1st Respondent Principal Secretary of the Ministry of Finance, one K.B. Mabuza, 1st and 2nd Respondents, the Minister of Finance, had no power or right in terms of Section 208 of the Constitution or any other law in Swaziland to issue the Second Schedule of the Legal Notice in issue, in these circumstances."*

[30] Having rightly come to the above conclusion, the Court looked around for a means of avoiding the difficulties which that conclusion revealed. The Court sought to avert what it perceived to be a constitutional crisis in this way at paragraph [35] of the judgment:

> *"Even though we deem Legal Notice No. 177 of 2013 to be unconstitutional, we are mindful of the fact that to declare it unconstitutional in its entirety will cause constitutional a crisis. It would be prudent for this Court to read in the words proposed in the order into the Second Schedule of the Legal Notice No. 177 of 2013. This is so in order to remove the anomaly that purports to restrict the*

Supreme Court sessions to two per annum whilst taking away the allowances payable to the resident Supreme Court Judges. That is the more desirable remedy."

[31] The Court sought to "remedy the prevailing situation" by adopting the course taken by a Full Bench of this Court in **Attorney General v Mary-Joyce Doo Aphane** [2010] SZSC 32 where section 16 (3) of the Deeds Registry Act 37 of 1968 was declared to be inconsistent with sections 20 and 28 of the Constitution and therefore invalid.

[32] Legal Notice No. 177 of 2013, a still born legal nullity *ab initio,* could not lawfully reduce the salaries and allowances of judicial officers which they were then enjoying. Nor could it affect matters which lay within the exclusive preserve of the Honourable Chief Justice who is the Head of the Judiciary and of the Judicial Service Commission: the functions of which are set out in Section 160 of the Constitution. The independence of the Judiciary, an independent arm of Government, is declared in section 141 of the Constitution. It follows therefore that all of the salaries, allowances and conditions which the relevant members of the Judiciary enjoyed before the unlawful issue of Legal Notice No. 177 of 2013 remain in full force and

effect, and are in no way affected by that Notice which is devoid of all legal efficacy and validity save in the Second Schedule where it makes certain correct statements of fact. The powers of the Chief Justice to determine the number of sessions, and days per session, of the Supreme Court in any given year, and in all years for that matter, remain completely unimpaired. Rule 3 of the Court of Appeal Rules 1971 under the caption *Sittings of Court of Appeal* reads:

> *"3. The date, time and place of a sitting of the Court of Appeal shall be determined by the Judge President, who shall select the judges to form the court at any sitting."*

It is the Honourable Chief Justice who is now clothed with the powers, duties, and responsibilities which had hitherto resided in the Judge President.

[33] Before departing from this topic, it would be beneficial to recite the dictum of Lord Denning in **Macfoy V. UAC** (1961) 3 All E.R. 1169 where he observed thus:

> *"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You*

cannot put something on nothing and expect it to stay there. It will collapse."

RELEVANT CONSTITUTIONAL PROVISIONS

[34] Before this Court, and upon the papers, there were contending submissions concerning the meaning, import and effect of those provisions of THE CONSTITUTION OF THE KINGDOM OF SWAZILAND ACT, 2005 (ACT NO. 001 OF 2005) which have a bearing, not only upon the constitutionality of Legal Notice No. 177 of 2013, but also upon the standing of the judiciary and all of its component parts, as one of the legs of the tripod upon which the system of Government in the democratic Kingdom of Swaziland rests.

[35] The concept of constitutional supremacy is expressly declared in the PREAMBLE which records that "WE, *iNgwenyama*-in-Council . . . .hereby Accept the following Constitution as the Supreme Law of the Land." That supremacy was restated in section 2 (1) of the Constitution which reads:

"This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

[36] It is against the backdrop of that sacred principle that any act or law which claims to have been done or promulgated under the aegis of the Constitution must now be examined.

[37] Legal Notice No. 177 of 2013 described itself as being issued under section 208 of the Constitution. That section secures the remuneration of certain officers. Its provisions are mandatory: and rightly so. For it would be intolerable and inimical to the functioning of good government if the remuneration of those officers could be reduced whimsically and capriciously by any person or authority to the detriment and disadvantage of those officers.

[38] Subsection (1) mandates that:

*"There **shall** be paid to the holders of the offices to which this section applies such salaries and allowances as may be prescribed."*

Subsection (2) indicates the source from which remuneration of those officers must flow. The term "remuneration" clearly includes both salaries and allowances. It reads:

> *"The **salaries and any allowances** payable to the holders of the offices to which this section applies **shall** be a charge on and paid out of the Consolidated Fund."* Emphasis added.

The all-important subsection (3) affords and guarantees security of remuneration to the officers concerned in these emphatic terms:

> *"The salary and the terms of office of the holder of any office to which this section applies **shall not be altered to the disadvantage of the holder of that office after that holder has been appointed to that office."***

Subsection (4) specifies that:

> *"This section applies to the office of judge of the superior courts…"*

[39] Section 139 (1) refers to:

> *(a) "the Superior Court of Judicature comprising –*

(i) The Supreme Court, and

(ii) The High Court."

This provision establishes that the precepts of section 208 (1) thru (4) apply to the Honourable Chief Justice, and to the Judges of the Supreme Court and of the High Court whether on contract, or permanent, or acting, after they have been appointed.

THE INDEPENDENCE OF THE JUDICIARY

[40] The series of events leading up to this appeal have once again brought into sharp focus the question of the independence of the judiciary. In discussing this all important principle of the Constitution of Swaziland this Court adopts the authoritative statement of the law which was so powerfully expressed by Johan Kriegler J. in the South African context in the case of **S v Mamabolo** (CCT44/00) [2001] ZA CC 17; 2001 (3) SA 40 (CC); 2001 (5) BC LR 44. This Court adopts that excerpt from the judgment and declares it to be an accurate statement of the law of this Kingdom. That pearl of judicial sagacity is to be found in paragraphs [16] – [17] of the judgment of the Constitutional Court of the Republic of South Africa. It reads:

"16.In our constitutional order the judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers ***it stands on an equal footing with the executive and the legislative pillars of state****; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its bill of Rights – even against the state.*

17. No-one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law against governmental erosion. The emphatic protection afforded the judiciary under the Constitution therefore has a particular resonance. Recognizing the vulnerability of the judiciary and the importance of enhancing and protecting its moral authority, chapter 8 of the Constitution, which marks off the terrain of the judiciary, significantly commences with the following two statements of principle:

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

[41] It is precisely because the judiciary is the weakest of the three pillars of our state that the framers of the Constitution have, in various sections, under several heads, restated the imperative prescription for judicial independence like a sacred litany in a cantata. The draftspersons clearly and presciently sought to protect the judiciary from creeping encroachment upon its powers and exclusive preserves such as has been attempted by the erstwhile Principal Secretary in the Ministry of finance in this case.

[42] Section 62 of the Constitution sets out some of the objectives and characteristics of the independence of the judiciary. It reads:

> *"(1)* ***"The independence of the judiciary as enshrined in this Constitution or any other law shall be guaranteed by the State****. It is the duty of all governmental and other institutions* ***to respect and observe the independence of the judiciary****.*
>
> *(2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*

(3) The judiciary shall have jurisdiction over all issues of a judicial nature and ***shall have exclusive authority to decide whether an issue is within its competence as defined by law.***

(4) There shall be no inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review in accordance with the law.

(5) Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments, promotion or transfer for improper motives.

(6) ***The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."*** Emphasis added.

[43] At the very beginning of Chapter VIII, THE JUDICATURE, under the heading ***Administration of Justice,*** section 138 of the Constitution states in compact unequivocal terms that:

"Justice shall be administered in the name of the Crown by the Judiciary which shall be ***independent and subject only to this Constitution."*** Emphasis added.

[44] Sub-sections (1) thru (4) of section 139 describe the judiciary and some of its powers. Subsection (5) must be carefully noted. It specifies that:

> *"Subject to the provisions of this Constitution**, the Chief Justice is the head of the Judiciary and is responsible for the administration and supervision of the Judiciary."*** Emphasis added**.**

This subsection simply and plainly means that any purported exercise of any of the functions, powers or duties of the Honourable Chief Justice by any other person or authority is constitutionally impermissible and is of no legal force, effect, or efficacy whatsoever. This principle applies forcefully to the unconstitutional issue of Legal Notice No. 177 of 2013 by the then Principal Secretary Ministry of Finance.

[45] Section 141 of the Constitution is captioned ***Independence of the Judiciary***. It reads:

> *"(1) In the exercise of the judicial power of Swaziland, the Judiciary, in both its judicial and administrative functions, **including financial administration, shall be independent and subject only to this Constitution, and shall not be subject to the control or direction of any person or authority.***

(2) Neither the Crown nor Parliament nor any person acting under the authority of the Crown or Parliament nor any person whatsoever shall interfere with Judges or judicial officers, or other persons exercising judicial power, in the exercise of their judicial functions.

(3) All organs or agencies of the Crown shall give to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts under this Constitution.

(4) A judge of the superior court or any person exercising judicial power, is not liable to any action or suit for any act or omission by that judge or person in the exercise of the judicial power.

(5) The administrative expenses of the Judiciary, including all salaries, allowances gratuities and pensions payable to, or in respect of persons serving in the Judiciary, shall be charged on the Consolidated Fund.

(6) The salary, allowances privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Judge of a superior court or any judicial officer or other person exercising judicial power, shall not be varied to the disadvantage of that Judge or judicial officer or other person.

(7) The Judiciary shall keep its own finances and administer its own affairs, and may deal directly with the Ministry responsible for Finance or any other person in relation to its finances or affairs." Emphasis added**.**

[46] In the context of this case, subsections (1), (5), (6) and (7) are of critical importance. If full effect is to be given to the underlined words of sub-section (1) and sub-section (7) - which underpin its financial independence - the judiciary cannot be treated as if it was a department of some other entity or agency of government. It is an independent arm of Government. It is empowered to "deal directly with the Ministry responsible for Finance or any other person in relation to its financial affairs." Clearly, such 'dealing' was enshrined in the Constitution so as to ensure that an adequate provision is made out of the consolidated fund to meet the expenses which are necessary for the provision of judicial services to the public.

[47] The judiciary must then be left free to disburse the funds allocated to it in administering its own affairs: subject only to the duty of accountability which falls upon all agencies to which government funds are allocated for the provision of services to the public.

REMUNERATION OF CERTAIN OFFICERS

[48] Section 208 of the Constitution guarantees the integrity of the remuneration of judges of the superior courts and protects their remuneration from erosion or degradation after their appointment to office in these terms:

> *(1) There shall be paid to the holders of the offices to which this section applies such salaries and such allowances as may be prescribed.*
>
> *(2) The salaries and any allowances payable to the holders of the office to which this section applies shall be a charge on and paid out of the Consolidated Fund.*
>
> *(3)* ***The salary and the terms of office of the holder of any office to which this section applies shall not be altered to the disadvantage of the holder of that office after that holder has been appointed to that office.***
>
> *(4) This section applies to the office of* ***the judge of the superior courts****, appointed member of a Board, Commission or service commission, Attorney-General, Director of Public Prosecutions, Auditor-General, Secretary to Cabinet and such other office as may be prescribed."* Emphasis added.

[49] Sections 141 (6) and 208 (3) read together mandate that the following terms of any judicial officer shall not be varied or altered to the disadvantage of that Judge or judicial officer. Those terms are:

I. Salary
II. Allowances

III. Privileges and rights in respect of leave of absence

IV. Gratuity

V. Pension

VI. Other conditions of service

VII. Terms of Office

The above provisions make it clear that the purported discontinuation by the Principal Secretary in the Ministry of Finance of allowances and conditions which were currently being enjoyed by appointed members of the judiciary is a legal nullity and an egregious breach of the protective provisions of the constitution which were designed to safeguard the salaries, allowances, terms and conditions of judicial officers from unconstitutional degradation.

CONCLUSION

Section 72 of the Constitution sits beneath a conspicuous caption which can hardly escape the attention of any careful reader of that sacred document.

That caption, printed in heavy italicized characters reads:

"***Exercise of Minister's functions during absences or illness***"

The underlying text declares that:

> *"72. Where a Minister is absent from Swaziland or is by reason of illness or any other cause unable to exercise the functions of the office of that Minister the Minister may, after consultation with the Prime*

*Minister, delegate those functions to **another Minister in writing** for a maximum period not exceeding six months."* Emphasis added.

It is difficult - nay impossible - to determine how the Principal Secretary, who was not a member of Parliament, upon the advice, so she says, of the Attorney General's chambers, could extract from those simple English words, an authority to exercise the powers of a Minister without being appointed to the Office of Minister in the manner prescribed by Section 67 (2) of the constitution which says clearly that:

"The King shall appoint Ministers from both chambers of Parliament on the recommendation of the Prime Minister."

This judgment will end as it began by describing this matter as a classic case of bureaucratic overreach which opened up a Pandora's Box of legal and constitutional problems for the hapless litigants who became fortuitously ensnared by inauspicious happenstance in the issues decided in this case, and for those judicial officers whose constitutional rights came under such an insidious threat.

ORDER

[50] It is the order of this Court that:

i. The appeal be and is hereby dismissed with costs.

ii. Save to the extent declared in iii. below, Legal Notice No. 177 of 2013 is hereby declared to be null, void, and of no legal effect whatsoever.

iii. The sitting allowance, Allowance Pre-Session and Retention/ Retainer Allowance, are hereby declared to remain in full force and effect as correctly expressed in the Second Schedule of Legal Notice No. 177 of 2013.

iv. The Principal Secretary Finance is not empowered by the Constitution or by any other law to have issued Legal Notice No. 177 of 2013.

_____

S.A. MOORE
JUSTICE OF APPEAL

I agree

_____

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

P. LEVINSOHN

JUSTICE OF APPEAL

I agree

DR. B.J. ODOKI

JUSTICE OF APPEAL

I agree

J.P. ANNANDALE

ACTING JUSTICE OF APPEAL

For the Appellant : Mr.M Vilakati

For the Respondent : Mr. M. Simelane

The Full text of Legal Notice 177 of 2013 is annexed to this judgment.