

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CASE NO: 17/14

In the matter between:

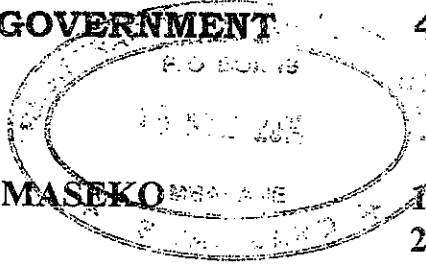
THE HONOURABLE CHIEF JUSTICE
THE DPP
THE ATTORNEY GENERAL
THE SWAZILAND GOVERNMENT

1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT

AND

THULANI RUDOLF MASEKO
BHEKI MAKHUBU

1ST RESPONDENT
2ND RESPONDENT



APPELLANTS' HEADS OF ARGUMENT

"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 /07 at page 20 thereof*

"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.....*" per Ramodibedi JA as he then was in the same matter of *Lindimpi Wilson Ntshangase(supra)* at page 23 thereof (*my emphasis*)

BACKGROUND

1.1 This is an appeal against the decision of the High Court in finding that it has review powers over decisions of the same Court.

1.2 This is a matter where the Respondents herein sought an order reviewing / declaring the warrant of arrest against the Respondents that was issued by the Chief Justice sitting as a High Court judge. The Respondents herein based their application for review/ declaratory on the fact that it is only the Magistrate's Court in terms of the Criminal Procedure And Evidence Act 1938. As such the sought for the setting aside of the warrant of arrest issued by the 1st Appellant in capacity as judge of the High Court on the ground that it was irregular, unlawful and of no force or effect.

1.3 The Respondents filed their notices of intention to oppose and have raised a point in *limine* to the effect that the High has no jurisdiction to set aside on the basis of irregularity, a decision of another High Court Judge.

1.4 The Judge a quo dismissed the point of law and set aside the warrant of arrest. The Appellants are appealing against the judgment of the High Court.

2. AD GROUNDS OF APPEAL

2.1 THE JUDGE A QUO ERRED AND OR MISDIRECTED HERSELF ASSUMING REVIEW JURISDICTION

**WHETHER DECLARATORY OR NOT CONTRARY TO
SECTION 152 OF THE CONSTITUTION.**

Appellants submit that the Judge a quo misdirected herself in assuming review jurisdiction contrary to section 152 of the Constitution of Swaziland 2005.

2.2 Section 152 thereof states,

“ The High Court *shall* have and exercise *review* and supervisory jurisdiction over all subordinates courts and tribunals or any lower adjudicating authority, and may , in exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers” (*my emphasis*)

2.3 Appellants therefore submit that the section only gives the High Court review powers only over subordinates courts and tribunals. The section does not give the Court the power to review and set aside its own decision, put differently an Honourable judge of the High Court can not review and set aside a decision of another High Court judge on the basis of irregularity.

- 2.3 In the case of *The Ministry of Housing and Urban Development / Sikhatsi Dlamini and 10 Others* *Case no. 31/08*, His Lordship the Learned Judge of Appeal Justice Ramodibedi (as he then was) stated that "I accept at the outset that as long as Maphalala J'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....." at page 14 thereof. This was after the Respondents have lodged an appeal under case number 38/08, involving the same parties, on the ground, inter alia, that Mamba J "*erred in law and in fact by effect reviewing or overruling the earlier judgment of Maphalala dated 19th June 2008 which was issued by a court of similar jurisdiction,.....*" (my emphasis)
- 2.4 In her judgment the Honourable Judge a quo instead referred to section 151 © of the Constitution, which states that the High Court shall continue having revisional powers as it possess at the commencement of the Constitution.
- 2.5 Appellants submits that even prior to the commencement of the Constitution, the High Court did not have powers to review its own decisions.

Alternatively, it was Appellants' argument that even if assuming that it had revisional powers over its own decisions, such could never be done by a single judge of the same Court. Such would require a full bench as a single Judge can not review a decision of another judge. This also applies even to the lower courts where a magistrate can not review a decision of another magistrate.

2.6 The Judge a quo in her judgment and in support of her decision of reviewing the decision of the Chief Justice sitting as a judge of the High Court admitted evidence that was not privy or known to the Appellants' Attorneys. This was despite the fact that only the point of jurisdiction was raised.

2.7 At page 62 of the record, it is evident that Her Ladyship in the Court a quo refers to a letter that was written by the Respondents' Attorneys addressed to the Registrar. The Appellants' Attorneys were seeing that letter for the first time in Court and objected to it being referred to in Court.

2.8 Even the Respondents' Attorney who authored the letter admitted that it was a foresight not to serve the letter to the other party.

2.9 However, despite that the Judge a quo did consider that letter to the prejudice of the Appellants herein. Appellant submit that the learned Judge a quo erred in taking the letter into consideration as it was not part of the record before her.

2.10 **ONLY THE SUPREME COURT CAN REVIEW ITS OWN DECISION IN TERMS OF THE CONSTITUTION.**

Appellants submit that it is only the Supreme Court of Swaziland that have power to review its own decision. Section 148 of the Constitution states,

(1)“ The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power,

(2) The ***Supreme Court may review any decision made or given by it*** on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court,

(3) In the exercise of *its review* , the Supreme Court ***shall sit as a full bench.***” (*my emphasis*)

Appellants therefore submit that it is only the Supreme Court in terms of the Constitution of Swaziland which can review its own decision. Further, the section all states as to how should that be done, that when sitting as a review court, the Supreme Court shall sit as a full bench. This means that instead of the usual three (3) Judges who sit at the Supreme Court, a full bench or five (5) Judges of the Supreme Court shall sit for a review. The case in point where the Supreme sought to review its own decision is the case of ***Siphamandla Ginindza / The Honourable Judges of the Supreme Court and Others.*** In that case the Supreme Court did sit as a full bench for purposes of hearing the review.

3. EVEN THE SUPREME COURT CAN NOT REVIEW A DECISION OF THE HIGH COURT.

Appellants further submit that even the Supreme Court can not review a decision of the High Court. This was stated in the case of ***Nqcamphalala / The Principal Judge of the High Court and 9 Others Supreme Court case No. 24/12.***

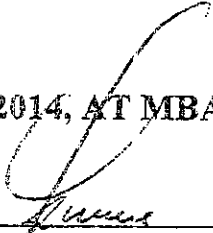
The decision in *Ngcamphalala* case was quoted with approval in the case of *Dlamini/ Okonda Supreme Court case no. 75 2012.*

4. The Judge a quo erred and or misdirected herself in failing to appreciate the basic fundamental principle that contempt of court is *sui generis* and hence it does not fall under the Criminal and Evidence Act 1938. The Court is entitled to devise its own procedure in self protection. Appellants submit that contempt of court can happen anywhere and at anytime and as such calling upon the court to protect its integrity.

4.1 Appellants submit that the fact that contempt of court is governed by the CP & E, does not necessarily mean that higher courts can not action or take steps for self protection. Magistrates Courts are creatures of Statute and as such governed by the CP & E. However, that does not mean that even higher courts shall be governed by the same statute. The High Court is governed by the Constitution which is the highest law in the land and it gives it inherent jurisdiction.

WHEREFORE APPELLANT PRAYS THAT THE APPEAL BE
UPHELD WITH COSTS.

DATED THIS 06th DAY OF MAY, 2014, AT MBABANE


FOR: ATTORNEY GENERAL

(Respondents' Attorneys)

ATTORNEY GENERAL'S CHAMBERS

4TH FLOOR, JUSTICE BUILDING

USUTHU LINK ROAD,

MBABANE

REF: AG3/CIV/1/ 14565)

TO: _____

THE REGISTRAR
HIGH COURT OF SWAZILAND
MBABANE


And To: MKHWANAZI ATTORNEYS

(1ST Applicant's Attorneys)

Malunge Township

MBABANE

Received copy hereof this 06th day of May 2014


..... 15:39 P.M.
For: 1st Respondent

And To: SIGWANE & PARTNERS
(2ND Applicant's Attorneys)
1ST Floor Embassy House
MBABANE

Received copy hereof this ...6... day of May 2014

Sigwane 15:34 hrs
For: 2nd Respondent