

IN THE. HIGH COURT OF SWAZILAND

Civ. Case No. 1944/95

In the matter between:

MZIKAYISE ANDREAS NTSHANGASE Applicant

and

NHLANGANO ACTING SENIOR MAGISTRATE 1st Respondent

DIRECTOR OF PUBLIC PROSECUTIONS 2nd Respondent

THE ATTORNEY GENERAL 3rd Respondent

CORAM: S.W. Sapire A.C.J.

FOR THE APPLICANT Mr. D. Mngometulu

FOR THE RESPONDENTS Mr. P. Simelane

Judgment

(5/7/96)

The Attorney General is the applicant seeking the setting aside of a judgment granted by default, in his absence. The judgment which it is sought to set aside was one granted on application at the suit of Ntshangase who sought the setting aside of criminal proceedings in which Ntshangase was found guilty of contravening Section 10(5) of the Swazi Administration Act No. 79 of 1950.

The Magistrate on finding Ntshangase guilty ordered his removal from the Mkhwakhweni area within thirty days of the order,

2

Although the application for review and for the setting aside of the proceedings was served on the Attorney General, no appearance was made. As the proceedings in the magistrate's court were irregular, as the magistrate proceeded with the trial in the absence of the defence attorney who had been unable to attend the trial on account of indisposition, thus depriving the accused legal representation which he required and which he wished to be availed, the conviction, sentence and order made thereafter were set aside.

This judgment came to the knowledge of the Attorney General who then in papers now before the court admitted that the application for review had been served on one of his staff officers. The Attorney General also admits that he failed to file opposing papers but stated that this was not due to wilful neglect. The Attorney General's affidavit discloses a lamentable situation in his office and it is a matter of considerable concern that court proceedings can escape his attention because documents are misfiled. Whatever criticism maybe levelled at the office of the Attorney General in this respect, I am nevertheless satisfied that the Attorney General did not intend to be in wilful default and would have attended to the matter and advanced any defence which may have been available to the review proceedings.

There is infact no defence and in the end his representative was forced to admit that the proceedings in the magistrate's court were indeed irregular.

The Attorney General did however suggest that should the relief sought by him not be granted, this would amount to a tacit confirmation in some way by this act of the unlawfulness of the flouting by Ntshangase of an order of the Ingwenyama.

That is a misconception. The charge which was laid against Ntshangase and the offence of which he was

3

committed was a contravention of Section 10 of Swazi Administration Act as amended. Section 10(5) reads:

"Any person who fails to comply with an order made under the subsection (3) or any of the conditions attached thereto shall be guilty of an offence and liable on conviction to a fine of one hundred Emalangeneni or six months imprisonment or both."

The Act in the subsiding paragraph provides -

"In addition to the penalty prescribed in subsection (5) a person convicted of an offence under that subsection may be removed from the Swazi area to which the order under subsection (3) relates by a member of the Royal Swaziland Police Force without any further legal process."

On convicting the accused, the magistrate made a further order that he be removed. Such further order is both unnecessary and incompetent having regard to the provisions of subsection 6.

It is not necessary for me to decide whether or not there is an order of the Ingwenyama which has been contravened by Ntshangase and nothing that I may say can add to or detract from such order.

Any order of Ingwenyama exists independently of any judgment of this court. These proceedings relate solely to the irregularity in the magistrate's court.

In the premises the application cannot succeed and must be dismissed. The applicant is to pay the respondent's costs.

4

The order of this court of 3 May 1996 is, because these proceedings are now finalized, of no further force and effect. It is now for the authorities to take whatever steps may be appropriate to enforce the order of the Ingwenyama.

S.W. SAPIRE

ACTING CHIEF JUSTICE