THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 84/2002

In the matter between

MARIO MASUKU	APPLICANT
And	
DIRECTOR OF PUBLIC PROSECUTIONS	1st RESPONDENT
ATTORNEY GENERAL	2nd RESPONDENT
Coram	MAPHALALA-J
	ANNANDALE - J
For the Applicant	MR. P. SHILUBANE
For the Respondent	ADVOCATE E. THWALA
	(Instructed by the Attorney General)

RULING ON POINTS OF LAW IN LIMINE

(19/03/2002)

The Court

The applicant on the 14th February 2002, brought an application under a certificate of urgency for an order declaring that Legal Notice No. 131 of 2001 dated 23 August 2001 in terms of which the terms of office of Mr. Justice S.W. Sapire, Chief Justice, and Mr. Justice J.M. Matsebula terms of office expired on the 31st December 2001 null and void and of no force and effect.

What propelled the applicant to launch this application is that on the 24th January 2002, he appeared before Matsebula J charged with two counts of contravening Section 4 (1) (B) of Act No. 46 of 1938 (The Sedition and Subversive Activities Act) but the case was adjourned indefinitely on the 7th February 2002, because the presiding judge (Matsebula J) was of the view that there existed a doubt as to whether or not, the said judges' terms of office came to an end on the 31st December, 2001 in the light of a Government Gazette dated the 29th August 2001, which stipulated that the said judge's term of office as a judge of the High Court of Swaziland came to an end on the aforesaid date.

The applicant is presently in custody and he avers at paragraph 6 of his founding affidavit that he has an interest in this matter as he is desirous that his trial be concluded as soon as possible. He submits further that the matter is urgent in that he is languishing in jail and he does not know when his trial will be finalised. Further more, that he has no other remedy but to approach this court.

The respondent filed a notice of intention to raise points of law in limine on the 18th February 2002 and then on the 19th February 2002 filed a notice to strike out.

The points of law in limine in their abbreviated form are as follows:

1. Urgency - that the matter before court is not urgent at all because the Legal Notice which is the subject matter of this application was issued on the 23rd August 2001, and six months down the line brings this challenge using the urgency procedure.

2. Jurisdiction - the founding affidavit does not show that this court does have jurisdiction to hear and determine this type of an application for judicial review of a Legal Notice issued under a Decree and signed by His Majesty the King. 2nd respondent further submit that despite the fact that applicant did not make any allegation that this court does have jurisdiction to hear this application. This court does not have the necessary legal competence to hear this kind of an application.

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3. Recusal - the judges of this court would still not be entitled to hear this type of an application because clearly have an interest in the subject matter of this application and as such should any one of them preside over it the principle of natural justice which says "nemo judex in causa sue" will be compromised and justice will not, in the eyes of an ordinary bystander, manifestly and undoubtedly be seen to be done. Further, that any judge of this court who may sit and hear this application will be as good as determining his own terms of service.

4. Locus standi in judicio - that applicant herein does not have a locus standi to bring this application there being nothing making him special out of all fee trial prisoners some of whom have not been allocated a trial date.

5. The matter involves a labour dispute - this application involves a labour dispute, in terms of section 8 of the Industrial Relations Act No. 1 of 2000 and as such falls within the exclusive jurisdiction of the High Court (sic) and the issue of the retirement age of judges is not an exception to this widely worded Section.

6. There is a similar matter currently rending before the Court of Appeal-there is a matter wherein the same question of law has arisen and it currently before the Court of Appeal, the practice is that this matter be stayed pending the final determination of the true legal position by the highest court in the land.

7. Misioinder - Applicant ought to have joined the Minister of Justice herein because a legal notice made under his Ministry is being challenged in court. It is very irregular to bypass the Minister under whose portfolio the appointment of Judges of this court is done. Further the judge where retirement is sought to be challenged has not been joined as co-applicant because he is the one who has a direct interest in the matter. There is further no indication that the honourable Justice Matsebula mandated applicant to champion his interests before this court.

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The notice to strike out filed of record seeks to strike out the second sentence of paragraph 5.1. of the founding affidavit on the ground that it constitutes inadmissible hearsay, the source of which has not been disclosed.

At the commencement of arguments before us on the 26th February 2002, we raised merit motu point from the bench that it appeared to us that this application has been overtaken by events in view of the issuance on the 21st February, 2002 of Legal Notice No. 2 of 2002. The said Notice issued under the hand of His Majesty directed that Chief Justice S.W. Sapire and Justice Matsebula shall continue in office up to the 30th June 2002. Mr. Shilubane however, held the view that the notice does not alter the position of the applicant as it does not guarantee that the applicant's criminal case will be finalised before that date. Further, that the notice cannot in law affect proceedings which had already commenced.

Mr. Thwala for the respondents argued au contraire expressing similar views as the court that the application has been overtaken by events and that the applicant in the circumstances ought to withdraw

his application. We however, reserved our ruling on this point and allowed the parties to argue the points in limine as a whole.

Points no 3, 5 and 6 which relate to recusal, a labour dispute and the pending appeal were abandoned by Mr. Thwala and thus no further comments will be necessary thereto, save for the following:

Regarding point 3 supra we canvassed with respondent's counsel the propriety of moving for recusal of the presiding judges. Not a single one of the guidelines carefully set out in the judgment by the High Court in Civil Case No. 1822/2001, in the (unreported) matter of The Minister of Justice and Constitutional Affairs and Stanley Wilfred Sapire In Re: The ex parte application of Stanley Wilfred Sapire. have been followed insofar as it relates to practical procedure when recusal is being sought. In his own papers, applicant relies on this very decision to substantiate a further point in limine and cannot be heard to say he was unaware of the judgement and the guidelines which were set out therein. At best it is a spurious disregard of the laid down procedure to be followed in such instances. It was only when this blatant

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disregard was canvassed from the bench that respondent's counsel reluctantly retreated and abandoned the application for recusal.

It clearly needs to be stressed again that the stare decisis principle does apply in this jurisdiction and that legal practitioners must not pay mere lipservice thereto but heed to precedents, especially so as in this matter where counsel cannot plead ignorance of the matter.

The points of limine which remains to be determined by the court are points no. 1, 2, 4 and 5 viz, urgency, jurisdiction, locus standi in judicio and misjoinder, respectively. Because of the ratio decidendi applied to this matter and the outcome hereof, it is not necessary to pronounce on the individual points that were argued in limine. The crux of the matter is the effect which Legal Notice No. 2 of 2002 has on the pending criminal trial of the applicant and his apprehension that the trial would not be finalised, his apprehension being derived from the fact that the Hon. Matsebula J in fact did adjourn the matter sine die due to the publication of the "first" Legal Notice..

The effect of Legal Notice No, 2 of 2002 on the present application.

Mr, Shilubane advanced a three-pronged argument in his contention that the said Legal Notice does not alter the position at all. Firstly, he contended that in law one cannot make a law to affect proceedings which had already commenced. Secondly, that this Notice is exactly the same as the Notice they are challenging, and thirdly, that this Notice does not operate with retrospective effect taking into account that the applicant pleaded in the criminal trial after the term reflected in the first Notice had long expired. Applicant has a real and substantial interest in this regard.

Mr. Thwala advanced a contrary argument as outlined above.

We have considered this matter very carefully and we are of the view that proceeding with the matter in view of Legal Notice No. 2 of 2002 would merely be an academic exercise. The real basis for the applicant to bring this application was because of the previous Notice which caused the trial judge to put a hold on all the cases pending before him. This application was to get that Notice out of the way. Since the

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issuance of Legal Notice No. 2 the learned trial judge has returned and is presently proceeding with his cases. The obstacle that was the cause of the complaint has now fallen away. For practical purposes there is no reason why the applicant's criminal case cannot resume before the learned judge.

The question of the validity or otherwise of Legal Notice No. 131 of 2001 is of no import to applicant as matters stand presently. Those questions are pending before the Court of Appeal where the matter

involving the Chief Justice is to be determined on the issue of recusation.

In the premise, we hold that this application has been overtaken by events and any further discussions on the points in limine would be unnecessary.

A point of potential substance was argued by Mr. Shiluhane during the hearing. The gist of it is that it may remain possible that the applicant's trial is not finalised by the date on which the second Legal Notice purports to terminate the appointment of the learned trial judge, the Hon. Mr. Justice Matsebula. In the event that by the 30' June 2002 the trial has not been finalised, so he argues, the applicant will be back to square one and will have to bring a fresh application all over again. This argument was not raised in the founding affidavit as it was not possible to foresee, at the time when the application was first made, that a second Notice would be issued in which the purported date of termination was advanced by six months.

Two obstacles fragment this line of reasoning. Firstly, it is based on mere speculation. It is a matter of public record that the trial of the applicant has already progressed to an advanced stage. Applicant's counsel could not advance a reasonable estimation of the further anticipated duration of the trial, to show that indeed it is a reasonable possibility, if not probability, that the trial will not have been finalised during the purported present extended term of office of the learned trial judge. Secondly, the Constitution specifically provides for precisely such an eventuality, in that it vests in Section 99 (2) a trial judge with the power and authority to finalise pending matters before him, despite having reached the end of his term of office. The Section reads:

"Notwithstanding that he has attained the age at which he is required by the provisions of this section to vacate his office, a person may sit as a judge for the purpose of delivering judgement or doing any other thing in relation to proceedings which were commenced before him before he attained that age".

It is nevertheless in the interests of justice and of the applicant in particular to have this trial finalised as expeditiously as can be. He is entitled to a judgment by the court which took his plea. An order to facilitate this, the Registrar of the High Court is directed to re-allocate his matter before the Hon. Mr. Justice Matsebula as soon as is practically possible, but in any event not later than in the early days of the second session of the High Court.

In the result, the application is dismissed with costs, which is to include the costs of counsel.

S.B. MAPHALALA J.P. ANNANDALE

JUDGE JUDGE