IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1965/06

In the matter between

MFOMFO NKAMBULE **APPLICANT**

AND

THE GOVERNMENT OF SWAZILAND **1st RESPONDENT**

THE PRIME MINISTER **2nd RESPONDENT**

THE ATTORNEY GENERAL **3rd RESPONDENT**

CORAM: MAMBA AJ

FOR APPLICANT: S.A. NKOSI

FOR RESPONDENTS: J. MAGAGULA

JUDGEMENT

10th JULY, 2006

[1] Mr Mfomfo Nkambule, the applicant herein is a member of parliament for the Mtfongwaneni Inkhundla in the region of Manzini.

[2] It would appear that prior to the 22nd day of February, 2006, he was the Minister for Natural Resources and Energy and his appointment as minister in that ministry was revoked on that date and was appointed the Minister for Health and Social Welfare.

[3] This is contained in legal notices number 16 and 17 of 2006 respectively, published in the Swaziland Government Gazette Extraordinary dated the 24th day of February, 2006. The said revocation and appointment were with immediate effect and were in effect a transfer from one ministry to another. In terms of the said notices, the transfer was made by King Mswati III, king of Swaziland, in the exercise of the powers conferred upon him by section 67 of the Constitution of Swaziland, 2005.

[4] It is common cause that the appointment of the applicant as Minister for Health and Social Welfare was revoked on the 23rd day of May, 2006 as per legal notice number 86 of 2006 contained in the Swaziland Government Gazette Extraordinary published on the 24ih day of May, 2006. This notice says that it was made by Mswati [II, the Lngwenyama and King of Swaziland in the exercise of the powers conferred upon him by section 68 of the Constitution of the Kingdom of Swaziland, 2005. It is noted here that this notice is said to be made not just by the king, but by the Ingwenyama and King of Swaziland. The significance of the King acting as King and Ingwenyama is not immediately clear to me.

[5] It is common cause further that the removal of the applicant as Minister for Health and Social Welfare was made by the King in terms of section 68 (4)(a) of the Constitution, that is to say; "Acting on the recommendation of the Prime Minister", the second respondent herein.

[6] The applicant has filed this application and is challenging his removal or the revocation of his appointment as a Cabinet Minister and in particular as the Minister for Health and Social Welfare. In his application the applicant is seeking inter alia, the following relief;

> "2. Setting aside the dismissal of the applicant as Minister of Health and Social Welfare and reinstating the applicant to the office of Minister of Health and Social Welfare with immediate effect.

"5. Ordering the first respondent to continue paying the applicant's salary as Minister of Health and Social Welfare with immediate effect."

[7] As stated above in legal notice number 86 of 2006, the revocation of the appointment of Mr Nkambule as a Cabinet Minister was made by the Ingwenyama and King of Swaziland. The applicant has, however, cited the second respondent and has sought to justify this by stating in paragraph 11.1 of his Founding affidavit that

"...It is clear, Constitutionally that, the King in exercise of his executive functions can not refuse to exercise the executive function to revoke the appointment of a Minister after the Prime Minister has made recommendation that such Minister's appointment be revoked.

In effect, and judicially, it is the prime Minister who causes the dismissal of a Minister. It is not the King who dismisses a Minister from his position."

[8] It was submitted by Mr Nkosi on behalf of the applicant that the above conclusion is based or founded on the provisions of section 65 (3) of the Constitution which provides that :

"(3) Where the King is required to exercise any function on the advice or recommendation of any person, he shall exercise that function on that advice or recommendation, save that the King may before acting on the advice or recommendation, in his discretion, once refer back that advice or recommendation in whole or in part for reconsideration within ten days by the person or authority concerned." (The underlining is mine.)

[9] It was argued that the use of the word shall in the above quoted sub section indicates that the King has no discretion in the matter, bar the referral back for reconsideration within the stated period. If a recommendation is made to the King for instance by the second respondent that a certain Minister be relieved of his position as a Cabinet Minister, it is argued the King is enjoined to exercise that function and dismiss the Minister as recommended or advised.

[10] If this interpretation is correct, then I can only say the use of the words "advice or recommendation" in the context in which it appears, seems to me inappropriate or a misnomer. It is verbal diplomatic short hand for saying that where the King is instructed, ordered or told to exercise a function, he, the King, shall be obliged to exercise that function. For purposes of this judgement, I say no more than that this interpretation may well be correct in the context of our Constitution. It is after all a Swazi Constitution or a Constitution to govern cr regulate the affairs, and lives of EmaSwati. It is or at least it should reflect the soul, spirit, aspirations, mores, thinking or values of EmaSwati.

[11] I have it on reliable authority that in terms of Swazi Law and Custom or values protocol or etiquette, no person or authority may order or instruct the King to do anything. Thus it would be unconscionable or grossly inappropriate to use such words, even in a Constitution in 2005 with reference to him.

[12] The gravamen of the applicant's attack on his dismissal as a Cabinet Minister is contained in paragraph 11.3 of his Founding affidavit. He states that the second respondent "acted in gross violation of my rights as a Minister and as a citizen of this country by failing to adhere to my Constitutional right to be given a fair hearing and treated justly and fairly"

[13] He says he was given neither notice nor hearing before he was dismissed, whilst he had a legitimate expectation that his situation or position as a Minister would not be diminished or taken away without him being heard on the issue. He complains in effect that the rules of natural justice where not followed or obeyed in effecting the revocation of his appointment.

[14] The applicant further states that he was not formally informed of his sacking and that he only leamt about it from a "press conference convened by the second respondent on the 24th day of May, 2006...that first and second respondents have appointed one NJABULO MABUZA, a member of parliament under the Khubutha Constituency, to replace me as Minister for Health and Social Welfare." (per paragraph 9.3).This is again common cause and the appointment of the said Mr Mabuza as Minister for Health and Social Welfare is contained \in legal notice number 85 of 2006. This

appointment was again made by the Ingwenyama and King of Swaziland in terms of section 67 of the Constitution and is with effect from the 23rd day of May, 2006. This is the same date on which the revocation of the appointment of the applicant was made.

[15] Both counsel filed full heads of argument in support of their respective submissions. As Mr Magagula had raised certain points **in limine** on behalf of the respondents, I allowed him to argue his points first on both the points in limine and on the merits. Counsel were in agreement that this was the proper course to take or adopt in the circumstances.

[16] In view of the fact that one of the applicant's prayers is that he be reinstated as Minister for Health and Social Welfare, which post is currently held by Mr Njabulo Mabuza, I **mero motu** raised the issue whether or not Mr Mabuza was a necessary party in these proceedings who needed to be joined or cited in the proceedings. I examine this question below.

[17] The issue of joinder, whether it be non joinder or mis joinder is governed by the Common law. The rules of court pertaining to this subject are a reflection or confirmation of the Common law rules thereon. In EX PARTE SUDURHAV1D (PTY) LTD; IN RE NAMIBIA MARINE RESOURCES (PTY) LTD V. FERINA (PTY) LTD, 1993 (2) SA 737 @ 741, the court referred to the case of VITORAKIS V. WOLF, 1973 (3) SA 928 (W) and stated that;

> "the learned judge, correctly in my respectful opinion, pointed out in his judgement that the rules of court had made a radical departure from the Common law on this question and that if the applicant could bring herself within the appropriate rule, that was sufficient.
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> .. .One should be careful not to look almost exclusively to the Common law as counsel has done, for guidance in this problem. On the contrary, our modern rules of court are so explicit on this point that there is now...hardly anything left of the basic Common law approach to joinder or intervention-The learned judge was not, as I understand him, saying that resort can not be made to Common law principles of intervention

> when a matter can not be resolved by recourse to the rules. All he was saying was that the rules have widened the scope of the common law principles and the rules should be looked to first."

[18] **H**.J. **ERASMUS,** in his book, **SUPERIOR COURT PRACTICE (1994 EDITION) at Bl-94** states that;

> "the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court's order may affect the interests of third parties. The test is whether or not a party has a direct and substantial interest in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgement of the court. The rule is that any person who has a direct and substantial interest in any order the court might make, is a necessary party and should be joined."

[19] I, with due deference to the learned author, agree that this is a correct statement of the Common law rule. The applicable rule of court is rule 10 which although refers to actions and not applications, equally applies to applications by virtue of the provisions of rule 6 (27) of our rules of court.

[20] I mero motu raised the issue of joinder with counsel because, ex facie, the papers filed herein it appeared to me that the incumbent Minister for Health and Social Welfare, Mr Mabuza, has a direct and substantial interest in the relief sought by the applicant. In HENRI VILJOEN (PTY) LTD V. AWERBUCH BROTHERS, 1953 (2) SA 151 @ 168 a direct and substantial interest was described as "an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation."

[21] The applicant seeks inter alia to be reinstated and paid as the Minister for Health and Social Welfare which is the post held by Mr Mabuza and for which he is, I assume, being paid. Whilst Mr Nkambule does not seek an order removing Mr Mabuza from the said Ministerial position, reinstating

Mr Nkambule would inevitably and or logically remove or displace Mr Mabuza from that post. I would not want to even begin to try and understand or envisage a Government Ministry with two Ministers at the helm at the same time. A Minister and a deputy or assistant Minister, perhaps, I can understand. It is, in my judgement, clear that Mr Mabuza does not merely have an indirect financial interest in the subject matter of this litigation. His cabinet status or position is involved and so is his political position in general and the rewards that go with that position; be they financial, political, social or otherwise.

[22] In the case of HOME SITES (PTY) LTD V. SENEKAL 1948(3) SA 514 (A) as in the present case the issue of non joinder was raised mero motu by the court. FAGAN AJA had this to say:

> " Indeed, it seems clear to me that the court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having the party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgement will not prejudicially affect that party's interests. There may also, of course, be cases in which the court can be satisfied with the third party's waiver of his right to be joined, eg. if the court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgement. It must be borne in mind, however, that even on the allegation that a party has waived his rights that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver or the conclusion of law to be drawn from them or both."

Again in KLEP VALVES (PTY) LTD V SAUNDERS VALVE CO. LTD 1987 (2) SA 1, GROSSKOPF JA said the following (at page 39-40):

> "During the course of argument the court raised the question whether the exclusive licensee and the exclusive sub licensee should not have been joined as parties to these proceedings. The appellant and the respondent both indicated that they did not desire the joinder of the licensee or the sub licensee. Of course, the desire of the parties can not be conclusive in this matter. As

was pointed out in AMALGAMATED ENGINEERING UNION V MINISTER OF LABOUR 1949 (3) SA 637 (A) @ 649, the fact that the two parties before the court desire the case to proceed in the absence of a third party can not relieve the court from inquiring into the question whether the order it is asked to make may affect the third party. Consequently, after judgement was reserved on all issues the court intimated to the parties by letter that a decision on the joinder issue might be necessary unless there were to be filed a written consent by each of the licensee and the sub licensee agreeing to be bound by the Court's judgement, notwithstanding that it has not been cited as a party to the proceedings. Such consents have now been filed, and it has accordingly become unnecessary to determine whether, in the absence of such consents, the non joinder of these persons would have precluded the court from deciding some or all of the issues in this appeal."

In casu, I did not of course require that such consent or similar intimation be solicited or obtained from Mr Njabulo Mabuza. This would, in any event have necessitated that he be served with all the documents filed herein and be given adequate time to respond thereto. As matters stand, Mr Mabuza has neither agreed to abide the Court's judgement nor waived his rights to be joined in these proceedings.

[25] Colman J in TOEKIE'S Butchery (EDMS) PBK EN AND ERE V STASSEN, 1974 (4) SA 771(T) @ 774 eloquently stated the position as follows:

"Similarly in the AMALGAMATED ENGINEERING UNION case supra at 661, FAGAN AJA considered and rejected the contention that the joinder of an interested third party was not necessary because a decision in the proceedings would not be res judicata against it. He referred to the undesirable possibility that if the interested party were not joined in the present proceedings the same question might arise in subsequent proceedings and be decided differently, so that there would be two valid but irreconcilable orders relating to the same point. The AMALGAMATED ENGINEERING UNION case supra is authority for the proposition that the point of non joinder might and should be taken by the Court of its own motion, even against

> the will of the parties, and even if the matter has already reached the stage of an appeal...Joinder can only be dispensed with if the interested party has unequivocally waived his right to be joined and undertaken to be bound by any decision which the Court may make."

[26] It is perhaps ironic that the rule governing joinder of parties is aimed at safeguarding the legal interests of third parties who have not been cited in court but whose rights would be affected by an order of court given without them being afforded the opportunity to be heard. Justice demands that no person should be condemned before he is given the chance to defend himself or herself. That is the very principle that brought the applicant to court. Should Mr Mabuza be granted the opportunity to exercise his right to be heard before he is dislodged from his Ministerial position? The answer is, in my judgement, yes.

[27] Because of this conclusion, it has become unnecessary for me in this judgement to make a finding on whether or not the applicant was :

(a) entitled to a hearing pertaining to the revocation of his appointment before

(b) relieved of his duties as a Cabinet Minister by the Prime Minister or the King.

These are issues that can wait for decision in a proper application, should the applicant be so advised to file in the future.

[28] The usual order on costs is that costs should follow the outcome of the case. The applicant was fully aware of the legal interest that Njabulo Mabuza has in the relief applicant sought in this application. He nevertheless did not cite him as a party in this application. For their part the respondents did not object to the non joinder of Mr Mabuza. This issue was only raised by the court of its own motion, as it was bound to do so in the circumstances. In the exercise of my discretion each party must bear its own costs.

[29] In the result I make the following order :

1. The application is dismissed on account of the non joinder of Mr. Njabulo Mabuza.

2. Each party is to bear its own costs.

MAMBA, AJ