IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 4436/07

In the matter between:

PERCY NDLANGAMANDLA	**1st APPLICANT**
MUSA SHONGWE	**2nd APPLICANT**
MACHAWE DLAMINI	**3rd APPLICANT**
NHLANHLA HLATSHWAKO	**4th APPLICANT**
THABISO MAVUSO	**5th APPLICANT**

and

THE UNIVERSITY OF SWAZILAND	**RESPONDENT**

CORAM: Q.M. MABUZA -J

FOR THE APPLICANT : MR. M. MAGAGULA OF MAGAGULA & HLOPHE ATTORNEYS

FOR THE RESPONDENT : MR. S. MDLADLA OF S.V. MDLADLA & ASS.

JUDGMENT 8/4/08

[1] The application herein came before me as a matter of urgency for an order in the following terms:

1. Dispensing with the usual forms and procedures relating to the institution of proceedings and directing that the matter be heard as one of urgency.

2. Condoning Applicant's non-compliance with the Rules of the above Honourable Court.

3. That a Rule Nisi do hereby issue, calling upon the Respondent to show cause at such time as this Honourable Court may direct, why an order in the following terms should not be made final;

3.1. interdicting and restraining the Respondents from implementing the semesterisation programme in respect of the faculties which have not yet implemented the programme pending the exhaustion of the internal of the internal remedies by the Applicants as per the Court's recommendations.

3.2. Interdicting and restraining the Respondent from proceeding with the irregular examination set for the 10th December 2007.

3.3. that prayer 3.1 and 3.2 hereinabove operate forthwith immediate effect pending the finalisation of this matter.

3.4. Costs of the application.

3.5. Granting further and/or alternative relief.

[2] I heard the matter on the 18th, 19th and 20th January 2008. One of the factors that made the issue urgent was due to the fact that an examination for the students was scheduled to be written on the 21st January 2008.

[3] During the hearing several applications were made by the Respondent. The important ones were:

- Points ***in limine*** were raised by them which I dismissed.

- An application for my recusal which I also dismissed.

I indicated that my reasons for dismissing both applications would follow. These are my reasons:

[4] It is important to outline the background to this matter. The University of Swaziland and the students have been embroiled in court proceedings in three different major matters. These are interrelated.

- The first matter came before Maphalala J wherein the students sought certain prayers but their application was refused.

- The second application was brought before Mamba J and was refused and the learned Judge indicated that he would give reasons thereon later.

- The third application came before me and I granted the application.

[5] On the dates on which the application came before me the duty judge was Mamba J. I was advised that he had requested that someone else handle the matter as he was fresh from hearing the previous one and still had to give his reasons therein. Maphalala J. was reported out of the country. As the three of us were the only sitting judges that left me as I had not previously been involved and had been abroad when the first two were heard.

[6] This meant that in order to prepare adequately I had to read all the applications beginning with those dealt with by Maphalala J, Mamba J and those to be dealt with by me.

[7] The issues before me could have been disposed of within a day. Instead the Respondent's attorneys presented the long drawn out arguments which took 3 full days which resulted in complete emotional stress for all involved. The issues as I understood them which had to be decided were:

- Were there prospects of success in an appeal lodged by the Applicants to the Supreme Court and if there were, I was requested to issue an order staying the execution of the judgment issued by Mamba J.

[8] Unfortunately the order for stay was awkwardly crafted as is evident from paragraph (1) hereinabove. During submissions I indicated that I would grant an amendment under further and alternative relief as I understood the prayers sought, so might I add did the Respondents attorneys.

[9] I wish to add that the application before me came in the backdrop of rioting and violence which had erupted at the

Kwaluseni University campus. Police were called in and they had to remain on campus indefinitely, violence had erupted between the police and the students. The rioting and violence had extended beyond the campus onto the roads and homes and areas surrounding the Kwaluseni Campus. The situation was dangerously out of control and had become a national crisis. This is also the reason why the court had to sit the entire week-end to enable it to conclude the matter.

[10] Mr. Magagula Attorney for the Respondents raised three points ***in limine*** namely:

- The doctrine of clean hands
- Urgency
- Res judicata

[11] In regard to the doctrine of clean hands, Mr. Magagula submitted that there was an order which had been obtained against the University students that they refrain from acts of violence and vandalism of University property. His argument was that the students could not seek the present court order when they had failed to abide by one themselves which was issued on the 9/12/2007. That order was apparently obtained exparte after violence had erupted at the Kwaluseni Campus and the University had to close.

[12] The Court was not shown the court order referred to by Mr. Magagula nor any return of service thereof to show that the students had been served with it. I rejected this point for this reason.

[13] The second point ***in limine*** raised was that of urgency. Mr.

Magagula submitted that the urgency was self-created in that as of August 2007 when the University opened the Applicants were aware that semesterisation would be effected. They had signed contracts to this effect. Consequently he had been given 24 hours within which to respond. He also submitted that the Applicants could have launched the application in January 2008 when the University opened.

[14] Mr. Mdladla's counter-submission was that the applications that were brought before Maphalala J and Mamba J were deemed urgent and similar considerations should apply herein. I agree. He went on to state that in the matter before Mamba J judgment was delivered on the 9/12/07 and on the 10/12/07 the University was closed. The High Court was closed for the Christmas vacation and so were attorneys offices. The two latter arguments may not be strong but I found the matter urgent for the reason that a national crisis had developed. Loss of lives were being threatened as some students became injured and were hospitalised. I took judicial notice of this fact as it was widely reported in the newspapers, radio and electronic media. The latter had visuals accompanying their reports.

[15] The third point raised by Mr. Magagula was that of ***res judicata.*** He submitted that the matter before me and the one that was brought before Mamba J were the same. They involved the same parties, the same cause of action and the same subject matter. Judgment had been passed in the matter before Mamba J. The only difference he argued was that the earlier order had excluded "stay" and "pending".

[16] In response Mr. Mdladla submitted that the issues were not the same in that the Applicants sought a stay of the execution of

the judgment issued by Mamba J, pending their appeal to the Supreme Court. The issue before me was whether or not there were prospects of success.

[17] I agreed with Mr. Mdladla's submission and even went further to state that in my view there were prospects of success. The prospects of success were based on the **principle of legality.** My view was that after reading the documents presented to Maphalala J and Mamba J what leaped at the reader was the power play by the Respondents using the University Act of 1982. My view was that the Constitution being the supreme law of the land now controlled the excise of power by public functionaries. I even referred to the judgment of Sachs J in which he discusses the principle of legality in a democratic society See:

- Minister of Health and Another vs New Clicks South Africa (Pty) Ltd and 7 Others Case CCT 59/2004.

- The Prime Minister of Swaziland and 7 Others vs MPD Marketing and Supplies (Pty) Ltd. And 2 Others Appeal Case No 18/2007. (Unreported).

I still maintain that view coupled with the fact that the University Act was promulgated during Parliamentary Sovereignty where the tenants of the rule of law were not a major consideration. With the advent of the Constitution Applicants are also regarded as major stakeholders and should now be treated equally and fairly and given a fair hearing in all University issues that affect them. Equality of arms is now the norm and not the exception.

[18] Mr. Magagula responded by saying this issue of legality was

not a ground of appeal and I remarked that the notice of appeal had indicated that as soon as Mamba J furnished his reasons it would be amended.

[19] I may further add that I was also going to add that in my view there was a dispute of fact as both parties had different concepts with regard to the semesterisation programme and oral evidence should have been led with regard to this aspect. My saying so did not mean that I was favouring the Applicants. I thought the matter could be concluded quickly once I had expressed what I had in mind.

[20] But alas this was not to be so. On the January 2008 when I handed down my decision dismissing the points ***in limine,*** Mr Magagula had a notice of appeal prepared which he lodged the minute I had finished speaking. After an adjournment I returned and stated that I would proceed with the matter. The notice of appeal was meant to throw me off balance and momentarily did so. It was on my return that the attitude of the attorneys for the

Respondent changed. It hardened. It was condescending. It was abusive. It bordered on the contemptuous for the bench. I may add that the Respondents were represented by three attorneys and an articled clerk. An additional member of the firm joined them on Sunday 20th January 2008. All this I construed was in an effort to intimidate me.

My view when I resumed was that the Respondents had to seek formal leave to appeal for the ongoing proceedings to stop. Mr. Hlophe who had all along been sitting and whispering to Mr. Magagula to my distraction while the latter had been addressing me also joined in the fray. I also indicated that another reason

prompting me to proceed with the hearing was that there was a national crisis which had to be stopped.

On resumption Mr. Magagula applied for a brief adjournment requesting to see me in my chambers. I agreed. In chambers he asked for my recusal on the basis that I was biased and that I had already prejudged the case in favour of the Applicants. I refused stating that what I had stated about the Applicants' prospect of success was what every judicial officer did in order to curtail long drawn arguments. I again mentioned the issue of the violence and rioting at the University but this concern fell on deaf ears.

[23] Mr. Magagula asked for leave to move a formal application for my recusal. We returned to court and the application was moved formally for record purposes. The matter was adjourned to Sunday morning on the 20th January 2008 to enable the Applicant to draw up the necessary papers.

[24] On Sunday morning the Registrar, Mrs. Hlophe who is also a wife to Mr. Hlophe partner to Mr. Magagula telephoned me asking for a postponement on behalf of the attorneys. Red flags of alarm went off in my mind as this was unusual. An attorney should have moved the postponement. I said to myself this was a small infraction of propriety I would overlook it.

[25] The day progressed and in the afternoon Mrs. Hlophe approached me in my chambers and again requested a postponement of the matter. Her husband and Mr. Magagula had difficulties in finding a commissioner of oaths. This time I raised the issue of impropriety with her,

that her deputies should have handled the matter as there were conflicts of interest with her. Tension was high by now. A little later Mr. Shabangu an attorney of the same firm came to my chambers to request a postponement. I had already agreed when Mrs. Hlophe requested me.

When the matter was finally ready to proceed, Mr. Magagula moved the application for my recusal. I requested my recorder to replay the tapes so that counsel for the Respondent could identify the portion of the record that made him and his client conclude that I was biased but alas they had removed the tapes without my permission and did not follow the usual procedure. Mrs. Hlophe had given them without consulting me. The letter requesting the tapes from counsel was delivered on Monday 21/01/08 and backdated to 18/01/08, another infraction of propriety. From there on it was a tug of war between Mrs. Hlophe and myself in obtaining the tapes as she felt that her husband's firm were entitled to them more than myself even though I was the presiding judge. (Another source of embarrassment for me) It was my view that the Court staff should transcribe the tapes and not the Respondents' attorneys or else they be sourced out to an independent transcriber in order to maintain the aura of impartiality. In that way all parties would be assured of no additions or deletions. Having read the affidavit supporting the application for my recusal I did not see anything in it for me to recuse myself, I adjourned briefly and asked counsel for both parties to see me in my chambers. I allowed only Mr. Magagula and Mr. Mdladla to see me. I put a proposal to them that I wished for Mr. Vilakati the University Registrar who had been in court since the proceedings began to give evidence. My view was that the contents of the affidavit were too technical to have come from a non-lawyer highly educated though he was.

I expressed the view that I wished for Mr. Vilakati to take the witness stand and tell me in his own words what it was that made him think that I would be biased. I expressed the need to hear the human element and from the horses mouth. I indicated that I was at a 50 - 50 impasse and perhaps the evidence of Mr. Vilakati would swing me one way or another. I had indicated that this was not meant to intimidate Mr. Vilakati as both him and his family were known to me. (I attended University with both of them and attended high school with his wife. I had also taught part time at the Institute of Distance Education at the University where she was employed permanently. I had left after my appointment to the bench.) The information in brackets was not disclosed to them. But I had indicated in open court that the Vilakatis were well known to me.

[28] I did not think Mr. Vilakati would mind as I specifically stated that I did not wish him to give evidence on any other aspect nor for Mr. Mdladla to take advantage of any other issue upon which he would cross-examine. This was agreed upon.

[29] However on resumption of proceedings Mr. Hlophe who had now robed came running into court and objected strenuously to Mr. Vilakati giving evidence. I think the record is explicit on what took place thereafter. I requested an adjournment as I was thoroughly taken aback and was embarrassed.

[30] On my return I gave my ruling that I would not recuse myself and briefly stated that the affidavit did not set out sufficient facts for my recusal. Another appeal was noted by the attorneys for the Respondents. My view was that they had to make a formal application for leave to appeal. There were other

ancillary applications made by Mr. Magagula. I think mainly to irk or annoy me so that I would abandon the hearing. These I refused. At one time Mr. Magagula told me that I did not have the capacity to preside over the case. This was said to provoke me.

[31] I refused to rise to the bait of provocation and indicated that with every trick to delay the matter out of the way I would still hear the matter as there was a national crisis to avert. My order at the end of the hearing would put a stop to it.

[32] Ultimately the parties agreed that I issue the interim interdict pending the appeal, which I did and reserved costs pending the Appeal.

Q.M. MABUZA -J