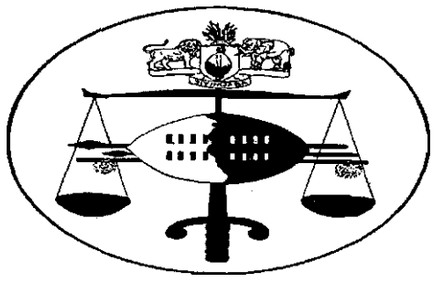

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE	Civil Case No. 3347/2003

In the matter between:

ROBERT MSHWEPHEZANE MABILA

AND TWO OTHERS — Applicants

And

THE DIRECTOR OF PUBLIC

PROSECUTIONS AND 10 OTHERS — Respondents

S.B. MAPHALALA - PJ

ANN AND ALE-J

MAMBA-J

For the Applicant — MR. M. MABILA

For the Respondent. — MR. J.S. MAGAGULA

JUDGMENT

27th March 2009

The court

[1] On the 12th December 2003, the Applicant filed an application for the following relief:

1. *Directing the Respondents to deliver to the Applicant a certified copy of the record of the proceedings, alternatively a record of the proceedings, in the further alternative any transcript and/or notes relating to the proceedings of the High Treason Tribunal constituted by Decree No. 2 of 1987, in which proceedings the Applicant together with others*

was convicted of High Treason during April 1988.

2. *Directing each of the Respondents to inform the Applicant in writing as to the facts of which each of them may be aware relating to the whereabouts of the record of the proceedings, any transcript and/or notes.*

3. *Directing that such certified copy of the record, transcript, notes and/or information be delivered to the Applicant within 14 days of the grant of this order.*

4. *Directing that such of the Respondents as may oppose this application, pay the costs of this application jointly and/or severally.*

5. *For such further and/or alternative relief as this Honourable Court may deem fit.*

[2] Two years later on the 23rd March 2005 the Applicants filed a Notice of Amendment for the following relief:

6. *By renumbering the existing prayers 4 and 5 as prayers 8 and 9 respectively.*

7. *By the addition of the following prayers 4 to 7 after the existing prayer 3;*

> *"4 Authorizing the Seventh Respondent, namely the former Chief Justice of Swaziland (the Honourable N. R. Hannah) to disclose and deliver to the Applicant in Windhoek and to this Honourable Court, his copy of the judgment and his own notes of the High treason Tribunal proceedings, for copying by the Applicant and delivery thereafter to the Honourable Court;*

8. *In so far as may be necessary, releasing the Seventh Respondent from any of the in camera conditions applicable to the aforesaid proceedings, as envisaged by Section 8.4 of the Tribunal Decree. 1987.*

9. *Directing that the following persons be allowed to intervene in these proceedings as the*

Second and Third Applicants respectively, namely:

10. *Prince Mfanasibili Dlamini;*

11. *LLewelyn George Mzingeli Msibi;*

12. *Directing that the present Applicant, Robert Mshwephezane Mabila, be re-cited as First Applicant".*

13. *Directing that such of the Respondents as may oppose this amendment and/or the relief sought herein, pay the costs of this application jointly and/or severally.*

14. *For such further and/or alternative relief as this Honourable Court may deem fit.*

[3] On the basis of the above application on the 25 May 2005 this court issued the following order:

"Having heard both Counsel for the Applicant and Respondents in the Notice of Amendment of the Notice of Motion, it is hereby ordered that the Notice of Motion be amended by addition of the following prayers 4 and 5, which read as follows:

15. *"4 Authorizing the Seventh Respondent namely the former Chief Justice of Swaziland, (the Honourable N.R. Hannah) to*

disclose and deliver to the Applicant in Windhoek and to the Honourable Court, his copy of the judgment and his own notice of the High Treason Tribunal proceedings for copying by the Applicant and deliver thereafter to this Honourable Court".

16. *"5 In so far as may be necessary releasing the Seventh Respondent from any of the in camera conditions applicable to the aforesaid proceedings, as envisaged by Section 8.4 of the Tribunal Decree, 1987".*

17. *Prayers 6 and 7 are postponed sine die and Respondents are to file their papers not later than 18th May 2005.*

(d) The Respondents are to pay today's costs".

[4] The Second and Third Applicants being LLewelyn George Mzingeli Msibi and Prince Mfanasibili Dlamini joined the proceedings filing affidavits in support thereto. They were subsequently joined as parties in the application.

[5] The basis of the above claims is that a Tribunal as envisaged in the Tribunal Decree 1987 was convened during 1987, and Applicant together with 11 others, was arraigned and tried *in camera* before the specially constituted Tribunal presided over by the Chief Justice at the time the Honourable Nicholas R. Hannah (the Seventh Respondent). Applicants contend that they were denied legal representation at all and were told to speak for themselves notwithstanding that Chief Justice Mr. Justice Hannah sat as Chairman and the Director of Public Prosecutions was prosecuting on behalf of the State.

[6] During April 1987 First Applicant was convicted on a charge of High Treason and sentenced to a period of 8 years imprisonment. On the 7th July 1988, the First Applicant was released by order of His Majesty King Mswati III, herein represented by the First Respondent but his conviction as well as the guilty verdict

for High Treason was maintained. The other Applicants also went through the same fate. The other Applicants were sentenced to 15 years imprisonment each.

[7] Before we proceed to examine the arguments of the parties before us, we wish to apologize profusely to the parties for the delay in handing down judgment due to other urgent matters which clamoured for our attention.

[8] The stated aim and purpose of the application before us is to have the record of proceedings which pertains to the trial of the Applicants, in which they and others were convicted of high treason, to be released to themselves. This, they say, is to allow themselves and their legal counsel to peruse the record for the purpose of deciding on the remedies which there might be in order to "clear (his) name" of the stigma and blemishes which furnish their good name and reputation.

[9] In his founding affidavit, the First Applicant lists various positions which he had held prior to his conviction, culminating in that of Principal Secretary of the Ministry of Justice and Constitutional Affairs. *Ex officio,* the incumbent of that public office, until most recently, also held the position of Secretary of the Judicial Service Commission, the statutory body which *inter alia* advises the Appointing Authority on the appointment of all Judges at diverse levels. This is mentioned in order to demonstrate the level of confidentiality and responsibility which the Applicant had bestowed upon him prior to his conviction, which by necessity impacts on the present matter before us, where he seeks to pursue the possible options opento him subsequent to his conviction and sentence. The other applicants, who later joined the matter, also held high levels of public office in the then prevailing traditional structures of government.

[10] Central to the objection to release the applicable records to the Applicants is the contention by the Respondents that the proceedings were conducted behind closed doors, or *in camera.* With reliance on that fact, the premise advanced is that in turn, it also precludes the records of proceedings to be availed to the Applicants.

[11] It requires to be noted that the first Applicant as well as his co-applicants, are not mere "busybodies" or persons who for some or other reason have taken an interest in the high treason trial of some years ago. The Applicants were indicted as accused persons who ended up with convictions and sentences of direct imprisonment. They have vested personal interests in the matter which differentiates them from others who merely might have an academic or other interest in the matter, which in itself could have cast it in a different light.

[12] In any ordinary criminal trial, an accused person in this jurisdiction has an automatic

> right to appeal against his or her conviction, or to have the matter taken on review if appropriate. In order to do so, it is a *sine qua non* to furnish the court which is to deal with the matter with a record of proceedings which were conducted in the court below. This is invariably an inflexible hard and fast requirement. Our jurisprudence is resplendent with cases which were to have been considered on the merits in the course of an appeal, but due to the absence of a record of proceedings against which the appeal lies, were upheld against the State for purely that reason. No Court of Appeal can decide whether a conviction and sentence is proper and justified if it is not able to have regard to evidence and procedural aspects which resulted in such conviction.

Otherwise put - whatever remedy the Applicants might or might not have resulting from their conviction and sentence of the crime of high treason - a most severe offence - entirely depends upon the availability of the record of

proceedings which resulted in that conviction and sentence. By so saying, we remain mindful of the statutory and other limitations which are stacked against the Applicants insofar as their rights are concerned in respect of appeal and review proceedings. However, those are not their only available remedies. Without descending to the realm of advising on legal rights pertaining to the issue at hand, if suffices to state that the door to potential redress has not finally closed upon them, which in turn would have resulted in an exercise in absolute futility. Instead, some options do remain available to the Applicants, which they might want to pursue in consequence of the legal advice which they seek to obtain once the records are availed to them.

[14] As stated above, the *crux* of the resistance against release of the records is founded upon the contention that since the proceedings before the tribunal were conducted *in camera,* it therefore should also follow that subsequent release of the records are automatically precluded.

Whether that is indeed so is the issue to be decided and with which contention this court disagrees.

[15] It is trite that where so required, criminal and civil proceedings may well be conducted behind closed doors or *in camera.* Both local and international precedents have numerous such justifications, as well as being founded in international law and instruments. As stated elsewhere in this judgment, the present matter did not result in a judicial decision to order proceedings to be conducted *in camera,* based on the applicable legal justifications to so order, but it came about by being so decreed by way of a gazetted decree, which in addition established the tribunal which heard the matter.

The tribunal itself did not exercise its own discretion with regard to openness of the hearing or otherwise, instead it followed the decreed mode of the hearing as was imposed upon it.

Therefore, it is not open to this court to now consider whether in fact it was in order to conduct the trial *in camera.* It is not the issue to decide. This court does not sit on appeal or on review in order to consider whether a proper exercise of discretion by that tribunal was exercised or not. It is a *fait accompli,* a given factor, that the tribunal which decided the fate of the Applicant and his co-accused merely followed the dictates of the decree which obliged them to not only hear evidence and decide upon the guilt of the accused persons before them, but also to conduct the trial *in camera,* if so requested by the pro-forma prosecutor. Also, there is no indication anywhere in the papers placed before us that the tribunal ordered anything to the effect that upon conclusion of the trial, the records, or judgment for that matter, should remain under lock and key, or inaccessible to the accused persons, for either a stated period of time or indefinately.

In S *v Pastoors1986 (4) SA 222 (WLD),* Spoelstra J set out a useful summary of the applicable legal principles which pertain to

directives as to when proceedings may be heard *in camera,* based on the *South African Criminal Procedure Act of 1977. Section 153 (2)* thereof reads:-

> *"If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct:*
>
> *(a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or he is authorized by the court; (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court."*

Spoelstra J said as follows, at 224B - F:

> *"The general broad approach can be summarized briefly as follows:*

18. *All trials are heard in open court accessible to any member of the public who wishes to attend. The reasons for this principle are fully discussed in the judgment of Ackermann J.*

19. *A court would encroach upon this general rule only where special circumstances are present requiring such an inroad to secure the proper administration of justice or where a public trial is prohibited by statute, for instance where minors are involved.*

20. *The onus of satisfying the Court that such special circumstances are present rests upon the party who alleges such circumstances and who brings an application that the basic rule be dispensed with.*

21. *A court has a discretion in a matter of this kind to dispense with the basic rule if an applicant satisfies the Court that the prescribed jurisdictional facts for the exercise of a discretion in terms of s 153 (2) are present, that is that there is a likelihood that harm may result to a*

person if he testifies at the proceedings. The harm may take any form and the nature thereof is one of the considerations which would be considered in exercising the discretion conferred by the section.

5. *The expression "a likelihood that harm may result" means a reasonable possibility of such harm and not a probability on the one hand or a remote or farfetched or fantastic one or the other.*

6. *If such likelihood that harm may result to any person, other than the accused, is shown, the Court has a discretion to make a direction in terms of s 153 (2) (a) and (b), or to refuse to accede to the request.*

7. *Where a reasonable possibility of harm has been established, and whether or not the Court should exercise its discretion in*

favour of an applicant, are questions of fact to be decided on the facts and circumstances of each particular case".

[19] The judgment of Ackerman J referred to is reported as S *v Leepile v and Others (1) 1986 (2) SA 333* (W), as well as a further few other law reports, all emanating from the same trial but relating to different applications to conduct proceedings *in camera,* some of which were decided under the auspices of S *ection 153 (1),* which permits the court to order an *in camera* hearing it of appears to the court that such a course would (not might):

"be in the interests of the security of the State or of good order or of public morals or of the administration of justice".

The Swazi Criminal Code differs from the South African Code referred to above and these authorities cannot be literally followed but if provides useful guidance as to the manner in

which our courts should exercise the discretion as to whether proceedings should be conducted in open court or otherwise. *Section 172 (5)* reads that:

> *" The High Court may, if it thinks fit, and any magistrates court may, if it appears to such court to be in the interests of good order or public morals or of the administration of justice, direct that a trial shall be held with closed doors or that (with such exceptions as the court may direct) females or minors or the public generally or any class thereof shall not be permitted to be present thereat; and if an accused person is to be tried or is on trial on a charge referred to in Section 66 (6)* (indecent acts, extortion blackmail-our insert), *the court may, at request of the person against or in connexion with whom the offence charged is alleged to have been committed (or if he is a minor, at the request of such person or of his guardian), whether made in writing before such trial or orally at any time during such trial, direct*

that every person whose presence is not necessary in connection with such trial, or any person or class of person mentioned in the request, shall not be permitted to be present thereat".

The overriding concern remains that unless special and compelling circumstances dictate the contrary, all criminal trials are to be held in open court and that the public at large are to be afforded reasonable access to the courts in order to attend and follow proceedings. This much is codified under Section 172 (1) which has it that:

"Every criminal trial shall take place, and the witnesses shall, subject to this Act or any other law, give their evidence viva voce, *in open court in the presence of the accused*

[22] The requirement of having criminal proceedings conducted in open court has also found its way into our Constitution, enshrined under Chapter III, the Bill of Rights or as it is stated, the Protection and

Promotion of Fundamental Rights and Freedoms. Section 21 which deals with the right to a fair hearing declares under Subsection (11) that:

> *"All proceedings of every court or adjudicating authority shall be held in public".*

[23] Subsection (12) authorises reasonable and acceptable limitations of this fundamental right as follows:-

"(12) Notwithstanding the provisions of Subsection (11), a court or adjudicating authority:

(a) may, unless it is otherwise provided by Act of Parliament, exclude from its proceedings persons other than the parties and their legal representatives to such extent as the court may consider-

(i) in circumstances where publicity may unduly prejudice the interests of

defence, public safety, public order, justice, or public morality or would prejudice the welfare of persons under the age of eighteen years or as the court may deem appropriate; or

(ii) in interlocutory proceedings;

(b) shall, where it is so prescribed by a law that it is reasonably required in the interests of defence, public safety, public order, justice, public morality, the welfare of persons under the age of eighteen years or the protection of private lives of the persons concerned in the proceedings, exclude from its proceedings persons, other than the parties and their legal representatives, to such extent as is so prescribed".

[24] *Vis-a-vis* the *South African Criminal Procedure Act of 1977*, our own *Criminal*

Procedure and Evidence Act of 1938 is thus amplified to a great extent by our Constitution, to go beyond the provisions of South African Law, as dealt with in the law reports referred to above.

[25] As indicated below, international instruments equally allow for trials to be heard *in camera* as and when necessary by courts of law or other adjudicating deemed bodies. There is however one resounding refrain throughout all of these which is that the discretion to so decide is vested in the courts. It is the courts of law before which accused persons appear on trial which have to weigh and consider the appropriate jurisdictional facts in order to derive the proper exercise of discretion. Only once that has been done can proceedings properly be conducted *in camera* when witnesses may give their evidence without the outside world being made aware of what was said or by who. Further, if records are to made inaccessible to either the public at large or

> to specific persons or classes of persons upon conclusion of a trial *in camera,* it has to be specifically ordered, including an order whether it be for a specified period of time or otherwise. This is a specific discretion to be exercised by a court or tribunal and is only to be done under well justified circumstances. No such order was made in the present matter and the Respondents do not rely on such a purported order either.

The facts of the present matter are on a totally different footing. The tribunal did not exercise its discretion in order to determine whether the proceedings properly were to be conducted behind closed doors, or not. This condition was decreed upon it and left it with no discretion. The *Tribunal Decree of 1987* had it under Section 8.4 that:

> *"All proceedings of the Tribunal or any part thereof shall be held in camera if the pro-forma Prosecutor, at any time, so requests, and the*

Tribunal shall comply with any such request".

[27] That the judgment of the Tribunal is apparently within the public domain seems to us to be borne out by the fact that it *prima facie* is enclosed in the Applicant's founding affidavit as "Annexure RM I". It consists of some 67 typed pages and it is under a heading of "JUDGMENT, delivered on 12th March 1988". However, it is not signed by the Chairman or any of the four members.

[28] *Ex facie* the "JUDGMENT", it reflects the First, Second and Third Applicants, amongst others, to have been convicted on both counts of the indictment, namely of High Treason and of contravening *Section 2 of the Protection of the Person of the Indlovukati Act of 1967.*

[29] The "JUDGMENT" details evidence heard in the course of proceedings, as well as the names of witnesses who testified at the trial. As such, for whatever it is worth, it

seems to us that any form of secrecy sought to surround the proceedings have in fact evaporated. In the event that "Annexure RM I" is indeed what it seems to be, albeit unsigned, namely the judgment of the Tribunal, the matter has by now been taken over taken by events. Otherwise put, "the cat has been let out of the bag" and the original purpose of having a trial *in camera* has by now been superceded.

[30] The relief which the Applicants seek, in their amended prayer for relief and after the first Applicant had been joined by two others, is that both the judgment and the notes of the Chairman of the Tribunal is sought to be availed to the Applicants. In tandem, it seeks to relieve the Chairman of the Tribunal, a former Chief Justice of Swaziland, to be released from any or all of the *in camera* conditions applicable to the *in camera* proceedings.

[31] Despite a diligent reading of the papers filed of record, some 231 pages are contained

in it, it remains a moot point as to whether in fact the proceedings were actually ordered to be behind closed doors. However, all indications point towards it.

[32] Apart from the Decree itself, the first Applicant says in paragraph 15 of his founding affidavit that he and the others were "arraigned and tried *in camera".* This is acknowledged to be so by the former Attorney General in paragraph 41.1 of his answering affidavit.

[33] In all probability, it seems to be an accepted fact, though not specifically evidenced as such, that the *pro-forma* prosecutor requested the proceedings to be conducted *in camera* and that by virtue of Section 8.4 of the Decree, it automatically resulted in compliance of that request.

[34] The right to public hearings is a universal practice but as stated above, judicial discretion may be exercised to order

limitations thereon, subject to jurisdictional facts being present. Article 14

(1) of the International Covenant on Civil and Political Rights and article 6 (1) of the European Convention on Human Rights expressly guarantee the right to an open hearing, similarly to our own Constitution.

[35] Article 14 (1) provides that ".. in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The essence of these core values is echoed in various other Charters and Instruments which equally seek to promote fair trials, *inter alia* that judicial proceedings be held in public, save for exceptions to the rule. The African Charter on Human and Peoples' Rights, the American Convention, the Statute of the International Criminal Court, as well as the Statutes of the International Criminal Tribunals for Rwanda and the former

Yugoslavia are all heavily inspired by article 14 of the International Covenant.

[36] The International Covenant on Civil and Political Rights, as well as the other instruments referred to, all make allowance for *in camera* proceedings. The press and public may be excluded from all or part of a trial for certain specified reasons, namely in the interest of morals, public order or national security in a democratic society, in the interest of the parties' private lives, or where the interest of justice otherwise so requires. The "interest of juveniles" is a further ground, referred to in the European Convention. The Rules of Procedure and Evidence of the International Tribunals referred to above also refers to the Trial Chamber going into closed session for reasons of public order or morality, safety, security or non-disclosure of the identity of a victim or witnesses, or for the protection of the interests of justice. However, Rule 79 (B) specifically requires that "the Trial

Chamber shall make public the reasons for its order".

[37] The Human Rights Committee of the United Nations emphasized that "the publicity of hearings is an important safeguard in the interest of the individual and society at large"

(General Comment No. 13 on article 14 of the Covenant). Apart from the "exceptional circumstances" provided for in article 14, "a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons" and notwithstanding the non-publicity of the trial itself when so ordered, "the judgment must, with certain strictly defined exceptions, be made public" *(UN compilation of General Comments, pp 123-124, para 6).*

[38] Trials held in secret are contrary to article 14 (1), such as the trial of eight former Zairian parliamentarians and another whose trial

was not held in public and were sentenced to fifteen years imprisonment *(Communication No. 138/1983, N Mpandanjila et al v Zaire, UN doc. GAOR, A/41/40p 126 para 8.2).*

[39] Of course the same coin also has another side to it, where it is obligatory for prosecutions to be ordered behind closed doors when circumstances so require, and which is universally sanctioned, such as in the exception noted above. The right to a fair trial under article 14 (1) of the Covenant was violated in a case where the trial court failed " *to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross examine the witnesses and present the accused's defence".* The Supreme Court did mention this issue but it *"failed to specifically address it when it heard the appeal" (Communication No. 770/1997, Gridin v Russian Fedentian, UN doc. GAOR, A/55/40 (Vol II) p 176, para 8.2*

and para 3.5 at p 173) where it was alleged that the court room was crowded with people who were screaming that the accused should be sentenced to death).

What all of this serves to show, as applicable to the matter at hand, is that trials behind closed doors are the exception and not the rule; that there are specific grounds which may well result in such orders; that the discretion to so rule is dependant upon the existence of the applicable jurisdictional facts; and that the discretion must be judicially exercised. Hand in hand with these principles is the universal requirement that following a hearing *in camera,* all of it or only partially so, the judgment has by necessity to be made public. Secret trials with secret judgments bode the gravest ill on any judicial system where the rule of law has any application and where a fair trial has any meaning at all.

[41] Where secret trials result in imprisonment, such as fifteen years in the matter before us, it becomes even more imperative to disclose the judgment as well as the

records and notes of proceedings especially to those who were intimately affected by it. To hold otherwise would certainty lead to an erosion of the esteem of the judiciary itself, over and above public policy and a respect of human rights in any open and democratic society.

[42] If indeed there was justification or good cause to keep the records and judgment a secret affair, such as grounds of state security or public order or whatever, the Respondents would have brought, it to the fore. They did not do so by any reasonable measure. Instead of seeking to justify continued non-disclosure, the Respondents concentrated the focus of their resistance to an alleged failure by the Applicants to justify why indeed they require the records, notes and judgment. This stance demonstrates a failure to understand that the standard norm is to have trials conducted in open court and that the public must have reasonable access to all records generated in the

process. Also, with rare exceptions, judgments are handed down in open court. If the Respondents wanted it otherwise, they did not avail themselves to the opportunity to do so, as was incumbent upon them.

[43] It is therefore that this Court inevitably concludes that the Applicants herein should be granted their prayers for relief, as amended and set out below, and that the opposition thereto should be dismissed.

[44] It is ordered as follows;

1. Prince Mfanasibili Dlamini and Llewelyn George Mzingeli Msibi are hereby joined as the second and third applicants, respectively.

22. *The seventh respondent, the former Chief Justice of Swaziland, the Honourable N.R. Hannah, is hereby authorised within 21 days of service of this order upon him by the Registrar of*

the High Court of Namibia, to provide copies or make available to the applicants or their legal representatives through the said Registrar, for making copies by them in Namibia, the full transcript or such narrative notes as were recorded during the high treason trial of the applicants which culminated in their conviction in 1988.

23. *The aforesaid Honourable Justice is hereby authorised to hand over to the applicants a copy of the judgement delivered in the aforesaid trial; or* ***alternatively*** *to indicate or signify whether or not the enclosed "judgement"(Annexure "A") which is unsigned, is the actual judgement that was delivered by the Tribunal of which he was the Chairman.*

24. *The Registrar of this Court is ordered to forward this order to her counterpart in Namibia who is authorized and requested to serve this order.*

25. *All costs pertaining to the service and or execution of this order are to be borne by the applicants, jointly and severally, each paying the other to be absolved.*

26. *Each party shall bear its own costs of the application.*

S.B. MAPHALALA

M.D. MAMBA
JUDGE

27.

J.P. ANNANDALE

PRINCIPAL JUDGE

JUDGE