IN THE HIGH COURT OF SWAZILAND

REASONS FOR THE COURT'S DECISION

CASE NO. 527/2014

In the matter between:-

THE LAW SOCIETY OF SWAZILAND	**APPLICANT**
AND	
MPENDULO SIMELANE N.O. (Judge of the High Court of Swaziland)	**1ST RESPONDENT**
CHAIRPERSON: JUDICIAL SERVICE COMMISSION (JSC)	**2ND RESPONDENT**
SWAZILAND GOVERNMENT	**3RD RESPONDENT**
ATTORNEY GENERAL N.O.	**4TH RESPONDENT**

Neutral citation	**:**	*The Law Society of Swaziland v Mpendulo Simelane N.O. & 3 Others (527/2014) [2014] SZHC 179 (01 August 2014)*
CORAM	**:**	**DLAMINI T.A. AJ,** **SIMELANE M.E. AJ,** **DLAMINI B.S. AJ.**
Heard	**:**	**01 August 2014**
Delivered	**:**	**01 August 2014**

Summary: ***Constitutional law –*** *Appointment of Judges of the Superior Courts is the exclusive preserve and prerogative of His Majesty the King on the advice of the Judicial Service Commission. In terms of section 11 of the Constitution the King and iNgwenyama is immune from suit or legal process in any case in respect of all things done or omitted to be done by him.* ***Civil procedure – Non-joinder –*** *Parties with a direct and substantial interest in the proceedings must be joined.* ***Held:*** *Application dismissed.*

The Court,

1. As a prologue to this, the reasons for the decision of the Court in respect of this constitutional matter before us, it behoves the Court to point out at the very outset that in terms of Section 153(1) of the Constitution of the Kingdom of Swaziland Act No. 1 of 2005, the appointment of the Chief Justice and the other Justices of the superior courts, is the exclusive preserve and prerogative of His Majesty the King, on the advice of the Judicial Service Commission. We say *'exclusive preserve and prerogative'* of His Majesty the King because of the use of the word *'shall'* therein. Further to this prerogative of His Majesty the King, and in terms of Section 11(a) of the same Constitutional Act of Swaziland, headed ***'Protection of King and iNgwenyama in respect of legal proceedings'***, the King and iNgwenyama **shall be immune** from *'suit or legal process in any case* ***in respect of all things done*** *or omitted to be done by him….' [Court's emphasis]*

2. The Legislature in Section 11(a) again made use of the word *'shall'*. The use of the word *'shall'* in these two constitutional provisions has different meanings. In the first instance, and in relation to Section 153(1) it means that the appointment of the Chief Justice and other Justices of the Superior Courts is the sole responsibility of His Majesty the King, albeit on the advice of the Judicial Service Commission. Then in terms of Section 11(a) the use of the same word *'shall'* signifies that it is generally imperative or mandatory that His Majesty the King not be subjected to any suit or legal process, in any cause in respect of all things done by him in the execution of his Mornachial duties. On the one hand the statute places an imperative and mandatory duty on the King, and on him alone, of course on the advice of the JSC, to be the only one with the constitutional authority and power on the appointment of the head of the Judiciary, the Chief Justice, and other Justices of the Superior Courts. On the other hand, and constitutionally, the use of the word in Section 11(a) encapsulates that His Majesty the King is exempted from any suit or legal process flowing from all things done by him. And this includes the appointment of the Chief Justice and all Justices of the superior courts of this country. Under no circumstances therefore should any litigant, attempt, directly or indirectly, to challenge the authority of His Majesty the King in any cause in respect of all things done or omitted to be done by him! Once the King has spoken it is the end of the

matter. It is final. And as a Swazi Nation that is where our old adage of ***'Umlomo longacali manga' [the Mouth that tells no lies]*** comes from.

3. Now, this matter before us principally concerns the appointment of the 1st Respondent as Justice of the High Court of Swaziland. The Applicant, the Law Society of Swaziland, has come in haste to this Court seeking a declaratory order that the appointment of Justice Mpendulo Simelane as a Judge of this bench is inconsistent with the provisions of the Constitution of Swaziland and therefore unconstitutional, null and void and of no force or effect and that it be accordingly set aside. Further, the Law Society also seeks an order interdicting and restraining the 1st Respondent from performing any functions as a Judge of the High Court of Swaziland pending the final determination of this application.

4. The application is opposed by the Respondents. As a preliminary step the 1st Respondent raises points of law *in limine* which he submits are sufficient to unseat this application without even venturing into its merits. The first and principal point goes to the very heart of this application. He submits that he was appointed Judge of the High Court of Swaziland by His Majesty King Mswati III, King and *iNgwenyama* of Swaziland; in the exercise of the powers conferred upon him by Section 153 of the Constitution of this country. He goes on to submit that in terms of Section 11 of the

Constitution, the King and *iNgwenyama* is immune from legal suit or legal process in any cause in respect of all things done or omitted to be done by him. According to the 1st Respondent and *ex facie* prayer 2(a) of the Notice of Application, the Applicant is challenging His Majesty's appointment of him (1st Respondent) as a Judge of the High Court of Swaziland, contrary to the provisions of section 11 and which is therefore legally incompetent.

5. The 1st Respondent also raises the points of law of *non–joinder and mis-joinder*. In relation to the former, he contends that the Judicial Service Commission should have been joined as a party to this application by virtue of the fact that it has a direct and substantial interest in the matter. On the latter he submits that since there is no relief sought against the Chairperson of the Judicial Service Commission, his joinder and citation was unnecessary in the circumstances and as such constitutes the legal flaw of mis-joinder.

6. Interestingly, when the matter was brought to attention of the Presiding Judge, Dlamini T.A, he noted the Applicant had not filed its replies to the 1st Respondent's answer. We pause here to mention that the matter last appeared before the Chief Justice on 13 June 2014, whereat the Applicant was represented by Attorney Mr. Howe and the Respondents by Attorney Ms. N. Nkhambule. At that appearance of the matter, a consent Order was

granted to the effect that; 1) the Applicant was to file its replying affidavits, if any, on or before 24 June 2014, 2) that the Applicant was to paginate the record on or before 11 July, 2014, 3) that the Applicant must file its heads of argument on or before 14 July, 2014; 4) that the Respondents must file its heads of argument on or before 24 July, 2014; and 5) that the application will be heard in argument on the 01st August, 2014.

7. Then the Applicant's Counsel, Advocate Skinner, appeared before Dlamini T.A. AJ in chambers on 31 July 2014, together with his instructing Attorney, Mr. Howe, and a Mr. Malaza who was standing in for the Attorney General and they were accompanied by the Registrar of the High Court. Advocate Skinner informed Dlamini AJ that he had instructions from the Law Society to apply for his recusal, since, as he put it, they had issues with his appointment as a Judge too. Dlamini AJ advised them to prepare a full application with reasons for the recusal application and serve it on the Respondents and that the matter was to proceed the next day, being the 01st August, 2014, at 09:30am.

8. The matter was indeed called at 09:35am before the full bench for hearing. The Respondents were represented by Advocate Kades accompanied by his instructing Attorney from the Attorney General's Chambers, Ms. N. Nkhambule. But the Applicant's representative, Advocate Skinner was not

before Court, nor was his instructing Attorney, Mr. Howe. The Court instructed a Police Officer (Court Orderly) to call out the name of the Applicant 3 times outside Court. The Police Officer went out of Court and called out the name of the Respondent 3 times as directed by the Court and there was no response, thus there was no appearance for the Applicant.

9. Advocate Kades advised the Court that his instructing Attorney had written to the Applicant's Attorneys (Howe Masuku Nsibandze Attorneys) on 10 July, 2014, bringing it to their attention that they were out of time in respect of filing their replies. They further wanted to know if they would still be filing the replies as ordered by the Court. The Applicant's Attorney responded on 17 July, 2014, to say that they shall be filing the replies as soon as possible. The only impediment in them so filing was apparently that Mr. Manzini, the deponent to the founding affidavit was out of the country. Advocate Kades brought it to the attention of the Court that despite the reminder and the undertaking by the Applicant's Attorneys that they would be filing, nothing had been forthcoming. Advocate Kades then applied for the dismissal of the matter in light of the failure of the Applicant to appear in Court on the date set for the hearing of the matter and for the dilatory manner they have dealt with their own application.

10. No reason was advanced to the Court for the non-appearance of the Applicant's Attorney or the instructed Advocate. Advocate Kades and his instructing Attorney informed the Court that he was also not aware why they had failed to appear as nothing had been communicated to them. This Court is therefore not aware of the exact reason for the failure to so appear. Nothing was explained to the Court. The Applicant is the one which, in haste, came to this Court for urgent relief. The Court cannot overlook the fact that the same Applicant has been dilatory in so far as the filing of its replies and heads of argument was concerned. This, even after it had been reminded by the Respondents' Attorneys on the issue. We point out as well that Dlamini T.A. AJ personally asked Attorney Mr. Howe, when they appeared in his chambers on 31 July 2014, about the Applicant's replies and he informed him that they were waiting for the Respondents to file their heads of argument. Then, Dlamini T.A. AJ had not been aware that there had been correspondence exchanged between the parties where Attorney Howe had undertaken to file the replies soon. So naturally we were taken aback when this fact was brought to the attention of the Court. Attorney Mr. Howe was therefore not being candid with the court when he stated that his excuse for not filing was now that they were awaiting the Respondents' heads of argument. What do the heads of argument have to do with replies anyway?

11. Ordinarily, the Court would not have been so inclined to dismiss this matter, but we point out that this matter is of national importance. It is a direct challenge on the powers of His Majesty the King to appoint Judges of this Court. We have already stated at paragraph 2 above that in terms of section 11(a) of the Constitution the King and *Ingwenyama* is immune from suit or legal process in any cause in respect of all things done by him. It is a finding of this Court therefore that this application was frivolous from the moment it was launched and that it was bound to fail.

12. Then there is the point *in limine* of non-joinder. This is indeed valid point which the Applicant, in its own wisdom, chose not to reply to. The failure of the Applicant to join the Judicial Service Commission, the body entrusted with advising His Majesty the King, on the appointment of Judges is a clear case of non-joinder. In the circumstances, the orders sought by the Applicant could not have been granted without the Judicial Service Commission being joined as a party in the application. It is without any semblance of doubt that the Judicial Service Commission has a direct and substantial interest in this matter and the failure to so join it is fatal to the Applicant's case. There are several cases where courts have correctly dismissed proceedings on non joinder alone. It has been held that if a party is non-suited by reason of non-joinder, the obvious result is dismissal of the case on that ground alone. In **The Commissioner of Police and Another v**

Maseko Civil Appeal No. 3/2011 for instance, the Supreme Court stated that ***"…non-joinder is a matter that no court, even at the latest stage in the proceedings, can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who had no opportunity to state their case."***

13. For the reasons set out above and the manner the Applicant has dealt with a matter it brought in haste to this Court, it is the considered view of this Court that this application be and is hereby dismissed with an order for costs against the Applicant on the punitive scale which costs the Court orders that they be paid by the members of the Executive Council of the Applicant jointly and severally the one paying the other to be absolved and these are to include certified costs of Counsel.

T.A. DLAMINI AJ

B.S. DLAMINI AJ

M.E. SIMELANE AJ

DATED AT MBABANE ON THIS 01ST DAY OF AUGUST 2014

For the Applicants : ***No Appearance.***
For the Respondent: ***Advocate Kades (Instructed by the Attorney General).***