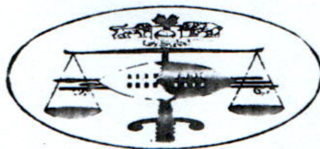

IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 249/2016**

In the matter between:

The Commission of the Anti-Corruption Commission **Applicant**

and

Gideon Dlamini **1st Respondent**

Fred Ngeri **2nd Respondent**

Sindile Ngeri **3rd Respondent**

Neutral Citation: The Commissioner of Anti-Corruption v Gideon Dlamini and Two Others (249/2016) [2016] SZHC 131 (12th June, 2024)

Coram : M. Dlamini, J. Mavuso and Z. Magagula JJJ

Heard : 4th April, 2024

Delivered : 12th June, 2024

Civil Procedure – definition of a judgment: *...a judgment albeit consisting of facts of the case, the issues, evidence by the parties and the findings, it is the reasoning or rationale for the orders granted.* [20]

orbiter dicta : *<u>obiter dicta</u> are those remarks or opinions by a judge which are not necessary or do not influence the decision taken.*

They are by the way because they are incidental and do not form part of the decision or orders. Incidental or by the way as they might be, the judge is entitled to make them. He cannot therefore be faulted. This style of judgment writing has been there since 1782.[1] *Why then does the law allow for obiter dicta, might be a question to those who are about business unusual. They provide as guidelines in the future. They are only persuasive and certainly not binding.* [21]

Appealability : *[a]n aggrieved litigant intending to lodge an appeal or a review for that matter, the litigant cannot appeal the entire judgment. He must challenge that portion of the judgment which adversely affects him. In the legal parlance, the appeal lies in the ratio – the reason for the adverse orders and never on the* ***dicta*** *of the judgment.* [22]

Summary : His Lordship, the Chief Justice dealing with an *ex-parte* application in chambers authored that a number of provisions in the Prevention of Corruption Act No.3 of 2006, (the Act), the enabling legislation for applicant herein were 'unconstitutional'. The applicant lodged an appeal. The appellate court referred the matter to this full bench for deliberation. This court *mero motu* raised the question of competency by this court with regard to the impugned judgment.

Epilogue

[1] The applicant, a special investigation entity established in terms of section 3 of the Act instituted an *ex parte* application in terms of section 13(2) of the Act. The application landed on the Chief Justice's desk. He handled it as per the Act. Although the Notice of Motion is undated, the affidavit of the investigator, one Sipho Mathew Mthethwa indicates 19th July, 2016.

[1] See Legal Dictionary

[2] The suspects sought to be arrested, searched and items seized from their premises were of a high profile standing. These were the respondents herein. The 1st respondent was the Minister of the Crown then. The 2nd respondent had married the 3rd respondent who was a daughter of a high ranking prince. According to the charge sheet,[2] the respondents faced two (2) counts of corruption and four counts of fraud.

[3] On the corruption charges, it was said that 1st respondent abused his powers as the Minister of the Crown by accrediting 2nd respondent who was his personal adviser without the authority of the Government thus causing 2nd respondent to have access to Government Funds through SIPA (Swaziland Investment Promotion Authority). The second charge under the Act was that 1st respondent facilitated a joint venture between an entity called Small Enterprise Development Company (SEDCO) and a company (presumably as the charge was silent on that, whose directors and shareholders were 2nd and 3rd respondent as the name suggest) Ngeri Group Holdings for purposes of establishing a Swazi Traders Link, a platform for online sells and purchases.

[4] The first count of fraud points to a cash "actual and/or potential" loss of E18, 000.00. While the subsequent points to E36, 000.00, E5000.00 and USD 90 000. A number of bulky attachments were annexed to the founding affidavit in support of the application.

[5] The Chief Justice then authored a judgment dated, 12th October, 2016. He dismissed the *ex parte* application. According to the Registrar's date stamp, the applicant lodged an appeal on the 31st October, 2016. It appears that nothing was done until 28th September, 2018 when the applicant prepared a record of proceedings in respect of its appeal with the appellate court.

Notice of Appeal

[6] It is imperative in this matter to quote verbatim the Notice of Appeal lodged at the instance of the appellant for reasons that will become clear later in this judgment. The Notice of Appeal with the Registrar's date stamp of 31st October, 2016 reads:

[2] Page 5 of the Supreme Court of record of proceedings

"PLEASE TAKE NOTICE that the Crown having been granted leave to Appeal the judgment on the 12th October 2016 by the Honourable Chief Justice, hereby note an appeal on the following point of law:

> *1. The Honourable Court a quo erred in law in declaring that Sections 11, 12, 13 and 17 of the Prevention of Corruption Act of No. 3 of 2006 are inconsistent with Section 22(2) of the Constitution of Swaziland Act No. 1 of 2005 and therefore unconstitutional."*[3]

[7] When the appeal was finally enrolled and heard in the Supreme Court, an order signed by the Registrar on the 17th October, 2019 pronounced:

"Having heard counsel for the Appellant and the 3rd Respondent, no appearance having been made for the 1st and 2nd Respondents, the following Order is made:

1. *The Appeal before this Court in Criminal Case Number 14/2026 is hereby removed from the Roll.*
2. *In view of a misdirection purportedly granting the Appellant the right to make constitutional challenges before this Court without a judgment of the High Court of Eswatini sitting in its constitutional jurisdiction having been delivered, the constitutional issues raised in the Appellant's Notice of Appeal dated 1st November 2016 namely that:*

"The Honourable Court a quo erred in law in declaring that Sections 11, 12, 13 and 17 of the Prevention of Corruption Act No.3 of 2006 are inconsistence with Section 22(2) of the Constitution of Swaziland Act No.1 of 2005 and therefore unconstitutional."

be and is hereby referred to a Full Bench of the High of Eswatini for adjudication on the same papers before this Court as may amplified by the Appellant.

3. *The Application to the High Court of Eswatini as referred to above and all supporting documentation shall be served personally on three Respondents or in such other manner as may be directed by the said High Court."*[4]

[8] From the file, nothing appears to have been done by the applicant as there are no notices

[3] Page 3 of the Record of Proceedings

[4] Pages 176 – 177 of the Record of Pleadings

of set down of the matter. The matter was however, resuscitated as it was placed before us for a date on 29th November, 2023, five years after the directive by the Supreme Court and more than seven (7) years after the impugned judgment of the learned Chief Justice. Why? This is not a question facing this court. However, it is a very pertinent one following that it had since become common knowledge that the entire Commission in the name of the applicant went into hibernation after the judgment by his Lordship, the Chief Justice. Results were the corresponding repercussions in the rate of corruption in the Kingdom. Good law abiding citizens reacted by venting out their frustrations at the People's Parliament which assembled at its constituency in October, 2023.

[9] When the matter was finally enrolled on the 29th November, 2023, applicant had not complied with the order of the Supreme Court of 17th October, 2018. A long postponement of the case was sought. It was declined. Service was eventually effected upon all the respondents. When all the parties were before court, the court *mero motu* raised the question of its competency in adjudicating on the merits of the Appeal. It invited all counsel to address it on the matter. The matter was heard on the 4th April, 2014.

Issue

[10] The question on competency of this court rests on the question on whether at law, applicant was entitled to raise as an appeal, the ground reflected in its notice of appeal.

Adjudication

[11] The approach in determining a response to the above question is to refer to the rules governing appeals. Rule 14 (1) of the Court of Appeal Act 74 of 1954 as amended reads:

> "*Right of appeal in civil cases.*
>
> *14. (1) An appeal shall lie to the Court of Appeal –*
>
> *(a) from all final judgment of the High Court; and*
>
> *(b) by leave of the Court of Appeal from an interlocutory order, an order made <u>ex parte</u> or an order as to costs only.*

(2) The rights of appeal given by sub-section (1) shall apply only to judgments given in the exercise of the original jurisdictions of the High Court."[5]

[12] The key words herein is "judgment" following that the Rules grant the right of appeal upon a judgment passed by the presiding officer over a matter.

<u>What is a judgment?</u>

[13] Sneha Mahawar[6] stated of a judgment; "*The word 'judgment' is derived after combining the two words namely, 'judge' and 'statement*'. The court in Surenda Singh v State of UP[7] stated of a judgment "*A judgment is a final decision of the court intimated to the parties and the world at large by formal 'pronouncement' or 'delivery.'*

[14] It is almost impossible to define what a judgment is without referring to two legal concepts, viz., *ratio decidendi* and *obiter dictum*. Schreiner JA[8] stated[9] of a *ratio decidendi*, "*the essence reasons given for the decision or general grounds on which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision.*"

[15] De Villers CJ[10] seemed to have drawn a distinction between reason and *ratio* as follows:

> "*.....whatever the reasons for a decision may be, it is the principle to be extracted from the case, the <u>ratio decidendi</u> which is binding and not necessarily the reasons given for it.*"

[16] Schreiner JA clarified;

> "*It may be that the contrast between a reason and the <u>ratio</u> depends mainly on the meaning attached to those words in their context by the*

[5] Rule 14 (1) of the Court of Appeal Act 74 of 1954

[6] Ramaiah Institute of Legal Studies: Judgment and Decrees of Civil Procedure 1908

[7] [1954] AIR 194 [1954 SCR 330]

[8] Pretoria City Council v Levinson 1949 (3) SA 305 at 316 -7

[9] With reference to Halsbury Laws of England vol 19 sec 556 note (i) (2)

[10] Collett v Priest 1093 Ad 290 at 302

users. As I understand the ordinary usage in this connection, where a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the ratio decidendi, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts (cf. Tidy v Battman (1934, L.J.K.B. 158 at p. 162)) and (c) (which may cover (a) that they were necessary for the decision, not in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons."[11]

[17] Writing similarly, the Constitutional Court, constituting of a full bench reflected:

"*It happens fairly frequently that a court will give more than one basis for determining an issue, each of which bases is dispositive. Do the second and subsequent bases become obiter purely because the first – standing all by itself – is dispositive of the dispute; or vice versa? I think not. The answer must still lie in whether each of the many prongs of the court's reasoning is central to the resolution of the issue under consideration. If the additional bases are central to the reasoning, not subsidiary and not mere reasoning on the facts, they are as much part of the ratio decidendi as the first bases.*"[12]

[18] The same court sitting in another matter also pointed out:

"*...in Garrido that the statement about evidence in Geuking was not obiter because it formed part of this Court's reasons for concluding that the subsection is not unconstitutional. These reasons including the statement about evidence were part of the judgment's ratio decidendi.*"[13]

[19] Brand, AJ authored;

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[11] [1949] (3) SA, at 317

[12] Turubull Jackson v Hibiscus Court Municipality and Others 2014 (6) SA 593

[13] Para 90, Director of Public Prosecutions, Western Cape, v Tucker 2022 (1) SCR 339

"Of course, it is trite that binding authority of precedent is limited to the <u>ratio decidendi</u> (rational or basis of deciding) and that it does not extend to <u>obiter dicta</u> or what was said "by the way".[14]

[20] The upshot of the above is that a judgment, to a lay person, may appear to be the entire statement or writing of a judge. However, to a legal mind, a judgment albeit consisting of facts of the case, the issues, evidence by the parties and the findings, is the reasoning or rationale for the orders granted. This definition of a judgment is fortified by the Legal Dictionary which states' "*When a written judicial opinion is made, it contains two elements: (1) <u>ratio decidendi</u>, and (2) <u>obiter dicta</u>. <u>Ratio decidendi</u> is the Latin term meaning, 'the reason for the decision," and refers to statements of the critical facts and law of the case. These are vital to the court's decision itself. Obiter are additional observations, remarks, and opinions and other issues made by the judge. ..... In reading a court's decision, <u>obiter dicta</u> may be recognized by such words as 'introduced by way of analogy,' or 'by way of illustration.' <u>Obiter dicta</u> may be as short as a brief aside or a hypothetical example, <u>or as long as a thorough discussion of relevant law</u>. In either case, the additional information is given to provide context for the judicial opinion."* **(Underlined, my emphasis)**

[21] I understand the Legal Dictionary to postulates that *obiter dicta* are those remarks or opinions by a judge which are not necessary or do not influence the decision taken. They are by the way because they are incidental and do not form part of the decision or orders. Incidental or by the way as they might be, the judge is entitled to make them. He cannot therefore be faulted. This style of judgment writing has been there since 1782.[15] Why then does the law allow for *obiter dicta,* might be a question to those who are about business unusual. They provide as guidelines in the future. They are only persuasive and certainly not binding as do *ratio decidendi.*

[14] Camps Bay Ratepayers and Residents Association and another v Harrison and Another 2011 (4) SA 42 (CC)

[15] See Legal Dictionary (supra)

[22] There is a second aspect of a judgment that needs discussion in this case. The principle of the law was well articulated by Wessels J,[1] as follows, "*Courts of law... are not constituted for the discussion of academic questions and they require the litigant to have not only an interest, but also an interest that is not too remote.*" An aggrieved litigant, intending to lodge an appeal or a review for that matter, cannot appeal the entire judgment. He must challenge that portion of the judgment which adversely affects him. In legal parlance, the appeal lies in the *ratio* – the reason for the adverse orders - and not on the *dicta* of the judgment.

Case at hand

[23] I have already highlighted the ground for appeal as articulated by the applicants before the Supreme Court herein of which we are called to adjudicate upon. It reads:

> *"The Honourable Court a quo erred in law in declaring that Sections 11, 12, 13 and 17 of the Prevention of Corruption Act of No. 3 of 2006 are inconsistent with Section 22(2) of the Constitution of Swaziland Act No. 1 of 2005 and therefore unconstitutional."*[2]

[24] The question is whether it was competent of the applicant to appeal based on this ground? Put differently, the question is whether the opinion of the Judge *a quo*, that certain provisions of the Act were unconstitutional was the basis upon which he dismissed the application for a warrant of arrest, search and seizure by the applicant that served before him in chambers? In terms of our discussion above, the poser is, "Was the pronouncements that certain provision of the Act were unconstitutional formed the *ratio decidendi* or mere *orbiter dicta* of the judgment? The answer lies in the impugned judgment itself.

[25] The learned Chief Justice, having pointed out the orders sought, then embarked on the Act establishing the applicant. He highlighted the purpose and composition of the Act. He went further to state the appointing authority of the two high ranking officers of the Commission, expressing that they were, in terms of the Act, independent in their

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[1] Darlrymple and Others v Colonial Treasurer 1910 TS 372 at 390; see also Cabinet of the Transitional Govt of SWA v EINS 1988 (3) SA 369 at 388

[2] Note[1]

functions. He did point out that the officers were guided by justice, fairness and the rule of law in the discharge of their functions and that they were enjoined to protect "*fundamental rights and freedoms entrenched in our Constitution,*"[18] and ought to desist from abusing their powers in so doing.

[26] The learned Chief Justice then mentioned the prerogative of the Commissioner to appoint investigators in conjunction with the Minister for Justice and Constitutional Affairs. He reiterated the function to investigate and the right to decline to investigate corruption matters without divulging the reason thereof, if declined. He also mentioned that the limitations in the investigation that the Commissioner may not enter premises to search and seize exhibits without a court order upon a written application and that such an application was *ex parte*. He highlighted that once an application is successful, the *'Commissioner'*, with the police officers may enter *"premises, motor vehicles, receptacles, offices, residences and business premises*"[19] of the suspects and "*consequently have the person arrested.*"[20] The learned Chief Justice then wrote:

> *"Sections 11, 12 and 13 of the Act undermine and contravene the principles of audi alteram partem, with regard to the entry and searching of the premises as well as the seizure of property and the consequent arrest of the person being investigated. The powers of the Commission in this regard are far-reaching and have a devastating effect on the dignity of the person being investigated. He foot-noted this by reference to section 18 of the Constitution. The right of the individual arbitrary search or entry into the premises is undermined."*[21]

[27] He proceeded to explain, "*The drastic nature of the Act flies in the face of the Constitution which provides the following:*"[22]The learned Chief Justice then numerated from the Constitution various sections, commencing with section 18 on the inviolability of the dignity of a person, and that a person shall not be searched in both in his person or

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[18] See page 3 para 3 of the impugned judgment

[19] Note[17], para7

[20] *supra*

[21] Note [17]para 8

[22] *Supra* at para 9

his property or his confidential communication other than that person's consent or, and the Chief Justice expressed, quoting sub (2) of 18 unless such is by provision of the law. He further quoted sections 18(2) (a), (b), (c).and (d).

[28] The Chief Justice also authored:

"The powers of the Commission under section 11, 12, 13 and 17 of the Act are not supported by section 22(2) of the Constitution. To that extent these sections of the Act are unconstitutional. Section 17 of the Act seeks to give immunity to the Commission in respect of the exercise of its powers under section 11, 12 and 13 of the Act, which as I have pointed out, are unconstitutional. Incidentally, the Constitution is the Supreme law of the land, and, if any other law is inconsistent with the Constitution that other law shall to the extent of the inconsistency be void. The King and Ingwenyama and all the citizens of Swaziland have the right and duty at all times to uphold and defend the Constitution. Any person who by himself or in concert with others by any violent or other unlawful means suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act or aids and abets in any manner any such person commits offence of treason." [23]

[29] Of critical importance and note in his judgment is that the learned Chief Justice ended his discussion of the constitutionality or otherwise of sections 11, 12, 13 and 17 of the Act as follows:

> *"In order to ameliorate the drastic nature of the Act, the legislature has provided that the investigator or officer designated in writing by the Commissioner to investigate would lodge an application in writing and specify the grounds for the application. The application should establish a prima facie case warranting prosecution."* [24] **(Underlined, my emphasis)**

[30] Having articulated the above, more particularly para 11 of his judgment, the learned Chief Justice took his time to focus on what constituted *prima facie* evidence. He first referred to Black's Law Dictionary, then the legal authors such as Hoffmann and Zeffert

[23] Note[17] at para 10

[24] Note[17] para 11

and to a number of case law, citing and quoting from those cases, using the South African and Lesotho jurisprudence. He went a step further with regard to the case law cited from the Kingdom of Lesotho, to narrate the brief facts of the case, articulating the *ratio* on *prima facie* case.

[31] His Lordship, the Chief Justice reverted to section 11 of the Act and authored:

> *"Furthermore, the powers of the Commission undermine the fundamental rights of the person under investigation, and in particular the presumption of innocence as well as the right to remain silent. The Act requires that the person investigated should submit a sworn statement on the allegations and further furnish books of accounts and other information."*

[32] The learned Chief Justice then quoted *ad seriatim* sections 11(1), (2), (3), 12 (1)(a), (b), (c), (d), (e), (3)(a), (b) (4) and (5). He immediately thereafter stated:

> *"The question before this court is whether the evidence adduced by the applicant does establish a prima facie case against the three respondents under investigation……"*

[33] On the above poser, the learned Chief Justice then took much time referring to the founding affidavit by the investigator who had filed it in support of his prayers for the search and seizure orders. He stated that the investigator deposed that the suspects contravened sections 21, 23, 24, 41, 42 and 57 of the Act and that they *"organized themselves into a criminal enterprise with the main purpose of committing various crimes through a contentious Public Private Partnership arrangement which involves setting up an online trading platform through the partnership organization."*[25] The learned Justice *a quo* correctly proceeded in quoting from the affidavit serving before him, *"the parties have a long term standing relationship which eventually developed into a corrupt relationship.....the parties connived, hatched a strategy to set up a special purpose vehicle through this fictitious Public Private Partnership between the small Enterprise Development Company (SEDCO) and NGERI Group holdings (NGH). The Public*

[25] Note[17] para 20

Private Partnership was used to lure unsuspecting business and Swaziland co-operating partners (Embassies) to make donations. The parties purported that donor funds were going to be used to fund activities of the Public Private Partnership, when in fact this was not true."

[34] Referring again to the founding affidavit, he pointed out that as a result of the suspects conduct, the Government suffered prejudice, He eloquently concluded from the evidence of the investigator which came in an affidavit form;

"It is common cause that the respondents conceived a business idea to establish a Public Private Partnership consisting of an electronic online trading platform that would provide a market for small business in the country and further advertise these businesses and sell their merchandise online. Donation were sought and obtained from certain companies within the county towards establishing the business. The donations received were small ranging from E5 000 (five thousand emalangeni[sic]) to E36 000 (thirty six thousand emalangeni [sic]) save for the Embassy of Qatar which donated E1 366 133.71 (one million three hundred and sixty six thousand one hundred and thirty three emalangeni [sic] seventy one cents)[26]. He continued to point out further as evidence that a memorandum of understanding was concluded between NGH and SEDCO. On the opening and operation of a bank account he stated, *"[a] bank account was opened at First National Bank in Mbabane where the donations were deposited. The second and third respondents were signatories of the account as well as the beneficiaries of the account."*[27]

[35] The learned Chief Justice then made a definite findings on whether the applicant did demonstrate a *prima facie* case. He found that there was no *prima facie* case in the following:

- in as much as there was evidence pointing that Government procedures and regulations were flouted when forming the Public Private Partnership,

[26] Note[17] para 23

[27] *Supra*, para 24

there was no *prima facie* evidence *"warranting prosecution of the respondents under the Act."*[28]

- the respondents organized themselves into criminal enterprise with the intention to commit the crimes mentioned.[29]

- formation of the partnership was *"as a vehicle to lure unsuspecting donors or that the Public Private Partnership was a fake hatched and connived by the respondents to defraud donors:*[30]

- of the alleged prejudice suffered by the Government. Further Government did not commit any funds into the bank account operated by the second and third respondents.

- that the first respondent ever received any monies drawn by second and third respondents. He also concluded, *"I am not convinced that the withdrawal of the money was part of a design by respondents to defraud the donors."*[31]

- In as much as the Act did not define corruption except under section 42 where one may infer its definition as the elements of corruption are outlined, fraud should not be considered as an offence of corruption. There was no *prima facie* evidence of violation of the Act.

- The first respondent abused his powers and those from his office.

[36] Having made his findings that there was no *prima facie* evidence established, the learned

[28] *Supra* para 25

[29] ibid

[30] ibid

[31] Note[17] para 29

Chief Justice returned to his thinking on the provisions of the Constitution and quoted in details section 14(1)(a), (b), (c), (d), (e) and (f) (2) and (3) and cautiously concluded:

> *"Sections 11, 12, 13 and 17 of the Prevention of Corruption Act No. 3 of 2996 contravene the fundamental rights and freedom of the individual as enshrined in the Constitution, however, this Court has not been called upon to determine their constitutionality. For present purposes, it suffices that this Court, **after due consideration,** has come to the conclusion that the applicant has failed to establish a prima facie case warranting the prosecution of the respondents as required under the Act."*[32] (Underlined and bold, my emphasis)

[37] The learned Chief Justice quickly thereafter wrote:

> *"Accordingly, the court makes the following order:*
>
> *1. The application is dismissed."*

What influenced the order for the dismissal of the application?

[38] From the discussion that judges' opinions as formed in their statement consist of mainly the *ratio decidendi* and *obiter dicta*, our duty is to decipher the two from the above judgment. It is glaringly clear that the opinion by the learned Chief Justice to the conclusion that sections 11, 12, 13 and 17 of the Act are unconstitutional did not form part of the reason for the dismissal of the application that served before him. In as much as the learned Chief Justice took much time addressing the said sections and also the fact that in between the discussion of the investigation officer's deposition, he would occasionally revert to mention the unconstitutionality of certain provisions of the Act, that as it may, did not detract from the fact that such was not the reason for the dismissal of the application. The words by the authors of the Legal Dictionary are apposite to reiterate that *orbiter dicta* (*dictum* – singular) remain so whether short or lengthy. In other words, that the learned Chief Justice authored a very lengthy *obiter dicta* did not render such to be the *ratio decidendi*. They still remained *orbiter* regardless of their lengthiness or brevity. In brief, the application was not dismissed because the provisions of the Act were found to be unconstitutional. Para 34 of the judgment clears any doubt in

[32] Supra, at para 34

that regard. The learned Chief Justice pointed out loud and clear that the issue before him was not whether certain sections of the Act were unconstitutional but whether there was *prima facie* evidence. He had already demonstrated that according to him, the applicant had failed in his papers to establish a *prima facie* case. For that reason, he dismissed the application.

[39] In summary, it was erroneous of the applicant to lodge an appeal on a matter which the learned Chief Justice did not decide upon. His statement on the unconstitutionality of sections 11, 12, 13 and 17 of the Act were nothing else other than mere *orbiter dicta.* This according to the drafters of the rules governing appeals or reviews are not appealable for the reason that they do not create a grievance against the applicant or appellant as the case may be. The grievance was created only when it was said that there was no *prima facie* evidence warranting the orders sought. That is the point which ought to have been taken on appeal. To author in its heads of argument serving before this court as supported by the ground of appeal filed in the Supreme Court, *"It follows that this Honourable Court need not concern itself with the finding relating to prima facie evidence and that this appeal is confined solely to the constitutionality or not of the impugned sections of POCA,"*[33] by the applicant was misguided and ill-conceived.

[40] I must end on this note, the exposition by Innes CJ[34] often quoted in this jurisdiction is in consonant with the circumstances of this case: *"After all, courts of law exist for the settlement of concrete controversies and actual infringement of rights, not to pronounce upon abstract questions, or to advise upon differing contentions,* ***however important****."*[35] (Underlined and bold, my emphasis)

[41] Counsel on behalf of applicant urged us to consider that the Supreme Court directed this court to adjudicate on the constitutionality or otherwise of the relevant sections of the Act and therefore we were bound to do so. It was the prerogative of the Supreme Court to enquire whether the ground was appealable. Further, the Chief Justice granted them

33 Para 13 of Applicant's heads of argument

34 Geldenhuys and Neething v Beuthin 1918 AD 426

35 *Supra* at 441

leave to appeal his judgment. These two factors compel this court to address the application on its merits. I do not think so. Whatever the Supreme Court directed upon this court, it could not by any stretch of imagination be that their Lordships intended to create jurisdiction for this court over matters which this court did not have. After all. a close reading of the directives does not suggest so. The directive to this court by the appellate court was wisely and meticulously crafted as follows:

> *"In view of a misdirection purportedly granting the Appellant the right to make constitutional challenges before this Court without a Judgment of the High Court of Eswatini sitting in its constitutional jurisdiction having been delivered, the constitutional issues raised in the Appellant Notice of Appeal dated 1st November 2016 namely that:*
>
> > *'The Honourable Court a quo erred in law in declaring that sections 11, 12, 13 and 17 of the Prevention of Corruption Act No. 3 of 2006 are inconsistent with Section 22(2) of the Constitution of Swaziland Act No. 1 of 2005 and therefore unconstitutional.'*
>
> *Be and is hereby referred to a Full Bench of the High Court of Eswatini for adjudication on the same papers before this Court as may be amplified by the Appellant."*

[42] The term 'adjudication' does not necessarily mean that we must ignore preliminary points of law and tackle direct the merits of the matter, I am afraid. It is part of the process of adjudication to enquire on the court's competence and thus our approach.

[43] If, for a second, we are wrong in this regard, there is a part of the judgment which the learned Chief Justice mentioned. It is as captured at para. 11 of his judgment. Having found that the Act contained '*drastic*'[36] provisions, he then stated:

> *"In order to **ameliorate** the drastic nature of the Act, the Legislature has provided that the investigator or officer designated in writing by the Commissioner to investigate would lodge an application in writing and specify the grounds for the application. The application should establish a prima facie case warranting prosecution."*(Underlined and bold, my emphasis)

[36] See para 9 of the impugned judgment

[44] Having stated the above, the learned Chief Justice then quickly and without any further ado embarked on the enquiry as to whether there was *prima facie* evidence presented before him. This therefore leads to the question, if indeed at the end of the day, the learned Chief Justice did declare the said sections to be unconstitutional. Was he not merely pointing out that the said sections standing on their own, or *per se*, as we often say in our expression, were unconstitutional but for the provisions in the Act compelling the applicant to make an application before court and demonstrate a *prima facie* case, their unconstitutionality at face value – *ex facie,* has been rendered in-effective? Otherwise why should the learned Chief Justice express that the unconstitutionality of the sections of the Act have been '*ameliorated*'? The fact of the matter is that we cannot ignore or wish-wash para 11 of the impugned judgment. We must read and give it its effect, period!

[45] The observations above, about para 11 of the impugned judgment leads this Court to refer to the exposition of the law as an exception to the *res judicata* principle as was expressed by Trollip JA[37] that, "*The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereto, remains obscure, ambiguous or otherwise uncertain so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order.*"[38] From this simple and expedient procedural step of our common law, the applicant ought to have approached the learned Chief Justice and sought clarity on its judgment instead of taking a recess for a period spanning over seven years at the expense of the tax payer's money[39] and the economic stability[40] of this country, and further, ignoring the wise words of the learned Chief Justice as he espoused in the very same impugned judgment:

"*The fight against the scourge of corruption is <u>important in the development and</u>*

[37] Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) (A) 298; see also Samuel Mfanfikile Malaza v Swaziland Royal Insurance Corporation Civil Appeal Case No. 19/2009

[38] *Supra* at 307

[39] As it is common knowledge that the entire contingency of the employees of the Commission and support staff remained in office during this period, thereby receiving their salaries and other benefits.

[40] As no investor desires to put his capital where corruption is unmonitored and uncontrolled.

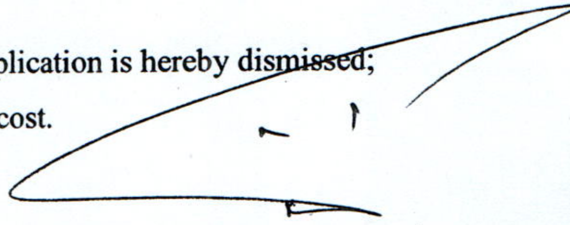
sustenance of a country's economy. Corruption is a cancer that needs to be uprooted if a country is to achieve its development objectives."[41] (Underlined, my emphasis)

Order

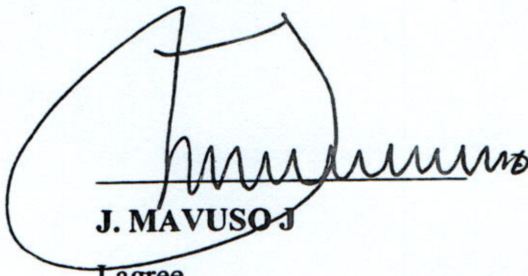
[45] In the above, it is clear that this court lacks the necessary competency to deal with the merit of the matter by reason that the applicant based its appeal on a ground which is not appealable at law. The court raised this point *in limine mero motu*. Cost therefore cannot be granted to any party, albeit learned Counsel for 3rd respondent submitted that the court was not competent to hear the matter on its merits. In the result, we enter as follows:

[45.1] Applicant's application is hereby dismissed;

[45.2] No order as to cost.

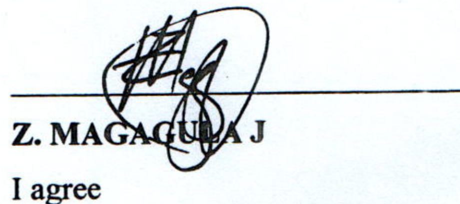


M. Dlamini J



J. MAVUSO J

I agree



Z. MAGAGULA J

I agree

For the Applicant	: G.J. Lappan instructed by the Director of Public Prosecutions
For the 1st – 2nd Respondents	: L. Howe of Howe Masuku Attorneys
For 3rd Respondent	: T. Mfokeng instructed by SV Mdladla & Associates

[41] Note[17] at para 28