IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Civ. Appeal No. 14/2002-

In the matter between

MARIO MASUKU Appellant

And

THE DIRECTOR OF PUBLIC PROSECUTIONS 1st Respondent

THE ATTORNEY GENERAL OF SWAZILAND 2nd Respondent

Coram LEON, JP

TEBBUTT, JA

BECK, JA

For Appellant

For Respondents

JUDGMENT

LEON, JP

The appellant was the unsuccessful applicant in the High Court in which he sought a declaration that Legal Notice No. 131 of 2001 dated 23 August 2001 in terms of which the terms of office of Mr. Justice S.W. Sapire, Chief Justice, and Mr. Justice

J.M. Matsebula expired on 31 December 2001 is null and void and of no force and effect.

At the time when he launched his application the applicant was in custody at Matsapha Prison on remand having been charged on two counts of contravening Section 4(1)(b) of Act No. 46 of 1918 (The Sedition and Subversive Activities Act).

On 24 January 2002 the applicant appeared in the High Court before Mr. Justice Matsebula on the said charges but the case was adjourned indefinitely on 7 February 2002 because the Court was of the view that there existed a doubt as to whether the learned judge's term of office came to an end on 31 December 2001 in terms of the said Legal Notice.

For reasons stated in his affidavit (to which it is not necessary to refer) he contended that the said Legal Notice was null and void and of no force and effect.

The basis of the application was that the applicant was languishing in jail and did not know when his trial would be concluded and that therefore his only remedy was to seek the relief which he sought. The object of the application was to ensure that Mr. Justice Matsebula resumed the trial and determined the fate of the appellant.

"The application was not opposed by the Director of Public Prosecutions (1st respondent) but was opposed by the Attorney General (2nd respondent). He did not file any affidavits on the merits but gave notice that he would raise a number of points of law in limine relating to urgency, jurisdiction, recusal, locus standi in judicio, a contention that the matter involved a labour dispute, misjoinder and a contention that there was a similar matter currently pending in this Court.

Some of the points in limine were abandoned by the second respondent's attorney at the hearing. With regard to the others, the High Court took the view that it was unnecessary to deal with them. The Court took that view because of the provisions of Legal Notice No. 12 of 2002 (referred to in the judgment as Legal Notice No. 2 of 2002).

3

Legal Notice No. 12 of 2002 is dated 21 February 2002 and was issued under the hand of His Majesty the King. It reads as follows:

"LEGAL NOTICE NO. 12 OF 2000

KING'S PROCLAMATION TO THE NATION 1973

(Proclamation of 12th April 1973)

CONTINUATION IN OFFICE OF CERTAIN JUDICIAL OFFICERS NOTICE 2002

In exercise of the powers conferred by the King's Proclamation to the Nation, 1973, I, MSWATI 111, KING OF SWAZILAND hereby issue the following Notice -
Citation and commencement

1. This Notice may be cited as the Continuation in Office of Certain Judicial Officers Notice, 2000 - CONTINUANCE IN OFFICE

The following Judicial Officers shall continue in office up to 30 June 2002

(1) Justice S. W. Sapire - as Judge and Chief Justice

(2) Justice J.M. Matsebida- as Judge

THUS DONE UNDER MY HAND ....THIS 21st DAY OF FEBRUARY 2002

MSWATI III

KING OF SWAZILAND"

4

The Court a quo took the view that to proceed with the application would be an academic exercise in view of the second Notice. It said this:

"The real basis for the applicant to bring this application was because of the previous Notice which caused the trial judge to put on hold all the cases pending before him. This application was to get that Notice out of the way. Since the issuance of Legal Notice No. 2 the learned trial judge

has returned and is presently proceeding with his cases. The obstacle which was the cause of the complaint has now fallen away. For practical purposes there is no reason why the applicant's criminal case cannot resume before the learned judge.

The question of the validity or otherwise of Legal Notice No. 131 of 2001 is of no import to applicant as matters stand presently...

In the premise, we hold that this application has been overtaken by events and any further discussions on the points in limine would be unnecessary."

It was, however, contended on behalf of the applicant in the Court a quo that it was nevertheless possible that the applicant's trial would not be finalised by the date on which the second Legal Notice purported to terminate the appointment of the learned trial judge. That argument was rejected on two grounds, namely (1) it was based on mere speculation as it was a matter of public record that the trial of the applicant had already progressed to an advanced stage and that no case had been made out that the trial could not be finalised during the purported extended term of office of the learned trial judge; (2) the Constitution specifically provides for the eventuality relied upon in that it vests in section 99(2) a trial judge with the power and authority to finalise pending matters before him despite having reached the end of his term of office. Section 99(2) reads;

"Notwithstanding that he had attained the age at which he is required by the provisions of this section to vacate his office, a person may sit as a judge for the purpose of delivering judgment or doing any other thing in relation to proceedings which were convened before him before he attained that age. "

5

The main points raised in the grounds of appeal are:

1. The Court a quo erred in holding that the second Legal Notice affected the criminal proceedings in question as it was promulgated after the applicant had launched his application.

2. The Court a quo erred in holding ex mero motu that the second Legal Notice affected the proceeding before it as it had no retrospective effect and is not law in terms of Section 2(1) of the Interpretation Act No. 21/1970 (as amended).

3. The Court a quo erred in holding that the application had become academic as a result of the promulgation of the second Legal Notice.

It is submitted, on behalf of the appellant, that Legal Notice No. 12 of 2002 is not law and therefore did not bind the Court which could not take cognisance thereof. Reliance is placed on Section 2(l)of the Interpretation Act No. 21/1970 which defines "law" as meaning

"(a) Act, law Order-In-Council, Proclamation

(b) Regulation, rule, bye-law made and given under the authority of a law mentioned in paragraph (a)."

It is submitted that Legal Notice No. 12 of 2002 purports to amend Section 99 of the Constitution of Swaziland, as repealed with savings, which can only be amended by a decree enacted by His Majesty and published in the Government Gazette. In this regard reliance is placed on Professor Dlamini vs the King (Appeal Case 41/2000).

Legal Notice No. 12 of 2002 was issued under the hand of His Majesty the King acting under King's Proclamation to the Nation 1973 (Proclamation of the 12th April, 1973).

In the Professor Dlamini case it was held by this Court that where the Constitution is amended by the King, that must be done by decree published in the Gazette. It is

6

contended that Legal Notice No. 12 of 2002 purports to amend Section 99 of the Constitution and that this can only be effected by decree published in the Gazette which is not the case here.

It is further contended, on behalf of the appellant, that the Court a quo erred on relying upon an unsubstantiated assumption that Mr. Justice Matsebula was hearing cases as a result of the promulgation of Legal Notice No. 12 of 2002. It was only entitled, so the argument ran, to rely upon a statute or a law not raised by the parties but not upon factual matters not raised by them.

On behalf of the second respondent it is submitted that the appellant is estopped from raising the invalidity of the Legal Notice because he voluntarily submitted himself to the jurisdiction of the trial Court. It is further contended that the appellant does not have a direct and substantiated interest in the retirement age of judges: only the judges do. However the appellant surely has a direct interest into whether his trial can continue.

In any event Mr. Twala for the second respondent contended that Law 12 of 2002 was a valid law and was intended to operate retrospectively, the word "continue" supported that argument.

When this appeal was called the Court enquired from Counsel what the present position was relating to the trial. We were informed that the trial had commenced before Mr. Justice Matsebula in January, 2002, that the Crown case had not yet closed but that Mr. Justice Matsebula had stopped the trial because he was uncertain as to whether or not he was entitled to proceed with it. The appellant had not pleaded that the Court had no jurisdiction - on the contrary it is, and has always been, the appellant's case that Mr. Justice Matsebula was entitled to sit as a judge and continue to try the case which was the reason why the application was brought. In other words, if the 2001 Legal Notice is invalid, as the appellant claims, there is nothing to prevent Mr. Justice Matsebula from continuing with the trial.

I am puzzled to know why the appellant has appealed. The effect of the judgment of the Court a quo is that Mr. Justice Matsebula is a judge, he is entitled to sit as a judge

7

and is obliged to hear the case and determine the appellant's fate. That is precisely why the appellant brought the application i.e. to ensure that Mr. Justice Matsebula does just that. I can only assume that that the appeal has been brought in order to obtain through the bade door as it were, a definitive ruling by this Court on the retiring age of judges. What then, is the position of the second respondent? He too agrees that Mr. Justice Matsebula is entitled to hear and determine the appellant's case albeit for different reasons. There is thus no dispute between the parties upon the real issue in this case.

I accordingly agree with the Court a quo that the validity or otherwise of the 2001 Notice is of academic interest only.

In Herbstein & van Winsen the Civil Practice of the Superior Courts (4th edition) the following is

stated at page 467:

"It has repeatedly been held that the Courts will not deal with abstract, hypothetical or academic questions in proceedings for a declaratory order. "

By way of example I refer to ADBRO INVESTMENT CO. LTD V MINISTER OF THE INTERIOR 1961(3) SA 283(T) at p 285. Williamson, J (as he then was) said this:-

"I think that a proper case for a purely declaratory order is not made if the result is merely a decision on a matter which is merely of mere academic interest to the applicant. "
A right or obligation in abstracto cannot be inquired into.

Ex parte van Schalkwyk N.O. and Hay N.O. 1952(2) SA 407 at 411

Ex parte Nell 1963(1) SA 754 (A.D.)

The appellant sought a declaration of rights in the Court a quo which is a matter of academic interest only.

The appeal must be dismissed, with costs.

R.N. LEON, JP

I AGREE

P.H TEBBUTT, JA

I AGREE

C.E.L. BECK, JA

DELIVERED this. .10th. .day of June, 2002