IN THE SUPREME COURT OF SWAZILAND

CIVIL APPEAL NO. 1/07

In the matter between:

LINDIMPI WILSON NTSHANGASE AND THREE OTHERS

APPELLANTS

VS

PRINCE TFOHLONGWANE & TWO OTHERS

RESPONDENTS

CORAM STEYN JA

ZIETSMAN JA

RAMODIBEDI JA

FOR THE APPELLANT: MR. M. MABILA

FOR THE RESPONDENT: MR. J. MAGAGULA

JUDGEMENT HEARD ON WEDNESDAY THE 2nd MAY 2007

JUDGEMENT DELIVERED ON THE 8th MAY 2007

SUMMARY

Application to review a decision of the High Court - A single Judge having purported to issue an order which was in conflict with a directive of a colleague referring a matter to trial for oral evidence - Dispute concerning the burial of deceased delayed for 4 years because of inaction in the traditional structures - Further delay reprehensible and unacceptable. Held per Steyn JA, Ramodibedi JA concurring that the granting of such an order was irregular and should be side -Failure to give due notice of application deprecated, amounting as it did to an "ambush" of the other side - Need for procedural certainty stressed - The provision of Section 149(3) of the Constitution of the Kingdom of Swaziland cited as supporting the above approach - Need for procedural consistency expressed.

STEYN JA

1. The parties are described in the above citation as appellants and respondents respectively and are referred to as such herein. The appellants seek to review, set aside or correct a ruling of the High Court. Certain alternative and ancillary relief - to which I refer below - is also sought. The application is opposed by the respondents via the office of the Attorney General. This review is brought pursuant to

the provisions of Section 14(1) of the Constitution of the Kingdom of Swaziland Act, 2005 which reads as follows:

"148(1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue order and directions for the purposes of enforcing or securing the enforcement of its supervisory power.".

2. The relevant facts are the following:

2.1 On the 6th December 2005 the appellants launched notice of motion proceedings in the High Court. In their papers the appellants sought an order, "Declaring that the late Muzikayise Andreas Ntshangase (the deceased) be buried at Mkhwakhweni area in the District of Shiselweni."

2.2 The deceased had died on the 22nd of December 2003. His body was at the time lying in the Mbabane Government Hospital morgue. At the time of the delivery of this judgment, some four and a half years later, the deceased has still not been buried. This is because of a dispute between the parties to these proceedings concerning where he should be buried. The first two appellants are

respectively a son and widows of the deceased, whilst the 4th appellant is the Indvuna of the Mkhwakhweni area referred to above. It is here where these four parties seek to bury the deceased.

2.3 The family duly reported the death to the authorities at the Ludzidzini Royal Residence where the deceased held and exercised certain responsibilities. In particular, he had served as a member of the Border Restoration Committee which is headed by the second Respondent. Both the second and third respondents reported the death of the deceased to His Majesty King Mswati III. This, they did because His Majesty had appointed the deceased to the said Committee, "with special responsibilities". His Majesty then referred the matter to the Swazi National Standing Committee headed by the first respondent to prepare for the burial. This Committee directed that the deceased should be buried at the Mbuluzi area under Chief Nhloko Zwane. This decision was made because it was alleged that the deceased had been evicted from the Mkhwakhweni area. The deceased's family and certain residents of this area rejected this contention. They alleged that although an eviction order had been issued on the 16th of August 1995 by the Shiselweni Magistrate's Court, this order was set aside by way of a default judgment by the High Court. This was followed by a judgment of the Acting Chief Justice confirming the nullity of this

order - both the original order and the subsequent judgment are annexed to the papers. The circumstances in which the eviction order was set aside are not relevant for present purposes. It will suffice if I were to say that the proceedings pursuant to which an eviction order was granted were held to be irregular by the High Court and accordingly these were set aside. The judgment of the learned Acting Chief Justice records that it was conceded by the Attorney General that such proceedings were irregular.

Whilst this "eviction" order cannot be relied on, the respondents allege that a prior eviction order had been issued by the Minister for the Interior "in the early 1980s". This is disputed by the appellants in their replying affidavits.

2.3 Although, therefore, the High Court set aside the eviction order issued by the Magistrate's Court, it would appear that there was a dispute as to the appropriate locality of the burial site of the deceased within the traditional structures. It is not necessary to detail these as they traverse territory that is also in dispute between the parties. The unfortunate outcome of these disputes, both within such structures and ***inter partes,*** is that the deceased's body has been lying in the morgue for more than four years and a bill in excess of E80,000.00 has accumulated. Indeed there are papers

that form part of the record before us which show that the body of the deceased "has deteriorated to alarming proportions thus causing a health risk and/or hazard". The stalement that has arisen as a result of the matter becoming embroiled in the traditional structures, is clearly not only unfortunate but also unacceptable.

2.4 When the application came before Mabuza J in the High Court, the learned Judge directed that the matter should be referred to trial. The relevant court order issued on the 10th of February 2006 merely directed that "The matter is referred to trial." The issues to be tried were not defined, neither were the parties directed to clarify the disputes to be resolved by way of pleadings or otherwise. However, a reading of the papers makes it clear that one of the principal issues between the parties is whether any lawful and legally binding eviction order exists pursuant to which the deceased was evicted from the Mkhwakhweni area. The court would also have to determine whether, if indeed such an eviction order was issued and executed, it still stood at the time of his death; whether it had been observed by the deceased and whether it vitiates the rights of the family to secure the burial of the deceased in the area concerned (Mkhwakhweni area). It would also have to determine in general whether it is in the public interest that no burial can take

place because no decision can be obtained from the structures to which the matter had been referred four years ago.

2.5 I revert to outline the tortuous process of the litigation. Pursuant to the matter being referred to trial, it came before Maphalala J for hearing on the 17th of October 2006. However, when the matter was called counsel for the respondents advanced a ***point of law limine*** from the bar. This point is described as follows by the trial Judge."... this application (for a declarator) is improperly before court in that by applicant's own admission this matter is still pending before His Majesty the King for a ruling and this Court is therefore not in a position to grant the order sought in the Notice of Motion in the circumstances." Despite the opposition of applicants, and some six weeks later, i.e. on December 1 2006, the Court upheld the ***point in limine.*** It overruled the objection of the appellant that the ***point in limine*** could not properly be raised in view of the order of the High Court referring the matter to trial. The learned Judge gave no reasons for his decision to ignore the prior decision of his colleague merely stating that "... I cannot say that the applicant is precluded in advancing this point at this stage of the proceedings." The Court also found that: "on the facts of the present

case I would not exercise my discretion in favour of the declarator and would allow the dictates of customary law to take effect. I say so, because as I have stated ... there are three committees which have been appointed by His Majesty the King to advise him on how to proceed with the burial of the deceased." (One Should add in parenthesis - "and these committees have over a period of four years failed to resolve the issue!")

3. When the matter was called before us, we raised with the Attorney General's representative the very issue which the appellant's counsel had raised before Maphalala J; i.e. was it competent for the court to uphold a **"*point in limine*"** which resulted in a reversal of the decision of his colleague that the matter should be referred to trial for oral evidence. Instead of it being referred accordingly, the Court in effect refused to hear the matter and it directed that "the dictates of customary law" should be "allowed to take effect" - whatever that may mean.

4. In the normal course of events, once a matter has been adjudicated upon by a Judge of the High Court such decision or ruling is final as between the same parties on the same issue. Such issue becomes ***res judicata inter partes.*** See the judgment of the Lesotho Court of

Appeal in **THABISO MAHASE V KHUBEKA AND OTHERS COURT OF APPEAL (CIVIL) NO.29/05,**

unreported as yet. See also **CREDIT CORPORATION (PTY) LTD V SHEMBE 1972(3) SA 462 (A)** at 472 A-B; **KBI VS ABSA BANK BPK 1995(1) S.A. 653 (A)** and see

generally Joubert ***et al*** (eds) **LAW OF SOUTH AFRICA**

VOL.9 (first re-issue 1999) paragraphs 424-9. The question is, should the same principle apply to procedural directions made by a single Judge, such as -e.g. in the instant case - a referral to trial? Certainly, and in so far as the Supreme Court is concerned, the Constitution of the Kingdom of Swaziland makes it clear in section 149(3) that:

"***In civil matters, any order, direction or decision made by a single Justice may be varied, discharged or reversed by the Supreme Court of three Justices at the instance of either party to that matter.***"

The High Court Act contains no provisions regulating any proceedings before a single Judge. The issue is whether as a matter of good practice such a constraint which the legislature has enacted

in the case of procedural directions of a single Supreme Court Justice should also apply to the Judges of the High Court.

5. For the reasons that follow, I am of the view that it should be. One must assume that Mabuza J had due regard to all the circumstances when making the order she did. The facts before her were identical to those that subsequently served before Maphalala J and no new factual averments were made to motivate the need for transferring the process of adjudication from the High Court and to be resolved by customary law. All that happened was that at 4pm on the day before the hearing of oral evidence a "notice of intention to raise ***points in limine*****"** was served on the appellants and apparently also on the Registrar. This notice reads as follows:

"TAKE NOTICE that the respondents shall raise the following point in limine at the hearing of this matter; to wit:-

1. This application is improperly before this Court in that:-

1.1 **By applicant's own admission this matter is still pending before His Majesty the King for a ruling:**

1.2 **This court is therefore not in a position to grant the order sought in the Notice of Motion in the circumstances.**

WHEREFORE the respondents pray that this application be dismissed with costs."

It should be noted that no evidence was tendered as to whether it was expedient to make the order it did. Several questions arise; e.g. is it likely that in view of the fact that the deceased had died four years ago, would the suggested course of action be likely to resolve the issue. Indeed evidence or an enquiry may well have established that the structures concerned had abandoned any attempt to resolve the matter. Certainly a lapse of four years in a case concerning the burial of a deceased is such a long period of time that the drawing of such an inference is a realistic possibility. Further delay is both reprehensible and unacceptable. It is also difficult to understand what is meant by the so called point of law. As framed it makes little legal sense.

6. The true cause of the procedural ***cul de sac*** in which this litigation ended up, is primarily attributable to the manner in which the litigation was conducted by the office of the Attorney General. This office joined issue with the appellants in a civil court of law. The respondents submitted themselves to the jurisdiction of the High Court to determine the dispute. If they thought that a different legal

system should deal with the matter they should have filed a properly motivated application at that time and not an unmotivated "point in limine" before a different Judge eight months later. The propriety of proceeding via the traditional structures and, as Maphalala J put it - "allow the dictates of customary law to take effect" should as indicated above, have been properly investigated at the time it served before Mabuza J.

What the Attorney General's representative did was to try to "ambush" his opponent. He did so by giving less than 24 hours notice to take a ***"point in limine".*** Rule 6(12)© of the High Court Rules provides that any person opposing the grant of an order sought in notice of motion proceedings shall within fourteen days of having given notice of his intention to oppose the application, deliver notice of his intention of doing so. Such notice should have been given to the appellants within the prescribed time constraints when the matter was due for hearing before Mabuza J more than a year ago; i.e. on the 10th February 2006. If they wished to challenge the decision of Mabuza J to refer the matter to trial they should have done so by way of appeal or review proceedings. To seek to frustrate or vary the order by raising a ***point of law limine*** before a fellow Judge nine months later, is in my view not only impermissible but also procedurally incompetent.

7. The appellants have clearly been unfairly prejudiced by the above conduct of the litigation via the office of the Attorney General. Because of such conduct the burial of the deceased already delayed for four years - will be delayed further. We can only help to try to limit further prejudice by the order which we make below.

8. I summarise our views as follows:

8.1 Mabuza J made a valid order circumscribing and giving direction to the future conduct of the proceedings by referring the matter to trial. There were disputes of fact that required determination. We will set these out below.

8.2 No notice of any point of law was given, neither was any such point taken before Mabuza J. and both parties submitted themselves to the jurisdiction of the High Court.

8.3 No appeal or review proceedings were instituted by the respondents subsequent to the matter being referred to trial as aforesaid.

8.4 It was in my view both procedurally inappropriate to seek and incompetent to grant an application made on the same papers for the matter to be dealt with and be resolved other than by way of the hearing of oral evidence as directed by Mabuza J.

8.5 The latter directive which has not been rescinded and still stands should be implemented at the earliest opportunity.

9. In conclusion, I should add that it would be procedurally unacceptable that "an order, direction or decision" of a single Judge in the Supreme Court can only be discharged or reversed by three Justices, but that a single Judge could do so in respect of his colleague in the High Court.

The order the Court makes is therefore the following:

9.1 The application for a review of the decision of Maphalala J dated the 1st of December 2006 upholding a point of law in limine succeeds. Such decision is set aside. The Court had no power to make such an order as it was in conflict with a directive of the High Court dated the 10th of February 2006 that the matter was referred to trial for oral evidence. Such directive stands and must be implemented.

9.2 For the guidance of the court hearing the matter we would define the issues to be tried as follows:

"l. Was any lawful and enforceable eviction order issued by any recognised authority in terms of which the deceased was evicted from the Mkhwakhweni area?

2. ***If such order was issued in terms of which the deceased was to be evicted, was it still valid and enforceable at the time of his death?***

3. ***In the event of Court finding that such an order was issued and enforceable as aforesaid, did the existence thereof vitiate the right of the appellants to bury the deceased in the Mkhwakhweni area. ?***

4. ***Generally, and in view of the subject matter of the dispute and the substantial lapse of time since the death of the deceased, whether the public interest does not require the Court to make such order concerning the burial of the deceased as it deems Jit and proper?***

10. The Respondents are to pay the Appellants costs of the review proceedings including those of counsel, jointly and severally, the one paying, the other to be absolved.

11. The Registrar is requested to set the matter down as a matter of urgency and at the earliest possible date, to be heard by a Judge of the High Court. In view of the decision previously made by Maphalala J. it is clear that another Judge should hear the matter.

J.H.N STEYN

Judge of the Court of Appeal

RAMODIBEDI JA:

1. I agree with the decision of my Brother Steyn that for the reasons set out in his judgment it was irregular for Maphalala J to seek to set aside the order of Mabuza J referring the matter to trial. In addition to the reasons advanced by my learned brother, I would add the following.

1.1. Parties to litigation need certainty. When a dispute is submitted to a civil court for a decision on the procedural direction the matter should take, and such court charts the course such litigation has to follow, the parties are entitled, in the absence of an appeal or review,

to assume that such decision is final. They would therefore prepare for trial in accordance with the directive. In the case

under review, the matter was referred to trial in a civil court of law and it was ripe for hearing. Witnesses would have been subpoenaed and both sides would have been ready to have their disputes determined in accordance with the directive made by Mabuza J. It is clearly undesirable that a single Judge should be empowered to set aside, vary or reverse such directive, order or decision as it would lead to procedural uncertainty and prejudice the other parties. It would also mean that in every case where a matter has been referred to trial, any one of the parties who have not exercised their right of appeal or review, could approach another Judge to set aside such an order or directive. Such a procedure would result in piecemeal litigation and would as such offend against the principle of finality to litigation. Litigants may not reopen issues after orders have already been made simply because they omitted to make certain submissions or to raise certain points in limine as here. In casu, the correct position is to consider that, having failed to raise, before Mabuza J, the points in limine now sought to be relied upon, the appellant must be taken to have waived its right to raise the objection before Maphalala J.

1.2 The fact that the legislature has itself in the Constitution enacted a provision requiring such a directive only to be capable of revocation by a court of three (3) Justices in litigation before the Supreme Court is a codified manifestation of a requirement protecting litigants against uncertainty and procedural disorder.

1.3. In the context of the need for the maintenance of an orderly procedural regime, I would point to the fact that on the papers as they stand the order referring the matter to trial still stands. (Indeed this was the contention of the counsel representing the Attorney General). This has the undesirable consequence that two mutually destructive orders stand side by side in respect of the same litigation.

1.4. I would also associate myself with the comments of my Brother Steyn, that the failure of the Attorney General to comply with the Rules of the High Court in regard to notice of an intention to raise a point of law was clearly prejudicial to the other side and should not have been sanctioned by the High Court. It must be borne in mind that this office had submitted itself and the parties it represents to have the issues resolved in a civil court of law,

whilst the effect of its last minute intervention was to have the matter transferred for resolution according to the dictates of customary law.

2. Therefore, and for the reasons set out in the judgment of my Brother Steyn and for the additional reasons set out above, I agree with the orders set out in his judgment.

I AGREE M.M. RAMODIBEDI

Judge of the Court of Appeal

ZIETSMAN JA:

I have read the judgment of my Brother Steyn. I agree substantially with the order proposed by him. I have, however, arrived at this conclusion for different reasons.

I find myself unable to agree with my Brother's conclusion that a directive given by one judge concerning the procedure to be followed in a particular case is always binding upon a judge subsequently seized with the case. Such a directive will, in my opinion, be binding if the relevant issues to be considered by the second judge were dealt with by the first judge. If the issues raised

before the second judge were not dealt with or considered by the first judge then, in my opinion, there is no reason why the second judge cannot deal with those issues, even if the resolution of these issues will have the effect of nullifying the directive given by the first judge.

This is the situation we have here. If the point ***in limine*** which was dealt with by Maphalala J had been argued before Mabuza J and rejected by her, I have no doubt that the same point could not again have been raised before Maphalala J. The issue would then have been ***res judicata.*** If Mabuza J had rejected the point ***in limine*** and had ordered that the matter be referred to trial, Maphalala J would have had no option but to proceed with the hearing of oral evidence. In the present case the point ***in limine*** was not argued before Mabuza J and no ruling or order was made on that issue by her. In the circumstances I cannot see why the present appellant would be precluded from raising the point before Maphalala J. How can ***res judicata*** arise in respect of an issue which has not been dealt with or determined by another judge?

Possible examples which come to mind will illustrate my view of the matter.

Let us assume that a judge dealing with an application refers the matter for the hearing of oral evidence on disputed facts. The matter subsequently comes before the same judge. One of the counsel then applies to raise a point ***in limine*** namely that the court has no jurisdiction to hear the matter, for example because the Supreme Court has now ruled that such matters can only be dealt with by the Labour Court and not by the High Court. If the point ***in limine*** is a good one and must be upheld, is the judge obliged, because of his earlier directive, to hear oral evidence and in effect go to the lengths of a full-scale trial before he can deal with the jurisdiction issue? This clearly cannot be the case. Logic and common sense dictate that the judge in such a case can initially deal with the point ***in limine.*** If the point is upheld the unnecessary costs of a full-scale trial will be avoided.

If a judge different from the judge who gave the directive is seized with the matter why cannot he follow the same procedure i.e. deal with and decide the point ***in limine*** before deciding whether the hearing of oral evidence will be necessary?

The directive referring the matter for the hearing of oral evidence cannot, in my opinion, entirely prevent the hearing of subsequently raised points relevant to the case. And it will then be up to the judicial officer to decide at what stage those points should be dealt with.

What decides the matter in my opinion, is whether the High Court judge who decided to refer the matter to trial had dealt with the issue now sought to be raised. If he had, his decision thereon would be final and binding upon any other High Court judge seized with the same matter. The later judge, however, in my opinion, would not be precluded from dealing with points ***in limine*** not dealt with by the earlier judge and upon which no decision had been given.

Reverting to the facts of the present case it is my conclusion that Maphalala J was entitled to deal with the point ***in limine*** raised by the respondent. He dealt with the matter and came to the conclusion that because the matter had been referred to His Majesty the King the court could not deal with it. In my opinion he erred in coming to that conclusion on the papers and it is for that reason that I consider that the appeal should succeed.

There are clearly disputes of fact that cannot be resolved on the papers as they stand. The main dispute concerns the place where the deceased resided prior to his death, and whether he was entitled to reside there. This has a bearing on whether the appellants have the right to have his remains buried in the Mkhwakhweni area.

But that is not the only factual dispute. According to the papers before us His Majesty the King appointed a committee, namely the Swazi National Council Standing Committee to resolve the issue. This committee directed that the deceased's remains be buried in the Mpuluzi area. The deceased's family members objected to this directive. His Majesty then referred the matter to three committees for their consideration, namely the Swazi National Council Standing Committee, the Ludzidzini Libandla Committee and the Border Restoration Committee. It appears that the matter was considered by the three committees and there is a dispute concerning the findings of these three committees. It is also not clear whether a recommendation was made by these committees to His Majesty the King. There is an allegation in the papers that His Majesty was told that no decision could be taken by the three committees and that this was reported to him. The further allegation is that His Majesty

said that there was nothing he could do in the circumstances because the committees were unable to arrive at a decision.

It seems that a total stalemate has been reached. If His Majesty the King has washed his hands of the matter it cannot be said that the matter is still pending before him.

It is essential that this matter be resolved and the only way that it can be resolved is for oral evidence to be heard on the many factual disputes referred to above, one of them being whether in fact a decision from His Majesty the King is to be awaited.

My conclusion is that Maphalala J was entitled to deal with the point ***in limine*** but that he came to the wrong conclusion in upholding the point ***in limine*** and in deciding that it was not necessary to hear oral evidence.

I would make the following order:

1. The appeal succeeds with costs and the order made by Maphalala J is set aside.

2. The matter is referred back to the High Court to be heard by a Judge of the High Court other than Maphalala J

N.W. ZIETSMAN

Judge of the Court of Appeal

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1. **SUMMARY BY THE COURT A BODY IN THE MORGUE**

The subject matter in this appeal concerns the body of a deceased dignitary who has been lying in a morgue awaiting burial for 4L/2 years.

The facts in brief summary are the following:

There is a dispute as to where he should be buried. This has led to protracted litigation both in the traditional and civil legal structures. Such litigation was about to be resolved through a trial action in the High Court when the office of the Attorney General, without due notice as provided by the Rules of Court, sought to raise on the day of the hearing what amounted to a plea in bar. This plea was in our unanimous view wrongly

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upheld by the Judge who heard the matter. The result of this misguided process has resulted in a further delay to the detriment of all concerned.

I would like to add a comment. It is tragic that the deceased cannot be laid to rest and that his loved ones have been unable to have closure. This situation reflects badly on all those involved. We trust that it is not too late for the parties and their advisers to come

together and to try to resolve the matter without any further litigation. The protracted process

brings the legal system whether within the civil or traditional

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structures into disrepute. The Attorney General's office will, I trust, because it is ***dominus litis*** make every effort to bring this matter to a close.