IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

In the matter between CIV.APPEAL NO. 10/2008

THE UNIVERSITY OF SWAZILAND APPELLANT

And

PERCY NDLANGAMANDLA	**FIRST RESPONDENT**
MUSA SHONGWE	**SECOND RESPONDENT**
MACHAWE DLAMINI	**THIRD RESPONDENT**
NHLANHLA HLATSHWAYO	**FOURTH RESPONDENT**
THABISO MAVUSO	**FIFTH RESPONDENT**

CORAM: TEBBUTT, JA

ZIETSMAN, JA

FOXCROFT, JA

FOR THE APPELLANT: MR. M.B. MAGAGULA

FOR THE RESPONDENTS: MR. S.V. MDLADLA

HEARD ON: 19th MAY 2008

DELIVERED ON: 22nd MAY 2008

JUDGMENT

THE COURT

The present proceedings in this Court stem from an application by the present respondents ("the students") on 6 December, 2007 in which they sought orders from the High Court interdicting and restraining the implementation of a semesterisation programme into certain faculties of the applicant, ("the University").

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Mamba, J dismissed the application and on 16 January 2008 the students noted an appeal to this Court ("the students' appeal").

They also launched another application to restrain the University from proceeding with the examinations set for 21 January 2008.

That application came before Mabuza, J and the University brought an application for her to recuse herself on the allegation that she had

displayed bias against the University and its lawyers. The learned Judge refused to accede to the request. She did, however, grant to the students an interim interdict pending the appeal which they had noted.

The present application is brought before this Court under Case Number "Civil Appeal 10/2008". It concerns the refusal by Mabuza, J to recuse herself in the interlocutory application already referred to which has been finalised in the judgment of this Court dated 16 May 2008.

This Court indicated in its judgment of 16 May, 2008 that it was appropriate and convenient that Civil Appeal Case No. 1/2008 (the students' appeal) be first adjudicated upon. In paragraph [40] Tebbutt, JA added;

> *"As the order of Mabuza J which the University sought to review and have set aside depended on the outcome of the students' appeal, which has succeeded, it became unnecessary to deal with the review application or the appeals under Civil Appeal Cases Nos. 6 and 7 of2008. "*

Despite these remarks the present review came before us by way of the

Notice of Appeal lodged in Case No. 7/2008 against the refusal of Mabuza, J to recuse herself.

Mr. H. Kessie Naidu who appeared together with Mr. V. Naidu introduced his Supplementary Heads with the submission that this was an application for the review of the judgment of Mabuza, J.

He concluded his written Heads with a plea to this Court to "review and set aside Mabuza J's refusal to recuse herself and in terms of its supervisory jurisdiction in terms of Section 148 (1) make such orders and give such directions concerning the conduct of Mabuza, J *(sic)"*.

Mr. S.S. Vilakati, Registrar of the University of Swaziland commenced his supplementary affidavit on behalf of the University with the averment that it "is filed consequent upon the High Court delivering its written judgment on the proceedings that is the subject matter of this Review application".

It is clear that the review before us is not directed to the issue of semesterisation which has been finally disposed of by this Court.

[See: Order of 12 April, 2008,

Judgment of 16 May 2008 in Case No. 10/2008].

This review is brought against an interlocutory judgment of Mabuza, J and the relief sought is the correction of a judgment said to be "highly prejudicial and condemning to our attorneys".

[Supplementary Book of Pleadings, p40].

The prejudice complained of has nothing to do with the semesterisation programme but appears to be based on the proposition that the remarks of the learned Judge *a quo* and refusal to recuse herself damaged the good name of Mr. Vilakati, the University and the applicants' attorneys.

It was also submitted that the alleged improper conduct of the Court *a quo* may not be "addressed through the relevant professional bodies" since the Constitution "prohibits such action against a judicial officer who has issued a judgment".

While it is so that Sections 141 (1) and (2) of the Constitution secure the independence of the Judiciary and prevent any interference with any judicial officer in the exercise of any judicial function, Section 160 (1) (d) provides for the Judicial Service Commission to:

> *"receive and process recommendations and complaints concerning the judiciary".*

Most of the allegations made on the papers and in the Heads of Argument concern the conduct and remarks of the learned Judge *a quo* in and out of Court. These are not matters for this Court to pronounce upon in the present circumstances. If we were to embark on the exercise urged by the applicant to investigate the conduct complained of, the learned Judge *a quo* would have to be provided with an opportunity to answer the allegations.

Such an enquiry would not fall within the purview of this Court which was seised of, and has disposed of, an appeal in the matter between the University and a number of students.

As Innes, CJ put it in the South African case of **Geldenhuys and Neethling v. Beuthin 1918 AD 426.** at 441.

> *"After all, courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important".*

[See also: Cabinet of the Transitional Government of SWA v Ems 1988 (3) SA 369 at 388 (AD)].

Any "expunging [of] a judgment that is highly prejudicial and condemning to our attorneys".

[Supplementary Book of Pleadings, p40].

as urged by Mr. Vilakati, would inevitably amount to an apparent vindication of the claims of the applicant and its attorneys and a concomitant rejection of the version of the learned Judge *a quo* as reflected in her judgment of 8th April, 2008.

It would be wholly inappropriate for this Court to entertain an application for the "expungment" (if such be legally possible) or setting aside of a judgment which provided reasons for the granting of an interim interdict, pending an appeal which has now been disposed of.

The interim order of Mabuza J has, in any event, ceased to have any legal effect upon the concluded appeal between the University of Swaziland and Percy Ndlangamandla and Others.

Mr. Naidu correctly conceded that the matter could not be referred back to the Court *a quo.*

He urged however that it was in the public interest for the judgment of Mabuza, J to be set aside. He submitted that the Constitutional Court in

South Africa had on several occasions held that even in matters which were moot, guidance could be given by the Court to the public in matters of national interest.

While this matter is no doubt of great interest to the public, it is certainly not in the public interest for this Court to pronounce, in effect, upon the conduct of a Judge and attorneys of this Court in the present circumstances. Such issues belong with the appropriate professional bodies.

Mr. Mdladla, who again appeared for the respondents, submitted that the application was frivolous and that applicant had failed to establish any prejudice vis-a-vis the respondents. He asked for costs on the attorney and own client scale. While we agree that there is no merit in applicants' application, we consider that such a costs order is not warranted.

In the result, the application for the review and setting aside of the judgment of Mabuza, J giving reasons for her refusal to recuse herself, is dismissed with costs.

P.H. TEBBUTT J.A.

N.W. ZIETSMAN J.A.

J.G. FOXCROFT