



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL CASE NO. 17/2014

In the matter between:

JUDGMENT

**THE CHIEF JUSTICE OF THE KINGDOM
OF SWAZILAND AND OTHERS**

APPELLANT

and

**THULANI RUDOLPH MASEKO
BHEKI MAKHUBU**

**1ST RESPONDENT
2ND RESPONDENT**

Neutral citation:

*The Chief Justice of the Kingdom of Swaziland and
Thulani Rudolph Maseko & Bheki Makhubu
(17/2014) [2014] SZSC 34 (30 May 2014)*

Coram:

S.A. MOORE J.A., DR. S. TWUM J.A., DR. B.J.
ODOKI J.A.

Heard:

14 MAY 2014

Delivered:

30 MAY 2014

Summary:

Immediately before the scheduled time enrolled for the hearing of the instant appeal, counsel for the parties approached this Bench in chambers – Counsel for the Respondents disclosed their instructions to seek the recusal of the members of this Bench on the ground that they were serving under the Honourable Chief Justice who was the

Head of the Judiciary and the functional President of the Supreme Court – In Open Court, counsel for the Respondents sought an adjournment in order to make applications for the recusal of the members of this court – Adjournment granted – Appeal to be enrolled for hearing in the November session of this Court – Question of costs for the day to be determined at an appropriate stage.

JUDGMENT

DR. S. RWUM J.A.

[1] This appeal is against the orders of the High Court that:

1. The Judge *a quo* erred and/or misdirected herself in assuming review jurisdiction whether declaratory or not in the matter contrary to the mandatory provisions of section 152 of the Constitution of Swaziland in as much as His Lordship the Chief Justice sitting in the High Court is not an inferior court.
2. The Judge *a quo* erred and/or misdirected herself in sitting in judgment over the decision of the Chief Justice. That decision could only be overturned by Supreme Court.
3. The Judge *a quo* erred and/or misdirected itself in dealing with the merits of the case whereas the court was called upon to deal with jurisdiction which was either to be upheld or dismissed.

4. The Judge *a quo* erred and/or misdirected herself in failing to appreciate the basic fundamental principle that contempt of court is *sui generis* and hence it does not fall under the Criminal Procedure and Evidence Act 67/1938. The Court is entitled to devise its own procedure in self-protection.
5. The Judge *a quo* erred and/or misdirected herself in the circumstances in setting aside the Respondents' warrant of arrest.
6. The Judge *a quo* erred and/or misdirected herself in dealing with evidential documents which were not part of the record. In particular the letter written by the applicants' attorneys requesting a full bench which was never brought to the attention of the respondents.
7. The Court *a quo* erred and/or misdirected herself in inviting the 2nd Applicant's Counsel only to deal with issues of merits when it was a point of law of Jurisdiction that had to be dealt with.

These grounds of appeal were set out in the Notice of appeal.

[2] The Roll of cases set down for hearing in the May session of this Court was first published on the 8th day of April 2014. The instant case was set down for hearing on the 14 May 2014. The published Roll was circulated,

inter alia, to The Law Society of Swaziland, Legal Practitioners, and to Litigants in Person. The published Roll also gave notice that: ‘There will be a roll call on Friday 2 May 2014 at 9:00 a.m.’

[3] Shortly before the sitting of this Court was about to commence on the morning of Wednesday 14th May 2014, Mr. Z. Mkhwanazi for the 1st Respondent, Advocate L. Maziya for the 2nd Respondent, and Mr. N. Kunene for the Appellant, approached this Court in chambers. Counsel for the parties correctly adopted this process: for it soon emerged that counsel for the Respondents had been instructed to apply for the recusal of the members of this Court on the ground that the Honourable Chief Justice, was both the Head of the Judiciary, and also the functional President of the Supreme Court.

[4] It was the unanimous consensus of all the lawyers concerned that the Respondents were fully entitled to apply for the recusal of the members of this bench: but that their intention to make their applications should be signified in open court. It was also agreed that Counsel for the Appellant was equally entitled to oppose any applications for this Bench’s recusal if so advised and instructed.

[5] When the matter was called in open court, Advocate Maziya, who was clearly spearheading the team representing the Respondents, conceded that what he was seeking, in essence, was an adjournment of the hearing of this appeal, previously enrolled for hearing as he stood on his feet, so that the Respondents could make such applications as were warranted by their instructions, and that any applications made would take their normal courses.

[6] Counsel for the Appellant did not offer vigorous objections to the applications for an adjournment; but telegraphed his intention to raise the question of costs for the day at the appropriate time.

[7] In all the circumstances of the case, this Court acceded to the applications for an adjournment leaving the question of costs for the day to be determined at an appropriate stage.

ORDER

[8] It is the order of this Court that:

1. The matter be and is hereby adjourned to the November 2014 sitting of this Court.

2. The question of costs for the day is to be determined at an appropriate stage.

DR. S. TWUM
JUSTICE OF APPEAL

I agree

S.A.MOORE
JUSTICE OF APPEAL

I agree

DR. B.J. ODOKI
JUSTICE OF APPEAL

For the Appellant : Mr. V. Kunene
For the 1st Respondent : Mr. M.Z. Mkhwanazi
For the 2nd Respondent : Mr. L. Maziya instructed by N. Manana