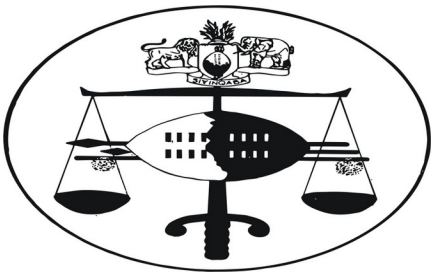

IN THE
INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE **CASE NO. 7/2008**

In the matter between:

THE ATTORNEY GENERAL **1ST APPELLANT**

THE CHAIRMAN CIVIL SERVICE COMMISSION **2ND APPELLANT**

AND

NHLANHLA HLATSHWAYO **RESPONDENT**

CORAM **MAPHALALA JA**
MABUZA AJA
MAMBA AJA

FOR APPELLANTS **MR M. VILAKATI**
FOR RESPONDENT **MR M. MKHWANAZI**

JUDGEMENT
28th August, 2009

MAMBA AJA,

[1] The Respondent, who is the acting Registrar of the Industrial Court, instituted application proceedings against the Appellant in that court for an order inter alia setting aside and declaring null and void his purported promotion as Examiner of Patents and Designs by the second Appellant on the ground that such promotion was ultra vires the powers of the second Appellant and also contrary to the order that had previously been issued by the Industrial Court on the matter of his removal as the acting Registrar.

[2] The Industrial Court, in the form of the Learned President of that Court had on 11th September, 2006 issued an order that the Government of Swaziland should, in consultation with the Respondent identify and promote the Respondent to a suitable position not lower than Grade C4 within the Judicial Service or Civil Service. The Respondent has held the post of Acting Registrar for a period in excess of three years.

[3] The Application referred to in paragraph 1 hereof was successful. The Learned President of the court set aside the promotion of the Respondent, on the 8th August, 2008 and ordered the Government to pay the costs of the application on the attorney-client scale. The Appellants, being not

satisfied with that judgement, have filed this Appeal and the grounds thereof are as follows:

> "1. The Learned Judge a quo erred and misdirected himself in refusing to recuse himself from a matter involving the Registrar of his court.
> 2. The Industrial court erred and misdirected itself in declaring that section 3 (5) of the Judicial Service Commission Act 13/1982 is inconsistent with section 178 of the Constitution.
> 3. The court below erred and misdirected itself in setting aside the decision of the 2nd Appellant to promote the Respondent.
>
> 4. The Industrial Court erred and misdirected itself in granting costs against the Appellant on punitive scale."

[4] I now deal with the first ground of Appeal, ie the failure by the President to recuse himself on a matter involving or wherein the acting Registrar of the court is a party.

[5] It is common cause that there was no application made in open court by the Appellants for the President to recuse himself from hearing the application. Because of this reason, the Learned President of the Industrial court did not deal with it in his judgement. As a result of this fact, this court has been denied the opportunity to read the presiding officer's views on the issue. However, it is common cause, and this we were informed from the bar at the hearing of this Appeal that, before the hearing of the Application in the court a quo, both Counsel approached the President in his Chambers, as is customary and expected on such matters,

and Mr V. Kunene who appeared for the Appellants then, informed the President that he would at the start of the hearing of the application move an application for the President to recuse himself from hearing the case. The President was informed that the Appellants were of the view that because of the close working relationship between him and the Respondent, justice could not be perceived or seen to be done, if the President heard the matter.

[6] It is common cause further that the President informed Mr. Kunene that he would refuse or decline the recusal application. The Learned President reasoned that if he was disqualified from hearing the case on the ground stated by Counsel, so were the rest of the two Judges of that court. When the matter was called in court, the President very properly and generously in my view, invited Mr Kunene to move and motivate the recusal Application – if he still considered it appropriate or meritorious. No doubt, faced with the prospect of the recusal application being declined or refused, Mr Kunene declined the invitation and the matter proceeded on its merits.

[7] The immediate question that announces itself from the above situation is whether the Appellants having not moved the Application in the court a quo are they estopped from raising it as a ground of Appeal before this court. The

Respondent thinks they are. The Appellants obviously hold a different view. My view of the matter is this: Where a decision-maker is, for whatever reason, as a matter of law, disqualified from hearing or adjudicating on an issue, his disqualification remains intact and cannot be cured or legitimated by inaction or silence on the part of any party to the dispute. In my view this is the case whether or not the failure to raise the objection has been tactically or inadvertently made. The decision taken by the disqualified decision-maker becomes tainted by the disqualification and remains so tainted even on appeal. If the decision is a nullity, the right to so complain by any party to the dispute may never be lost by mere inaction. It would be untenable for any court to hold valid that which is invalid simply because there has been no objection to it, initially. However, a successful party who has raised a new issue for the first time on appeal may be deprived the costs of the appeal. (See **MAHOMED v NAGDEE 1952 (1) SA 410). ARGUS PRINTING AND PUBLISHING CO LTD v RAPPORT UITGEWERS (EDMS) BPK 1975(4) SA 814 (A)**. The Appellants seemed to accept this when I put it to Mr Vilakati during argument before us. For these reasons I would therefore hold that the Appellant is not precluded from raising the issue of the recusal of the presiding officer as a ground of Appeal in the circumstances of this case.

[8] The Industrial Court, at the relevant time when the application was heard, was made up of three judges, including its President. The Respondent was and is still the acting Registrar of that Court. As acting Registrar he is the Chief Administrative Officer of the Court. He works very closely with all the judges of that court including the President who is the overall head of the institution. This is on a daily basis and this much is common cause.

[9] I entirely, with respect, agree with the President that if he was disqualified from hearing the matter involving the respondent, the other two judges of the Industrial court were equally disqualified. I am, however, constrained to disagree with the apparent suggestion by him that if all the said judges recused themselves, then the case would not be heard at all and because of this fact he could not recuse himself. I shall return to this later in the judgement.

[10] Judicial proceedings are matters rooted in justice. A litigant who approaches a court or tribunal does so in search for justice and must be afforded a fair trial. If the trial is not fair, one can hardly talk about justice having been done in such a case. Not only should the adjudicator be fair, independent and impartial but he must be seen to be so, in every respect in the eyes of the reasonable and informed ordinary man in the street. This principle was stated by

LORD DENNING MR in METROPOLITAN PROPERTIES CO. (FGC) LTD v LANNON AND OTHERS [1968] ALLER 304 (CA) at 309-310D as follows:

> "A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject matter. Second, "bias" in favour of one side of [or] against the other. So far as "pecuniary interest" is concerned, I agree with the Divisional Court that there is no evidence that Mr John Lannon had any direct pecuniary interest in the suit. He had no interest in any of the flats in Oakwood Court. The only possible interest was his father's interest in having the rent of 55, Regency Lodge reduced. … It is neither direct nor certain. It is indirect and uncertain.
>
> So far as bias is concerned, it was acknowledged that there was no actual bias … and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear; but I start with the oft-repeated saying of Lord Hewart, CJ., in R v Sussex Justices, Ex p. McCarthy (6) [that];
> "…it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done."
>
> In **R v BARNSLEY COUNTY BOROUGH LICENSING JUSTICES, EX P BARNSLEY AND DISTRICT LICENSED VICTUALLERS' ASSOCIATION (7), DEVLIN, L.J**, appears to have limited that principle considerably, but I would stand by it. It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other

people even if he was a impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision can not stand. …there must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

And referring to the phrase or term real likelihood of bias **EDMUND DAVIES, L-J IN METROPOLITAN PROPERTIES (SUPRA) at 314B-E** stated that;

"It is used to show that it is not necessary that actual bias should be proved. It is unnecessary …to investigate the state of mind of each individual justice. Real likelihood depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing. …The matter must be determined on the probabilities to be inferred from the circumstances in which the justices sat."

[11] I am mindful of the fact that judicial officers are trained in the law and also take a judicial oath of office to administer justice equally and fairly to all manner of man and that because of this there is a presumption of impartiality and fairness that operates in their favour. See **MINISTER OF**

JUSTICE AND CONSTITUTIONAL AFFAIRS v STANLEY WILFRED SAPIRE CIVIL APPEAL 49/2001. And the cases therein cited. This presumption must, perforce be stronger where actual bias or partiality has not been alleged against a judicial officer but only that there is apparent bias or a reasonable apprehension or real likelihood or bias, as in the present case. In casu the Appellants submit that because of the closeness of the working relationship between the President and the Respondent, the reasonable, objective and informed person, who is aware of all these matters, would not think that the President would bring an impartial mind to bear in deciding the matter at hand.

[12] In the **Stanley Sapire case (supra)** where the Respondent was the Chief Justice of the High Court and the full bench of three judges that heard his case were three of a complement of five including himself, the Court of Appeal held that this was a small bench which "must on that account inevitably have a close relationship (whether of friendship or not) with one another and more particularly with the Chief Justice."

[13] Whilst the Respondent is not a judge of the Industrial Court and therefore his case may be said to be distinguishable from **Sapire's case**, the distinction is, in my judgement, one without a difference. The overall

relationship and closeness thereof in the working environment is decisive. The Siswati adage that *Imbilapho ivela silondza,* which literally means; the lymphatic glands are sympathetic to the sore nearest to them, is apposite in this regard.

[14] Referring to the functions of the Respondent the court a quo stated that;

> "…The Registrar is solely responsible for the issue of legal process out of the court. He is responsible for the supervision of the administrative staff of the court. He is responsible for the security of the court records. He is in charge of the administrative functions of the Industrial Court and the Industrial Court of Appeal."

In performing these functions, the Registrar works closely with the President who is the overall head of the Industrial Court. The President even expected that the Judicial Service Commission would "inform the President of the Industrial Court of the imminent removal of his Acting Registrar." That is how close the working relationship between a President of the Court and a Registrar of that court is.

[15] I have mentioned above the fact that perhaps none of the Industrial Court judges were qualified to hear the Application. This did not, however, mean that the Respondent would be left without a remedy before the Industrial Court. An ad hoc or acting judge from within or outside Swaziland could have been appointed for that

purpose and it is regrettable that no consideration, at least as far as we were informed during argument, was given to this possibility. In the case of **R v DLAMINI, HARRY AND ANOTHER, 1987 – 1995 (3) SLR 290**, the second accused was the High Court Deputy Registrar and was charged with two counts of fraud which were allegedly committed whilst she was employed in the Registrar General's Office. Sapire SC, later Chief Justice, was specifically appointed in an acting capacity to try the case. There was no application for the recusal of the judges of the high Court, but the decision to appoint an acting independent judge to hear the case was mero motu taken by the then Chief Justice. A similar decision was made in **R v MABUZA, SIPHO 1987 – 1995 (3) SLR 343** where the accused was a local Magistrate facing a charge of defeating the course of justice.

[16] For the foregoing reasons, the learned President of the court a quo was disqualified from hearing the case. He was in error in failing to recuse himself. Even in the absence of an application for his recusal, he ought, of his own motion, to have recused himself. I would therefore allow the Appeal.

[17] In the case of **ISAAC DLAMINI v THE JUDICIAL SERVICE COMMISSION AND 4 OTHERS CIVIL CASE NO. 3638/06**, this Court, held that the involvement of the Principal Secretary in the Ministry of Justice and

Constitutional Affairs as the Secretary of the Judicial Service Commission was incompatible with the independence of the said Commission and therefore unconstitutional. Mr Vilakati, Counsel for the Appellants submitted that that decision is wrong and urged us to reconsider it and overturn it. Because of the decision I have reached above in this Appeal, I find it neither necessary nor desirable to embark on this exercise or to deal with the rest of the grounds of appeal referred to above. Such an endeavour would clearly be surplusage – an exercise in supererogation.

[18] The point on the recusal of the President although mentioned in Chambers was not formally raised in court with the presiding officer. It was therefore raised for the first time on appeal. Notwithstanding the informal and prima facie views of the President on the issue, it should have been raised before him in court for him to formally deal with it. Although the Appellants have succeeded in this appeal, but because they failed to raise this objection in the court a quo, this is a proper case wherein the successful party should be denied the costs of the Appeal (See the cases cited above). I would therefore make the following order:

1. The Appeal is allowed and the order of the Industrial Court is
   set aside.
2. The order of the Industrial court is altered to read:

"The President recuses himself from hearing this application."

3. The application is to start de novo.

MAMBA AJA

I agree.

MAPHALALA JA

I also agree.

MABUZA AJA