IN THE HIGH COURT OF SWAZILAND

Case No. 2180/2009

In the consolidated matters between

THULANI MASEKO and THREE OTHERS	**Applicants**
and	
THE PRIME MINISTER OF SWAZILAND	**1st Respondent**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS	**2nd Respondent**
THE DIRECTOR OF PUBLIC PROSECUTIONS	**3rd Respondent**
THE ATTORNEY GENERAL	**4th Respondent**

Neutral citation: *Thulani Maseko v The Prime Minister of Swaziland & Others* (2180/2009) [2016] SZHC 180 (16 September, 2016)

Coram: **ANNANDALE, MAMBA AND HLOPHE JJ.**

Heard: **8 &9 September 2015 and 8 & 9 February 2016**

Delivered: **16 September 2016**

[1] *Constitutional Law and Procedure – declaration of invalidity – to take effect from date of filing of application to facilitate smooth transition to new constitutional order.*

[2] Constitutional Law – Jurisdiction of the High Court – s 151 (2) – The court is empowered to hear and determine any matter of a Constitutional nature and has

jurisdiction to enforce the fundamental human rights in the Constitution.

[3] Constitutional law – adjudication on fundamental rights – where a law of general application interferes with or infringes on a fundamental constitutional right, the applicant bears the onus to prove such infringement and where such a infringement has been conceded or established, then the respondent who pleads that the infringement is justified and reasonable, bears the onus to prove such justification and reasonableness.

[4] Constitutional adjudication – where the respondent fails to satisfy the court by way of evidence or some other information that a limitation or restriction on a fundamental right is justifiable and reasonable as dictated by the Constitution, the court as per the Constitution is enjoined to hold the infringement unconstitutional and thus strike down that law.

JUDGMENT

MAMBA J

[1] By Notice of Motion dated 18 June 2009, the Applicant Mr Thulani Rudolf Maseko (hereinafter referred to as Maseko), filed an urgent application seeking *inter alia*, for an order:

> '2. Declaring that the Sedition and Subversive Activities Act No. 46 of 1938 is null and void on the ground of inconsistency with section 1 as read together with section 2 and 24 of the Constitution Act 001 of 2005 in that it is overbroad.
>
> 3. Alternatively;
>
> 3.1 Declaring section 3, 4 and 5 of the Sedition and Subversive Activities Act 46 of 1938 as null and void on the ground of inconsistency with the Constitution Act 001 of 2005 in that the said sections are wide and

overbroad and contrary to sections 1, 2 as read with section 24 of the Constitution.

4. Consolidating these proceedings together with case No. 4720/08 insofar as the challenge to Act 46 of 1938 is concerned.'

[2] On 12 June 2014, Mr Maxwell Manqoba Thandukukhanya Dlamini (Dlamini) filed his notice of motion under case no. 782/2014 wherein he also prayed for *inter alia*, an Order:

'1. Declaring the provisions of section 3 (1) and 4 (a) and 4 (e) of the Sedition and Subversive Activities Act 46 of 1938 inconsistent with sections 23,24 and 25 of the Constitution of Swaziland Act 001 of 2005, and therefore invalid.'

[3] Again, on 03 December, 2014 Dlamini, this time jointly with Mr Mario Thembeka Masuku (Masuku), Dlamini filed another notice of motion wherein they sought *inter alia* for an Order:

'1. Declaring the following provisions of the Suppression of Terrorism Act 3 of 2008 …to be inconsistent with the Constitution of the Kingdom of Swaziland, and therefore void:

1.1 paragraph (1) of the definition of terrorist act in section 2 of the Act;

1.2 paragraph (2)(j) of the definition of terrorist act in section 2 of the Act;

1.3 paragraph (h) of the definition of 'terrorist group' in section 2 of the Act;

1.4 section 11(i)(a) of the Act;

1.5 section 11(i)(b) of the Act; and

1.6 section 28 and 29 (4) of the Act.

2. As a result, striking out the provisions of the aforesaid sections in their entirety.

3. Alternatively to 2 above, excising such portions of the Sections, or reading in such words into the sections, as are necessary to make the said sections consistent with the Constitution of the Kingdom of Swaziland.

…

5. Declaring the following provisions of the Sedition and Subversive Activities Act 46 of 1938, to be inconsistent with the Constitution of Swaziland, and therefore invalid:

5.1 Section 3(1)

5.2 Section 4(a), (b), (c) and (e); and

5.3 Section 5(1) and (2).'

This application was made or filed under case number 1703/2014.

[4] On 29 August 2014 Mr Mlungisi Makhanya launched his own application seeking *inter alia*:

1. Declaring the following provisions of the Suppression of Terrorism Act 3 of 2008 … to be inconsistent with the Constitution of the Kingdom of Swaziland, and therefore void:

    1.1 paragraph (1) of the definition of 'terrorism act' in section 2 of the Act;

    1.2 paragraphs (2) (f), 2(g)(i), (ii) and (iii), 2(h), (2)(3) of the definition of terrorist act in section 2 of the Act;

    1.3 paragraph (b) of the definition of 'terrorist group' in section 2 of the Act;

    1.4 section 11(1)(a) of the Act;

    1.5 section 11(2) of the Act;

    1.6 section 28 (2) and 29(4) of the Act.

    …

4. That the declaration of 'invalidity operates with effect from the date on which the Act became law, alternatively such other date which the court may deem just and equitable.' This is under case number 181/2014, which has been erroneously referred to in the consolidated application as case 96/2014.

[5] All the above four (4) cited applications have, with the consent and agreement of the parties herein, been consolidated and were heard by this court as so consolidated on the dates stated above.

Locus standi in Judicio

[6] It is common cause that each of the applicants has been charged with a crime of contravening the provisions of the two respective Acts that each applicant is challenging in his respective application. All four applicants have stated that because of their respective charges, they have the requisite *locus standi* or legal standing to bring these applications before this Court. No serious objection to their *locus standi* has been mounted by the respondents in this case. Applicants have, in my judgment, the necessary standing.

RESPONDENTS

[7] The first Respondent is the Prime Minister of the Kingdom of Swaziland in his official capacity as head of the Executive arm of the State. The second respondent is the Minister for Justice and Constitutional Affairs in the Government headed by the first respondent and is the line Minister responsible for all matters relating to the Constitution of the Kingdom of Swaziland. The third respondent is the Director of Public Prosecutions in

his capacity as the official responsible for all Criminal Prosecutions in the public instance. He is the person who initiated the charges faced by the applicants referred to in the preceding paragraphs. The Attorney-General, in his official or nominal capacity as the legal advisor to all government departments and ministries, has been cited as the 4th respondent. Again, although there was some muted or half-hearted objections to the citation of the 2nd and 4th respondents in these proceedings, this point of objection was not seriously pursued in argument before us. I do not think it should detain this court or burden this judgment further than this. Nothing turns on this issue in these applications in my judgment. Indeed, I do not think that any of the orders or reliefs claimed would affect these respondents in any material or significant way.

[8] It is common cause and can readily be seen from the orders sought in these applications that the applicants contend that the various provisions in the relevant two Acts are contrary to the provisions of the Constitution. The applicants state that these provisions violate their respective rights as enshrined in the Constitution. This is therefore a Constitutional issue.

[9] Section 151 of the Constitution provides that:

‘(1) The High Court has –

(a) Unlimited original jurisdiction in civil and criminal matters as the High Court possessed at the date of commencement of this Constitution;

….

(2) Without derogating from the generality of subsection (1), the High Court has jurisdiction-

(a) to enforce the fundamental rights and freedoms guaranteed by this Constitution; and

(b) to hear and determine any matter of a Constitutional nature.'

See also section 2 of the High Court Act 20 of 1954 and [*Sihlongonyane (infra)*]. The fundamental rights enshrined in the Constitution are enforceable by the Courts as per section 14(2) of the Constitution.

[10] Again, it has to be remembered that the applicants submit in their respective applications that the charges that are the subject of these applications, are untenable because the acts complained of were done or committed in the exercise of their fundamental rights and do constitute an exercise of their constitutional fundamental rights either to Freedom of Expression or Freedom of Association or such other similar and related rights. Section 35 of the Constitution lays down that

‘(1) Where a person alleges that any of the foregoing provisions of this chapter has been, is being or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine any application made in pursuance to subsection(1); …’

The above cited provisions of the law, do, in my judgment sufficiently and amply set out the jurisdiction of this court to hear or entertain these applications.

[11] **GROUNDS FOR APPLICATIONS**

All the applicants, as already stated, complain that the pieces of legislation they have been charged under or for contravening (a) constitute a violation of their rights to freedom of Expression or Speech and or Freedom of Association as enshrined in the Constitution and or is inconsistent with

such constitutional dictates and are therefore null and void to the extent of such inconsistency; and

(b) the said statutory provisions are vague, overbroad and oppressive and therefore unconstitutional and ought to be so declared.

[12] **RESPONDENTS' DEFENCE**

It is contended by the respondents that

(a) the applicants are guilty of violating the respective provisions of the law under which they have been charged;

(b) the relevant statutory provisions are not vague, overbroad and therefore are lawful and constitutional or

(c) the impugned legislations constitute reasonable and justifiable limitations or restrictions on the applicable freedoms and these restrictions fall within the purview of sections 24(3) and 25 of the Constitution inasmuch as such restrictions are required in the interests of defence, public safety and public order.

[13] **SETTING OR FOUNDATION**

The substratum or basis upon which these applications are founded is the Constitution; and, more particularly the Bill of Rights contained in Chapter 3 thereof. Such foundation also finds justification in the nature and scope of the values and norms espoused therein. Some of these norms, notions

or attributes are those that are inherent or intrinsic in a constitutional democracy. Both sides in these proceedings are agreed on this aspect of these matters.

[14] Section 1 (1) of the Constitution proclaims Swaziland as a democratic state or kingdom. Section 2(1) also decrees that the Constitution is the supreme law of the land and that if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.' At the centre or core of a constitutional democracy is the rule of law; as opposed to a rule of or by man. (See *Attorney General v Simelane and Others, Civil case 59/2014*).

> 'A Constitution limits the power of the government in two ways. First, it imposes structural and procedural limitations on power. Only certain institutions may exercise certain forms of power, and may only do so if specific procedures are followed. …Second, principally through the operation of a Bill of Rights, substantive limitations are imposed. The government may not use its power in such a way as to violate any of a list of fundamental rights. But neither of these limitations on the power of government will be effective without three associated principles of law: Constitutional Supremacy, justiciability and entrenchment.

> The first principle, constitutional supremacy, dictates that the rules of the Constitution are binding on all branches of the state and have priority over any other legal rules. Any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law.' (Johan de Waal *et al*, **The Bill of Rights Handbook, 3rd ed. Juta @ P7-8**).

Justiciability gives efficacy and meaning to constitutional supremacy. The rule of law on the other hand is to protect individual rights and require and expect all citizens, the executive and legislature to play by the rules as set out in the supreme law and adjudicated upon by impartial and independent courts of law. The same courts have to play by the rules as well. Implicit in all of this is the principle of legality; that everything is being done in accordance with the law as established. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council, 1999(1) SA 374 (CC)*.

[15] Section 14(1)(b) of the Constitution guarantees and declares freedom of conscience, expression and peaceful assembly and association as fundamental human rights. All the rights and freedoms enshrined in the Constitution, the Constitution declares and or demands, 'shall be respected and upheld by the three arms of state and other government agencies and all other persons or individuals both natural and legal. Freedom of thought,

conscience or religion is again specifically guaranteed and protected under section 23 (1) of the Constitution. Similarly, freedom of expression and opinion, freedom to receive ideas and information and freedom to communicate these ideas and information without interference is provided for in terms of section 24(1) and (2) of the Constitution. These fundamental rights are, however, not absolute. *Argus Printing and Publishing Co. Ltd v Inkatha Freedom Party 1993 (3) SA 579 (A)* and *Argus Printing and Publishing Co Ltd v Esselen's Estate 1994 (2) SA (A)*. This is made plain by the provisions of sections 24 (3) and 25 (3) of the said Constitution which stipulates that:

> 'Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-
>
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
>
> …
>
> except so far as that provision or, as the case may be, the thing done under the authority of the law is shown not to be reasonably justifiable in a democratic society.'

[16] There are three main justifications for freedom of speech; viz, one's individual autonomy, an intrinsic attribute of democracy and it is the best

way of obtaining the truth or knowledge. Emerson quoted by Franklin S. Haiman in **SPEECH AND LAW IN A FREE SOCIETY at P 22** says Free Expression

> "includes the right to form and hold beliefs and opinions on any subject, and to communicate ideas, opinions, and information through any medium – in speech, writing, music, art or in other ways. To some extent it involves the right to remain silent. From the obverse side it includes the right to hear the views of others and to listen to their version of the facts. It encompasses the right to enquire, and to a degree, the right of access to information. As a necessary corollary, it embraces the right to assemble and to form associations, that is, to combine with others in joint expression."

In *Abrams v United States 250 US 616 (1919) at 624* Holmes J stated:

> 'But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.'

It is, however, accepted that 'ideas exchanged in the market place are not always pleasing to be heard.' (*Government of the Republic of South Africa v Sunday Times 1995(2)BCLR 182 (T) at 188).* See also *Holomisa v Argus Newspapers Ltd 1996(2) SA 588(W),* where Cameron J. stressed that free speech has its foundation and basis in the right to personal autonomy; more so in political and public discourse.

[17] **THE SEDITION AND SUBVERSIVE ACTIVITIES ACT**

I now examine the challenge to the Sedition and Subversive Activities Act 46 of 1938. Whilst, it is true that this Act predates the regaining of our independence in 1968, it is not entirely correct to say it is a relic of our colonial past as it was last amended after independence in 1987. In examining it I proceed on the premise that it is generally agreed by the respondents that the impugned provisions of the Act do adversely affect or infringe the rights of the relevant applicants in their right to Freedom of Speech and Freedom of Association. The respondents' defence, however, is that the restrictions or limitations are lawful or permissible. Indeed the cases were argued before us on this basis. This is, I think, also supported by the submission by the 2nd respondent in his opposing affidavit where he states as follows:

"10.1

I am advised and verily believe that the right to freedom of speech is not enjoyed without limits. Certain limitations and restrictions may be imposed by law as is the case in Swaziland with the Sedition and Subversive Activities Act.

…

10.3

I reiterate that the right to freedom of speech is not absolute and as such there are limits within which it may be exercised. The …. Act is justified in terms of these limits provided for by the Constitution.'

The second respondent submits further that the Act does not erode or unduly interfere with the fundamental or democratic freedom or right of speech or expression of the applicant as enshrined in the Constitution. He specifically quotes section 24(3) of the Constitution in support of his assertions.

[18] Sections 3,4 and 5 of the said Act state:

'3. (1) A "seditious intention" is an intention to –

(a) bring into hatred or contempt or to excite disaffection against the person of His Majesty the King, His Heirs or successors, or the Government of Swaziland as by law established; or

(b) excite His Majesty's subjects or inhabitants of Swaziland to attempt to procure the alteration, otherwise than by lawful means, of any matter in Swaziland as by law established; or

(c) bring into hatred or contempt or to excite disaffection against the administration of justice in Swaziland; or

(d) raise discontent or disaffection amongst His Majesty's subjects or the inhabitants of Swaziland; or

(e) promote feelings or ill-will and hostility between classes of the population of Swaziland.

(2) Notwithstanding subsection (1), an act, speech or publication shall not be seditious by reason only that it intends to –

(a) show that His Majesty has been misled or mistaken in any of His measures; or

(b) point out errors or defects in the government or constitution of Swaziland as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(c) persuade His Majesty's subjects or the inhabitants of Swaziland to attempt to procure by lawful means the alteration of any matter in Swaziland as by law established; or

(d) point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Swaziland.

(3) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.

4. Any person who –

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;

(b) utters any seditious words;

(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or,

(d) imports any seditious publication, unless he has no reason to believe that it is seditious;

(e) without lawful excuse has in his possession any seditious publication;

shall be guilty of an offence and liable on conviction to imprisonment not exceeding 15 years or a fine not exceeding E20, 000 and any seditious publication relating to an offence under this section shall be forfeited to the Government.

(5) (1) A person who does or attempts to do or makes any preparation to do an act with a subversive intention or who utters any words with a subversive intention shall be guilty of an offence and liable, on conviction, to imprisonment for a term not exceeding twenty years without the option of a fine.

(2) For the purposes of this section, "subversive" means –

(a) supporting, propagating or advocating any act or thing prejudicial to –

(i) public order;

(ii) the security of Swaziland; or

(ii) the administration of justice:

Provided that this paragraph shall not extend to any act or thing done in good faith with intent only to point out errors or defects in the government or constitution of Swaziland as by

law established or in legislation or in the administration of justice with a view to remedying such errors or defects;

(b) inciting to violence or other disorder or crime, or counselling defiance of or disobedience to any law or lawful authority;

(c) intended or likely to support or assist or benefit, in or in relation to such act or intended acts as are hereinafter describe, persons who act, intend or act or have acted in a manner prejudicial to public order, the security of Swaziland or the administration of justice, or who incite, intend to incite, or have incited to violence or other disorder or crime, or who counsel, intend to counsel or have counselled defiance of or disobedience to any law or lawful authority;

(d) indicating, expressly or by implication, any connection, associated or affiliation with or support for an unlawful society;

(e) intended or likely to promote feelings or hatred or enmity between different races or communities in Swaziland:

Provided that this paragraph shall not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities;

(f) intended or likely to bring into hatred or contempt or to excite disaffection against any public officer or any class of public officers in the execution of his or their duties, or any of His Majesty's armed forces, or any officer or other member of such a force in the execution of his duties:

Provided that this paragraph shall not extend to comments or criticisms made in good faith and with a view to remedying or correcting errors, defects or misconduct on the part of such public officer, force or office or other member thereof and without attempting to bring into hatred or contempt or to excite disaffection against such a person or force;

(g) intended or likely to seduce from his allegiance or duty any public officer or any officer or other member of any of His Majesty's armed forces.'

[19] It is not insignificant to note that the 2nd respondent nowhere in his affidavit states why the limitation is necessary and what purpose it is meant to achieve or serve or what mischief it is meant to address or curb. He merely states that the limitation or restriction is reasonably required '…in the interests of certain public purposes.' (Per paragraph 15.2). The averred 'interests' and public purposes' are not disclosed. This, in my judgment, is not an adequate answer to the challenge.

[20] Brennan CJ in *Lange v Australian Broadcasting Corporation 145 ALR 96 (1997)*, observed as follows:

> 'When a law of a State or Federal Parliament or a Territory legislature is alleged to infringe the requirements of freedom of communication imposed by … the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect (cf *Cunliffe* (1994) 182 CLR 272 at 337). Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government… If the first question is answered "yes" and the second is answered "no" the law is invalid.'

And in *R v Swaziland Independent Publishers (Pty) Ltd and another [2013] SZHC 88* at paragraph 92, this court held that the onus of establishing that the limitation or restriction is constitutional – in the sense of it being reasonably justifiable in a democratic and free society - lies with the party pleading such justification. The principle is: he who alleges must prove.

In *Gardener and Whitaker 1995 (2) SA 672 (E)* the court stated that:

> 'Where it is sought to justify the infringement of a fundamental right by virtue of a law of general application (which does not embody a fundamental constitutional right), placing the onus for such justification on the party relying thereon is easily explained. The limitation, after all, seeks to diminish a right regarded as fundamental by the Constitution. As stated above, the same cannot be said of competing fundamental rights. They are inherently of equal value in terms of the Constitution.'

See also *S v Zuma 1995 (2) SA 642 (CC)* and *S v Makwanyane 1995 (3) SA 391 (CC).*

In *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491(CC)*, a case referred to us by the applicants, the court had this to say:

> 'If the government wishes to defend the particular enactment, it then has the opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but the placing before court of the requisite factual material and policy considerations.'

And in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others, 2005 (3) SA 280 (CC)* the court held that:

> 'Where justification depends on factual material, the party relying on justification must establish the facts on which justification depends. Justification may, however, depend not on disputed facts but on policies directed at legitimate governmental concerns. If that be the case, the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the court may be unable to discern what the policy is, and the party making the Constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion.'

[21] In *Gardener (supra)* the court stated as follows:

> 'Where the infringement of fundamental rights is raised in litigation the case is normally adjudged after all the evidence has been led, on the basis of a two-stage approach. The first stage relates to the enquiry into the nature and ambit of the right and whether it has been

> infringed, and the second determines whether the infringement can be justified by a provision of law which complies with the requirements of the general limitation clause, being s 33 of our Constitution. The plaintiff bears the onus during the first stage of the enquiry, the defendant during the second stage (*Qozeleni's case supra at 640 H-641C; Khala's case supra at 228D-I (SA) and 371c-h (SACR); Majuva's case supra at 3151 (SA) and 296e (SACR); Phato's case supra at 45-5; and cf R v Oakes (1986) 26 DLR (4th) 200.'*

See also *Bernstein v Bester NO 1996 (2) SA 751*.

The respondents have been found woefully wanting on this front. They have not submitted any evidence or material of whatever nature in justification of the limitations in question. That being the case, the conclusion is, in my view, inescapable that the respondents have failed to satisfy this court that the restrictions and limitations imposed on the applicants' Freedom of speech or expression are either reasonable or justifiable. Besides, the deeming provisions of subsection 3 of section 3 are plainly contrary to the constitutionally entrenched right of being presumed innocent until proven otherwise.

[22] Because of the above conclusion, it is not necessary for me to examine whether or not the limitations are proportional to the mischief sought to be

regulated or whether there is a rational connection between such limitations and objectives to which such restrictions or limitations relate. We have not been told of any mischief herein. These objectives or interests, if any, may only be 'of defence, public safety, public order, public morality or public health' or the other interests enumerated under section 24(3) or 25 (3) of the Constitution.

[23] "Constitutional guarantees of free speech have also had effect elsewhere. In *Hector v Attorney General of Antigua and Barbuda and others (1991) LRC (Const) 237 (PC) [1990] 2 All ER 102)* the Privy Council struck down as unconstitutional a section of a criminal statute which made it an offence to publish material which would "undermine public confidence in the conduct of public affairs." Lord Bridge of Harwich stated;

> "In a free and democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible to public administration must always be open to criticism. An attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their

> stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office.
>
> …
>
> It would on any view be a grave impediment of the freedom of the press if those who print, or a fortiori those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based.'
>
> Per Froneman J in Gardener (supra).

I respectfully agree.

[24] For the foregoing reasons, I would grant the orders sought on or concerning the Sedition and Subversive Activities Act 46 of 1938.

THE SUPPRESSION OF TERRORISM ACT

[25] The Oxford English Dictionary (3rd ed.) defines terrorism as any act designed to cause terror, the instilling of fear, terror, intimidation or coercion. The term is obviously politically, and, at times emotionally or value laden. It is a subjective term. Therefore, there is no universally accepted meaning of the term or word. Similarly, the acts or conduct that may be referred to as terrorist acts may be politically, economically, ideologically, and religiously motivated. It would appear that nowadays,

terrorist acts refer to both overt and covert conduct in the form of murder or other forms of atrocity or violence perpetrated against lawful authority or non-combatant targets for political or religious purposes and designed to have adverse impact on large audiences. In our Act, the word terrorism is, of course, not defined. Perhaps, there was no need to do so as the Act regulates and penalizes mere acts or conduct.

[26] I have already listed in paragraphs 3 and 4 above the impugned sections of the Suppression of Terrorism Act 3 of 2008. In its preamble, the Act is described as one '… to provide for the detection, suppression and deterrence of terrorism and for punishment of all forms of terrorist acts and persons engaged in terrorist acts in compliance with the Conventions and Resolutions of the United Nations.' The Act goes on to say that a terrorist act means –

(i) an act or omission which constitutes an offence under this Act or within the scope of a counter-terrorist convention; or

…

(j) involves prejudice to national security or public safety; and is intended to

(i) intimidate the public or a section of the public;

or

(ii) compel the government, a government or an international organization to do, or refrain from doing any act.'

Any entity which may be proscribed, named or specified by the minister responsible for national security is described as a terrorist group. This declaration is made in terms of section 28 (2) of the Act. I shall return to this issue presently.

[27] Section 11(1) provides that:

'11. (1) A person who knowingly, and in any manner –

(a) solicits support for, or gives support to any terrorist group; or

(b) solicits support for, or gives support to, the commission of a terrorist act,

commits an offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen (15) years.'

These provisions, the applicants argue are, together with sections 28 and 29 (4) of the Act, inconsistent with the provisions of section 25 of the Constitution which guarantees one's Freedom of association and peaceful assembly, and to some extent section 24 which guarantees:

(a) Freedom of expression and opinion,

(b) Freedom to receive ideas and information without interference,

(c) Freedom to communicate ideas and information without interference and

(d) Freedom from interference with one's correspondence.

[28] The applicants have stated and this has been confirmed by the respondents, that they have been charged under the Act because they are members of the Peoples United Democratic Movement (PUDEMO) which is a specified entity and that at the relevant times, they were found wearing T-shirts and berets of such organization and also chanting its slogans and demands. As already stated above, a specified entity is described under section 2 (3) (b) as a terrorist group. It would appear that the Act does not, apart from giving a description of a terrorist act, terrorist group or terrorist property, describe what a terrorist is. (I guess though that a terrorist is the author of a terrorist act).

[29] The respondents, in particular the 4th Respondent, have denied that the challenged or impugned provisions of the Act do infringe the applicants' right to freedom of expression or opinion or their right to freedom of association. He, however, states that 'any infringement is justified as may be required in the interests of defence, public safety and public order.' (See para 12 at page 47 of the Book of Pleadings). The respondents have also denied that the relevant provisions of the Act are overly broad or vague.

[30] It is important to always bear in mind that this court has not been called upon to decide on the guilt or otherwise of the applicants, or, whether or not what they are alleged to have done constitutes an offence or crime under the Act. That is, a matter for the trial court, should the matter eventually go to trial. As in the issues involving the Sedition and Subversive Activities Act, the applicants have filed or annexed their respective charge sheets or indictment for two reasons. First, to show or establish that they have *locus standi* to challenge those provisions of the Acts. Put differently, that this is not a purely hypothetical or abstract case but that this is a real dispute between real persons. The dispute is not imagined. Secondly, to demonstrate what acts they are accused to have committed and that these acts constitute an exercise of their respective constitutional rights. I shall therefore refrain from commenting on the desirability or appropriateness or otherwise of these charges. Furthermore, this court has not been asked to review the decision of the relevant minister declaring PUDEMO a terrorist group or specified entity. These proceedings are for the court to determine and rule on the constitutionality or otherwise of the impugned provisions of the two Acts and also decide or determine whether or not the provisions thereof are not vague or overly broad.

[31] It is significant that whilst the Act refers to certain United Nations counter terrorism Conventions and Swaziland's obligations in terms of the resolutions of the United Nations, the United Nations strategic and operational framework to fight terrorism enjoins every country 'to ensure the respect of human rights while countering terrorism.' Again, the 2014 Public Report on the Terrorist Threat to Canada, concludes by saying that 'Terrorism is still the leading threat to Canada's National Security, but by adhering to our principled approach, firmly rooted in respect for the rule of law and human rights, Canada will remain resilient against this threat.' Therefore respect for human rights must be the foundation or must underpin any legislation or measures taken by any country in its fight against terrorism.

[32] I should state from the outset that the fact that the applicants have been charged for their involvement with or to PUDEMO is plainly a matter that affects or impacts on their right to freedom of association and opinion. For whatever reason, their views on the policies, aims, ideals and objectives of PUDEMO have drawn them to it. The wearing of any apparel or paraphernalia associated with PUDEMO, may or may not, depending on the particular circumstances of each case, be said to be a crime under the Act. The bottom-line in these proceedings, however, is that their association, involvement with this organization or entity has resulted in

them being charged under the Act. In a word, they have been told, PUDEMO is a specified entity, and your belonging to it or chanting its slogans and wearing its apparels is a crime in terms of the Act. Clearly, their rights to freedom of association and opinion are adversely affected by this.

[33] The question that immediately and logically announces itself from what I have stated in the preceding paragraph is:

Does the law or regulations that declare PUDEMO a specified entity not interfere with the applicants' constitutional rights to freedom of association and opinion? I answer that question in the affirmative. I have already set out above the relevant constitutional provisions on the relevant rights and freedoms and I do not think it is necessary to repeat these here. Suffice to say again that these rights are not absolute. They may be subject to certain restrictions or limitations. (See 25(3) of the Constitution).

[34] In response to the applicants' concerns, or challenge, the respondents have merely stated that Terrorism is an offence and it is necessary to protect the public against it. This assertion, however, does not address the rationality and proportionality tests referred to above. The fact of the matter is that the respondents have not told the court of any fact or material relevant to the enactment of these provisions that limit the constitutional rights of the

applicants. Generally speaking, most of the offences criminalized as terrorists acts in the Act are covered by the ordinary criminal law. In the main, terrorist acts refer to acts that may be said to be atrocities. Whilst it is not herein being suggested that the respondents should have waited until such acts were committed before enacting the Act, a court of law, faced with an application such as the instant one, would require certain evidence or information in order to determine whether the measures taken do justify the limitations or abrogations of the applicants' right to freedom of association, peaceful assembly, opinion and expression. There is no such information in these proceedings. (See the literature quoted by P.A. Freund *et al*, **Constitutional Law Cases and Other Problems, (Little, Brown and Company) Vol. 1 (1961) at 115).** With due respect, what the respondents have said or done is to make a recital or regurgitation of what the nature of the limitation should be to be constitutionally permissible or allowable.

[35] On the question or issue of Administrative justice, the applicants contend that their rights to natural justice were violated and are violated by the provisions of section 28 of the Act. In terms of this section where the Attorney-General has reasonable grounds to believe that an entity has knowingly committed or participated in the commission of a terrorist act or is acting on the behest and direction of or in association with such entity,

he or she may recommend to the minister responsible for national security to have the entity specified. Neither the Attorney-General nor the minister is enjoined to receive representation from the said entity before making the said decision. However, once the decision is made and the entity is declared specified, the entity may make representation to the Attorney-General to have the declaration rescinded. Again where the decision is not rescinded, the entity has a right to apply to this court for a review of such decision. These provisions are almost similar to section 29(4) of the Act.

[36] Of crucial importance or significance in the arrangements or provisions of sections 28 and 29 (4) is that it is only the specified entity that has the right to petition the Attorney-General or the court to rescind the declaration of being a specified entity. Persons like the applicants, who are members, associates or affiliates or supporters of that entity, are declared, in effect, terrorists or at least persons engaged or involved in terrorist acts or criminals before they are given the opportunity to be heard on that issue. This cannot be right. It is against the rules of natural justice or procedural fairness or administrative justice that a person be condemned before he has been given the opportunity to be heard on the issue under consideration. This is the case whenever the decision taken or about to be taken adversely affects that person in his personal or property rights. This precept of

natural justice has been specifically constitutionally guaranteed in section 33 of the Constitution and is a fundamental right or a Chapter III right.

[37] I respectfully, find support for the views in the preceding paragraph in the minority judgment of Justice Douglas in ADLER *et al* v BOARD OF EDUCATION 342 U.S. 485, 72 Sup. Ct. 380, 96 L. Ed. 295 (1952) where the learned judge said as follows:

> 'The present law proceeds on a principle repugnant to our society-guilt by association. A teacher is disqualified because of her membership in an organization found to be "subversive". The finding as to the "subversive" character of the organization is made in proceeding to which the teacher is not a party and in which it is not clear that she may even be heard. To be sure she may have a hearing when charges of disloyalty are levelled against her. But in that hearing the finding as to the "subversive" character of the organization apparently may not be re-opened in order to allow her to show the truth of the matter. The irrebuttable charge that the organization is "subversive" therefore hangs as an ominous cloud over her own hearing. The mere fact of membership in the organization raises a prima facie case of her own guilt. She may, it is said, show her innocence. But innocence in this case turns on

knowledge; and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed.

The very threat of such a procedure is certain to raise havoc with academic freedom. Youthful indiscretions, mistaken causes, misguided enthusiasms - all long forgotten – become the ghosts of a harrowing present. Any organization committed to a liberal cause, any group organized to revolt against an hysterical trend, any committee launched to sponsor an unpopular program becomes suspect. … A teacher caught in that mesh is almost certain to stay condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled. …

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of enquiry. …

> A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction.'

[38] From the foregoing analysis, it is plain to me that sections 28 and 29 (4) are to the extent that they deny persons in the position of the applicants to be heard before or after an organization or entity to which they are members, supporters or affiliates, is proscribed as a specified entity, is inconsistent with section 33 of the Constitution and therefore, to the extent of such inconsistency invalid or unconstitutional.

[39] For the foregoing, I would again allow the application concerning the unconstitutionality of the impugned provisions of the Suppression of Terrorism Act 3 of 2008.

[40] In *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane (470/13A) [2013] SZHC 144 (18 July 2013)* this court stated the following:

> 'Our Constitution came into effect on 26 July 2005. Section 35 (2) of the Constitution allows the Court to "…make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this chapter." The right to equality, of course, falls

under this chapter, ie, Chapter III. As to what may be an appropriate order or direction will obviously vary and depend on the peculiar circumstances of each case. In *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others, 1999 (1) SA 6 (CC)* the court observed that:

> '[94] The interest of good government will always be an important consideration in deciding whether a proposed order …is 'just and equitable', for justice and equity must also be evaluated from the perspective of the state and broad interests of society generally. As in Ntsele's case, it might ultimately be decisive as to what is just and equitable. …
>
> [95] The present is the first case in which this court has had to consider the retrospectivity of an order declaring a statutory or criminal law of offence to be Constitutionally invalid. The issues involved differ materially from those in cases where reverse onus provisions have suffered this fate. In the latter cases, an unqualified retrospective operation of the invalidity provisions could cause severe dislocation to the administration of justice and also be unfair to the prosecution who had relied in good faith on such evidentiary provisions. In addition, the likely result of such an unqualified order

> would be numerous appeals with the possibility of proceedings having to be brought afresh. …
>
> [97] An unqualified retrospective order could easily have undesirable consequences. Persons might act directly under the order to have convictions set aside without adequate judicial supervision or institute claims for damages. The least disruptive way of giving relief to persons in respect of past convictions for consensual sodomy is through the established court structures. On the strength of the order of constitutional invalidity such persons could note an appeal against their convictions for consensual sodomy, where the period for noting such appeal has not yet expired or, where it has, could bring an application for condonation of the late noting of an appeal or the late application for leave to appeal to a court of competent jurisdiction. In this way effective judicial control can be exercised. Although this might result in cases having to be reopened, it will in all probability not cause dislocation of the administration of justice of any moment.'

Bearing these factors in mind, we are of the view that the appropriate order of invalidity herein must be backdated to the date of filing of this application. Such a retrospective order will benefit the applicant

in full and all other prospective litigants who are similarly situated as her.'

I am of the considered view that similar orders should be made in these applications.

[41] Finally, may I, with all due respect and humility, end this my uncharacteristically long and elaborate judgment by reminding ourselves of, and reaffirming the universality of Human Rights. Indeed, the norms, values and aspirations discussed and interpreted in this judgment are not foreign to our Swazi way of life. They are clearly and proudly proclaimed in our own home grown or autochthonous Constitution. The Constitution is a living document, with all its virtues and infelicities, if any. It represents and reflects us, the people of eSwatini. It is the mirror that allows us to stand in front of it, look at ourselves in the eye and see ourselves as we really are. Firm, unshakable and resolute in our traditional institutions, justice, democracy and Human Rights. Section 2(2) of the Constitution enjoins all of us to uphold and defend it.

[42] In summary, I would make the following order:

(a) Sections 3(1), 4(a),(e) and 5 of the Sedition and Subversive Activities Act 46 of 1938 are hereby declared inconsistent with

sections 23, 24 and 25 of the Constitution Act 001 of 2005 and are therefore declared null and void or invalid.

(b) The following provisions of the Suppression of Terrorism Act 3 of 2008; namely paragraph (1) of section 2, paragraph (2) (f), (g), (i), (ii), (iii), (j), paragraph (b), section 11 (1) (a) and (b), and 11 (2), sections 28 and 29 (4), are declared inconsistent with the constitutional provisions relating to Freedom of Speech and Association as provided under sections 24 and 25 of the Constitution and are to the extent of such inconsistency unconstitutional and invalid.

(c) The invalidity is to take effect from the 18th June 2009 in respect of the Sedition and Subversive Activities Act; that being the date upon which Mr Maseko filed his application.

(d) The invalidity regarding the provisions of the Suppression of Terrorism Act is to take effect from 12 June 2014, being the date on which Mr Dlamini filed his application before this court.

[43] As these are constitutional proceedings, the practice and policy of this Court is, unless some exceptional circumstances exist, not to award costs against any litigant. There are no exceptional circumstances herein. Consequently, no order for costs is made.

MAMBA J

I agree.

J.P. ANNANDALE J

For Mr. Thulani R. Maseko	**:**	**Mr. M.Z. Mkhwanazi**
For Mr. Mlungisi Makhanya	**:**	**Adv. Jansen SC and**
		Adv. M. Dewrance
For Mr. T. Masuku	**:**	**Adv. Harthorn**
For Mr. M. Dlamini	**:**	**Adv. J. Berger**
For Respondents	**:**	**Adv. G.D. Harpur SC**
		Adv. AJ Lamplough