CRIM.CASE NO.20/02

In the matter between:

LUCKY NHLANHLA BHEMBE **Applicant**

VS

THE KING **Respondent**

CORAM **:** **SAPIRE C.J.**
MASUKU J.

For Applicant **:** **Adv. L.M. Maziya (instructed by Ben J. Simelane & Associates)**

For Respondent **:** **Mr P.M. Dlamini (Attorney-General)**

JUDGEMENT
17/09/02

Masuku J.

The Applicant is a member of the Police Force. He was indicted on a charge of rape attended by aggravating circumstances, and in respect of which bail cannot be granted. He has now applied to this Court for an Order in the following terms.

1. Reviving the 1968 Independence Constitution;
2. Nullifying the King's Proclamation to the Nation of the 12th April, 1973 and subsequent decrees made thereunder (especially Decree No.3 of 2001) on the ground that they are invalid and/or unconstitutional;
3. Declaring that the King of Swaziland lacks the power to legislate by Decree and lacked such power when Decree No.3 of 2001 was promulgated;
4. Admitting the Applicant to bail on such conditions as this Honourable Court may deem fit to impose;

5. Further and/or alternative relief.

The Orders sought may at a glance appear to be extravagant and irrelevant, taking into account that the main prayer sought is for the Applicant to be admitted to bail. The Constitutional history of this country has seen many developments, one of which was the legislation by the King by Decree. One of such Decrees issued by the King is Decree No.3 of 2001, which precludes the Court from admitting any Applicant to bail if he/she is charged with an offence falling within a schedule of offences therein listed. It is common cause that rape is one of such offences. In order for this Court therefor to consider whether or not to admit the Applicant to bail, it is imperative for it to undertake an exercise into the King's power to issue Decrees and to consider the validity of the Decrees thus far issued. If it is found that the King does have the power to issue Decrees and properly exercised those powers in issuing all Decrees, including Decree No.3 of 2001, then the Court will not admit the Applicant to bail. If it is found on the other hand that the King had no power to issue decrees, and Decree No.3 is found to be invalid, then the Court may consider whether or not it is proper to grant bail to the Applicant after applying relevant principles.

The Constitutional History of Swaziland

In order to place this matter in its proper perspective, it is necessary to chronicle the events in the constitutional history of this country.

It is common cause that Swaziland was a British Protectorate until 6th September 1968, when she gained her independence from Britain. At independence, there was put in place a Westminster type of Constitution (hereinafter referred to as the "Independence Constitution"). This Constitution provided for all aspects of government, civil liberties and rights, powers and functions of the Ngwenyama, traditional institutions and further stipulated a procedure for amending the said Constitution, redolent of any Constitution.

Five (5) years later, on the 12th April 1973, His Majesty, King Sobhuza II issued the Proclamation to the Nation (hereinafter referred to as "the Proclamation", in which he announced that all legislative, executive and judicial powers were vested in himself. He concluded that the Independent Constitution had "failed to provide the machinery for good government and for the maintenance of peace and order" and that it was "indeed the cause of growing unrest, insecurity, dissatisfaction with the state of affairs in our country and an impediment to free and progressive development in all spheres of life." His Majesty further noted that there was "no constitutional way of effecting the necessary amendments to the constitution, the method prescribed by the constitution itself is wholly impracticable

and will bring about the disorder which any constitution is meant to inhibit." He thereafter announced the repeal of the Independence Constitution, subject to all other laws continuing to operate with full force and effect but being construed in a manner that would bring them into conformity with the Proclamation and ensuing decrees. Certain portions of the Independence Constitution were however reinstated.

Thereafter, the King (including King Mswati III) issued a number of decrees, which purported to amend the 1973 Proclamation and Decree. These included the King's Proclamation No.1 of 1981, King's Decree No.1 of 1982; The Tribunal Decree of 1987; Decree No.1 of 1999; Decrees No.1,2 and 3 of 2001, which all seek to amend certain portions of the Proclamation.

As indicated earlier, the Applicant seeks an Order declaring the Proclamation and ensuing decrees (including Decree No.3 of 2001 invalid and or unconstitutional, in which case a further prayer is for this Court to revive the Independence Constitution.

The Applicant's case

The Applicant's main contention is that the King has no power in law to legislate by Decree inasmuch as there is no enactment purporting to give him that power. It is further contended that the purported repeal of the Constitution is null and void and of no force or effect for the reason that the procedure for amending the Constitution set out therein was not followed in the repeal.

The Attorney General argued *per contra.* The first point he raised and which requires immediate attention is whether the Applicant has made out a case for being admitted to bail. The Respondents allege that the necessary allegations for the grant of bail are wanting.

The exact allegations that are said to be missing by the Attorney General were not specified. In **JEREMIAH DUBE VS R (1) 1979 – 81 SLR 187** at **188, G,** Cohen J. stated the salutary principle of our law that the onus is on the accused to show on a balance of probabilities that the granting of bail will not prejudice the interests of justice.

At page 190 E –F, the learned Judge summed up the position in the following terms:-

> *"Summing up therefore, it seems to me that in a case of this kind, there is an initial onus which the applicant has to discharge on a balance of probability that he will neither abscond nor interfere with Crown witnesses. If bail is*
>
> *opposed by the Director of Public Prosecutions and the indications are that the crown case is of sufficient strength on its merits or the surrounding circumstances are such as to indicate that it is in the interests of justice that he should remain in custody, the applicant must further establish special facts before bail will be granted. The views of the Director of Public Prosecutions on the application are generally speaking not readily discarded by the court."*

In his Founding Affidavit, the Applicant furnished the following information:-

a) his occupation, age, marital status and number of dependants;
b) the charges preferred against him;
c) an explanation of the events leading to the arrest and from which it can be inferred that the Applicant protests his innocence;
d) he undertakes to abide by all the conditions that the Court may be minded to impose if it admits him to bail. In particular, he expresses a preparedness to surrender his travel document/passport to his nearest police station and further undertakes not to abscond trial.

It is my view, from a reading of the above that the Applicant has made sufficient allegations which, all things being normal, would entitle him to bail, depending of course on the attitude and depositions of the Crown which the court would consider. I interpolate to state that *in casu,* the Respondents have not objected to the Applicant being admitted to bail, save for submitting that the Court is precluded from granting the Applicant bail by the provisions of Decree No.3 of 2001. In particular, no averments are made that the interests of justice will be prejudiced if the Applicant is admitted to bail. For the foregoing reasons, I am of the view that there is no substance in the argument that the Applicant has not made a case for bail. He has in my view sufficiently discharged the onus upon him, particularly in the absence of assertions to the contrary.

I now proceed to deal with the issues raised on the merits.

a) **The King's Power to issue Decrees.**

The Applicant's main contention in this regard is that the 1968 Constitution never made provision for the King's unilateral enactment of legislation and therefor, King Sobhuza II did not have the power to promulgate the Proclamation and the ensuing Decrees. It was further argued that the Independence Constitution contemplated only an amendment or alteration of the Constitution and not outright appeal. A procedure for the amendment of the Constitution was set out and that for repeal was not, as it was not envisaged.

In order to decide this point, it is necessary to explore the relevant provisions of the Constitution, the Proclamation and other relevant pieces of legislation.

Section 2 of the Constitution provided as follows:-

> *"This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution, that other shall, to the extent of the inconsistency, be void."*

Section 134 of the Constitution made provisions for the alteration of the Constitution and provided for such alteration to be done in a joint sitting of the Senate and House of

Assembly summoned for the purpose in accordance with the provisions of Schedule 1. Schedule 1 provided for the summoning and procedure of the joint sittings of both Chambers of Parliament. It is correct therefor that no provision was made for a repeal of the Constitution and one can say that this was never envisaged by the drafters of the Constitution.

The only power conferred on the King and Parliament by the Constitution in making law was in Section 62 (1), which provided the following:-

> *"Subject to the provisions of this Constitution, the King and Parliament may make laws for the peace, order and good government of Swaziland."*

It is clear from the foregoing that the only form of legislation envisaged by the Constitution was the promulgation of legislation by the King and Parliament and which legislation was to be subject to the provisions of the Constitution and have the object of providing for the peace, order and good government of Swaziland.

As indicated earlier, in 1973, the Proclamation was made and in which the King concluded *inter alia:-*

a) that the Constitution had failed to provide for good government and for the maintenance of peace and order;

b) That the Constitution was the cause of growing unrest, insecurity and dissatisfaction in the country and an impediment to free and progressive development in all spheres of life;

© that the Constitution had permitted the importation into the country of undesirable alien political practices and which are incompatible with the way of life and which engender hostility, bitterness and unrest;

(d) there is no constitutional way of effecting the necessary amendments to the Constitution as the method prescribed by the constitution is impracticable and will result in the very disorder any Constitution is meant to inhibit.

The King then declared that the Constitution was repealed and that all other laws shall continue to operate with full force and effect and shall be construed in a manner conformable to the decree and ensuing decrees. Furthermore, the King declared that all Legislative, Executive and Judicial powers were vested in him.

From (d) above, there was clear recognition that the procedure set out for altering the Constitution was not followed as it was regarded as impracticable. In any event, it is abundantly obvious that the object was not to amend or alter the Constitution but to repeal it altogether because of its perceived negative effects. It therefor does not appear as to where the power and authority to repeal the Constitution was derived and that being the case, it is my view that the repeal of the Constitution was unlawful. Furthermore there appears to be no source of the King's power to issue the 1973 Decree and the ensuing ones. This was not provided for in the Constitution or in any other law. The irresistible conclusion, in view of the foregoing is that the King did not have such power. In this regard, I refer to an address by Mahomed C.J. to the International Commission of Jurists on "The independence of the Judiciary" (1998) 115 SALJ 650 at 660, where the learned Chief Justice stated the following:-

> *"…No law-making authority-however formidable be its military arsenal, however confident it might be about its own wisdom and however popular it might even*
>
> *believe itself to be in the perception of the electorate which put it into power-should ever be allowed to exceed the legitimate parameters of the constitutional covenant articulating fundamental human rights, save in the most compelling circumstances and through extraordinary procedures specially identified and defined within the very constitutional instrument from which it derives its power. One of the great and irreversible truths yielded by the ethos of human rights generated after the Second World War is that <u>Parliament</u> is not sovereign-only the <u>constitution</u> is."*

It is clear therefor that the extraordinary procedure of repealing the Constitution was not specially identified and defined in the 1968 Constitution. The power exercised was not derived from the Constitution. The source from which it was derived is unknown.

Mr Maziya further argued that Decree No.3 of 2001, amongst other decrees is invalid also for the reason that it contravenes the provisions of the *proviso* to Section 80 (2) that read as follows:-

> "*Save in so far as is hereby expressly repealed or amended the King's Proclamation of the 12th April 1973 shall continue to be of full force and effect:*
>
> *Provided that the King may be Decree published in the Gazette amend or repeal the said Proclamation after a new Constitution for the Kingdom of Swaziland has been accepted by the King and the people of Swaziland and brought into force and effect."*

Mr Maziya argued that it was inopportune and premature for the King to purport to amend

or repeal the Proclamation for the reason that no new Constitution for the country has been accepted by the King and the people of Swaziland and no such constitution has been brought into effect.

The effect of the above provision is that it entitled the King to amend or repeal the Proclamation after a new Constitution had been drafted, accepted by the King and the people and had been brought into effect. In this wise, the inescapable conclusion was that the Proclamation was a stopgap measure to operate pending the advent of a new Constitution. It is also implicit that the intention was to freeze the *status quo*, as it were, ushered in by the Proclamation until such time that any amendments thereto would be done in terms of a new constitutional order. This construction is in my view apparent from the nomenclature employed in Section 80 (2) above.

In response to the above, the Attorney General produced the King's Decree No.1 of 1980, which was signed on the 25th March, 1980 and purported to amend Section 80 (2) above. It provided the following:-

> "*In exercise of the Supreme Power in the Kingdom of Swaziland assumed by me in terms of the King's Proclamation of 12th April, 1973,* ***I SOBHUZA II, KING OF SWAZILAND****, do hereby decree that :-*
>
> 1. *The* ***proviso*** *to Section 80 (2) of the Establishment of Parliament Order, 1978 (No.23 of 1978) is hereby repealed and replaced with the following* ***proviso****-*
>
> *"Provided that the King may be Decree published in the Gazette amend or repeal the said Proclamation."*
>
> 2. *The King's Proclamation to the Nation (Amendment) Act, 1979 (Act No.10 of 1979) is hereby declared to be lawful and of full force and effect with effect from the 14th December, 1979."*

The effect of the above Decree was clearly to allow the King to amend the Proclamation and therefor was intended to change the complexion of the Proclamation i.e. from being a stop-gap measure pending the acceptance and putting into effect of a new constitution. It further sought to give retroactive legitimacy, force and effect to Act No.10 of 1979, which clearly fell foul of the *proviso* to Section 80 (2). It would appear that this Act was promulgated oblivious to the provisions of Section 80 (2), thus becoming invalid.

In my view, the amendment of Section 80 (2) provides a full answer to Mr Maziya's challenge based on the said Section 80. It however does not alter my conclusions that the

King did not have the power to legislate by Decree and further did not have the power or authority to repeal the Constitution whether in the manner he did or at all. Every Decree including the 1973 Proclamation and its offspring is therefor tainted with this illegality. The source or well from which the 1973 Decree drew its power and validity was poisoned. This poison, in my view runs in the veins of all other Decrees as they draw their power and existence from the 1973 Proclamation and Decree.

(b) What is the legal status of the 1973 Proclamation and Decree?

There was a divergence of views by both Counsel on this issue. Mr Maziya submitted that the Proclamation never assumed the status of Kelsen's *grundnorm,* whereas the Attorney General argued that it did.

The Attorney General premised his argument for supremacy on the provisions of Section 14 of the 1973 Decree and which provides as follows:-

> "*The Proclamation is the supreme law of Swaziland and if any other law is inconsistent with this Proclamation, that other law shall, to the extent of the inconsistency, be null and void.*

It is worthy of note that this paragraph which imbued the Proclamation with the touch of supremacy, was only promulgated in 1987. Furthermore, there was no attempt, whatever it would have been worth legally, to give retrospective effect to this belatedly declared supremacy. The *de jure* position, in view of the foregoing is that the Proclamation was only cloaked with supremacy in 1987 and that from 1973, it never enjoyed the status of supremacy. It would appear, subject to my earlier conclusions that the Proclamation was arrogated with supremacy and from legislative indications, this was in 1987 as aforesaid.

This still begs the question whether the Proclamation did assume the status of being the *grundnorm* of Swaziland: In order to come to a conclusion on this vexing question, it is necessary to briefly undertake an examination of Kelsen's aforesaid theory.

In the constitutional law landmark case of **MADZIMBAMUTO VS LARDNER – BURKE N.O. & ANOTHER N.O. 1968 (2) SA 284 (R.A.D.)** at **315 E-H,** Beadle C.J. quoted from Kelsen, "General Theory of Law and State" at page 118, where the following excerpt appears:-

> *"It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered a valid order. It is now*

according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm… It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order of which that norm is an integral part has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness."

The learned Chief Justice, in this connection, proceeded to quote from Lord Lloyd, "The Idea of Law" at page 182 (see page 315 H – 316A. the following extract appears:-

"*Certainly in this sense an operative legal system necessarily entails a high degree of regular obedience to the existing system for without this there will be anarchy or confusion rather then a reign of legality. And where revolution or civil war has supervened it may be necessary in the initial stages, when power and authority is passing from one person or body to another, to interpret legal power in terms of actual obedience to the prevailing power. When however this transitional stage where law and power are largely merged is passed, it is no longer relevant for the purpose of determining what is legally valid to explore the sources of ultimate* ***de facto*** *power in the state. For by this time the constitutional rules will again have taken over and the legal system will have resumed its regular course of interpreting its rules on the basis of its own fundamental norms of validity."*

From Kelsen's Birth and Death of the State as Legal Problems at page 220 (p.317 of **MADZIMBAMUTO D – F**), the following appears:-

"…Under what circumstances does a national legal order begin or cease to be valid? The answer, given by international law, is that a national legal order begins to be valid as soon as it has become – on the whole – efficacious; and it ceases to be valid as soon as it loses this efficacy. The legal order remains the same as long as its territorial sphere of validity remains essentially the same, even if the order should be changed in another way than that prescribed by the Constitution, in the way of a revolution or a ***coup d'e'tat****. A victorious revolution or a successful* ***coup d'e'tat*** *does not destroy the identity of the legal order which it changes."*

The events of the 12th April 1973, which have been described above, which include inter alia:-

a) the Constitution of the Kingdom of Swaziland being repealed;

b) that all laws, except the Constitution thereby repealed would continue to operate with full force and effect and would be construed in a manner that would bring them into conformity with that and ensuing decrees;

© that all Judges and other Judicial Officers, Government Officials, Public Servants, Police, Prison and Armed Forces would continue in office and would be deemed to have been validly appointed.

(d) that certain portions of the repealed Constitution and which were identified were reinstated.

Amounted to a revolution in the terminology adopted in the **MADZIMBAMUTO** case and the Decree introduced a new legal Order, repealing the Constitution and replacing it with the Decree and the saved portions of the Constitution. In dealing with a revolution, Professor B.O. Nwabueze "Constitutionalism in the Emergent States" 3rd Edition, 1973, at page 233, quoted the following from a judgement of Chief Justice Muhammed Munir of the Pakistani Supreme Court:-

> "*A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and persons by whom a revolution is brought about is wholly immaterial. The change may be attended by violence or it may be perfectly peaceful. It may take the form of a* ***coup d'e'tat*** *by a political adventure or it may be effected by persons already in public positions. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends. For the purposes of the doctrine there explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective. If the attempt to break the Constitution fails, those who sponsor or organise it are judged by the existing Constitution as guilty of the crime of treason. But if the revolution is victorious in the sense that the persons assuming powers under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success."*

At page 319 G, Beadle C.J. stated the following:-

> *"At what particular stage it can be said the revolution has succeeded and the constitution changed is a question of fact and must depend entirely on the particular circumstances obtaining at that particular time."*

In this regard, Mr Maziya argued, as can be seen from the Proclamation, that King Sobhuza mobilised the armed forces to act if necessary to render the new legal order efficacious. Furthermore, the detention without trial procedure was promulgated and which silenced even those who would otherwise not have submitted to the new legal order.

That notwithstanding, it is my view that the Proclamation did become efficacious and gained continuity. If it was as a result of force, as alleged by Mr Maziya, it is clear from the foregoing paragraphs that even a *coup d'e'tat,* violent as it may be, does usher in a new government and a new legal order in some cases. The question of fact referred to above should in my view should be answered as follows:- the revolution succeeded and the *grundnorm* changed and was accepted by the people of Swaziland and appears to be the efficacious "*grundnorm*" even today, some twenty-nine (29) years later. In **R VS NDLOVU 1968 (4) SA 515 (AA)** at **520E**, Beadle C.J. referred to the operative principle as the efficacy of change which can be ruled, in view of the length of time this order has existed, to have succeeded and taken root.

Regarding effectiveness of the new legal order, Professor Nwabueze (*supra)* stated the following at page 234:-

> *"Effectiveness must therefore be the criterion. And by effectiveness is meant that individuals whose behaviour the new order regulates actually behave by and large, in conformity with the new order. This effectiveness may have been achieved through the application or threat of force or through the active or passive support on the part of the people."*

It is my view that the situation that occurred in 1973 and afterwards even if force was threatened falls within the categories mentioned above and led to the new legal order being Efficacious and has by and large regulated the behaviour and actions of the people of Swaziland.

I find it apposite, in this regard to refer to page 328 F – I of the **MADZIMAMUTO** case, where Beadle C.J. reasoned as follows:-

> *"I accept the proposition that the validity of a new constitution does not depend on whether the old constitution has been changed by a lawful method or by an unlawful method. The only fundamental difference in the two methods of change by a lawful method, the time of the change is precisely demarcated and clear cut whereas in the case of a change by a successful revolution it may not be so easy*

> *to determine the precise point at which it can be said with confidence that the issue is no longer in doubt and that the revolution has in fact succeeded. Once it is clear however, that the revolution has succeeded, the ultimate result is the same. The validity of the new constitution does not depend on the method of change; it depends on the existing factual position which determines as a question a fact, whether the old constitution in the sense of the new norm has become the norm."*

At 329 C., the learned Chief Justice proceeded as follows:-

> *"If an old constitution is completely gone it is gone for all purposes; and as I pointed out earlier, the method of its demise matters not."*

These excerpts suggest that although we have found that the repeal of the Constitution was unlawful and so was the legislation by decree, the new legal Order has taken root and has become efficacious as a new basic norm, although it was ushered in through unlawful and unconstitutional means.

As correctly pointed out by Mr Maziya, Kelsen's theory has not received universal acceptance for it encourages dictatorship and is totally out of touch with modern concepts of constitutionalism. One cannot agree more with these criticisms, which are valid.

The situation facing this Court is however *sui generis* in the sense that in most jurisdictions e.g. in Rhodesia (as it then was) in the **MADZIMBAMUTO** and **NDLOVU** cases (*supra);* **UGANDA VS COMMISSIONER OF PRISONS: EX PARTE MATOVA (1966) EALR 514** and **THE STATE VS DOSSO PLD 1958 S.C. 533** (a judgement of Pakistan), the challenge was made within a reasonable time from the occurrence of the revolution. This in my view is a crucial and distinguishing element.

As aforesaid, this new order took root in 1973 without legal challenge which if timeously raised, would probably have altered the position, especially in view of my legal conclusions on the lawfulness and constitutionality of the repeal of the Constitution and legislation by Decree. Having survived unchallenged and undisturbed for almost three decades, the political and legislative realities are that the entire system of government and key institutions are based on this new legal order such that a state of uncertainty and the collapse of many institutions would result from removing the order, which has be now been entrenched. This would hardly be the correct route, given that this has become a settled *grundnorm*, which became efficacious and remains so to date.

The other difficulty that arises is what order would be put in place if the 1973 Decree were to be nullified by this Court. In prayer 1, the Applicant prays for an Order that this Court revives the 1968 Independence Constitution.

To accede, if found appropriate, to the Applicant's prayer I would do violence to the doctrine of separation of powers for it would call upon the Court to legislate and state which legal order must take root. In this regard, I can do no better than to again refer to Beadle C.J.'s exposition at page 326 – 327 of the **MADZIMAMUTO** case where the following is recorded:-

> *"Another fallacy in this argument is that if presupposes that the power to "declare" law is synonymous with the power to "enforce" law. If the "rule of law" is to be maintained, it is true that the power to "declare" and the power to "enforce" must go hand in hand; but the two powers are not synonymous….Enforcement is a matter for the administration…. It is a wrong conception therefore to imagine that the Judges, by "enforcing", or not "enforcing" a particular constitution, can play a Part in the resolution of the struggle for political power which occurs in the time of revolution."*

It would appear to me therefor that we have to recognise the 1973 Decree as the grundnorm, together with its legacy of Decrees, regardless of how illegally orchestrated they were. The 1973 Proclamation has become the new legal Order and has succeeded for almost three (3) decades with its legacy of Decrees, which has been presumed as one of the lawful ways of legislating in this country – **PROFESSOR DLAMINI VS R APPEAL CASE NO. 41/2001** and **CHIEF MLIBA FAKUDZE AND 3 OTHERS VS MINISTER FOR HOME AFFAIRS AND 3 OTHERS HIGH COURT CASE NO. 2823/2000**.

In the premises, it is my view that the application be and is hereby dismissed. Decree No.3, as part of the new legal and constitutional dispensation ushered in 1973 is law and is binding upon this Court.

Having said this, it is hoped that these complex and vexing questions of Constitutional law, which have remained dormant for close to three decades will finally be put to bed in the new Constitutional dispensation which is underway. In particular, a serious review of the advisability of legislating by Decrees and Orders-in-Council must be undertaken in view of the level of democracy presently sweeping the global village.

T.S. MASUKU
JUDGE