SWAZILAND HIGH COURT

HELD AT MBABANE Civil Case No. 3367/2004

In the matter between

SWAZILAND FEDERATION OF TRADE UNIONS	1st Applicant
PEOPLE'S UNITED DEMOCRATIC MOVEMENT	2nd Applicant
SWAZILAND FEDERATION OF LABOUR	3rd Applicant
NGWANE NATIONAL LIBERATORY CONGRESS	4th Applicant

and

CHAIRMAN, CONSTITUTIONAL REVIEW COMMISSION
CONSTITUTIONAL REVIEW COMMISSION CHAIRMAN,
CONSTITUTIONAL DRAFTING COMMITTEE
CONSTITUTION DRAFTING COMMITTEE GOVERNMENT
OF THE KINGDOM OF SWAZILAND ATTORNEY GENERAL
MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS
CLERK TO PARLIAMENT

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent

Coram

Annandale, ACJ
Matsebula, J
Maphalala, J
Nkambule, J
Shabangu, AJ

For Applicants	Adv. L. Maziya Instructed by M. Mkhwanazi & Associates, Mbabane

For Respondents	The Attorney-General, Mr. P.M. Dlamini

JUDGMENT

23 March, 2005

THE COURT

[1] The constitutional development process in all modern countries is hardly ever a process in which each and every citizen will be pleased. Drafting, debating and legitimising a new constitution has more facets than a well cut diamond which will only glitter if the majority of the people partake in the process at all phases, ultimately claiming ownership of a National Constitution of the people, for the people.

[2] It is therefore almost inevitable that somewhere along the process a challenge will be raised by concerned citizens against the form, content and process in which a new constitution comes into existence. The Kingdom of Swaziland is not unique in having such issues challenged in the courts of the land after interested groups have failed in their endeavours to alter the process through the ordinary avenues open to them.

[3] It is common cause that various bodies have tried in vain to alter the process in which Swaziland aims at the development and adoption of a post-independence constitution. One of the often hailed criticisms is that group participation in the making of submissions to the Constitutional Drafting Committee ("CDC", the 4th Respondent) was not allowed but that only individuals were

able to give their own views and submissions as to how the new constitution should be. There is a pending matter in the High Court which lays challenge to the drafting process itself, against the manner in which the draft constitution comes into being.

[4] The present matter has a shift of focus. Following the finalisation of a draft constitution, it was decided to present it in the form of a Bill to Parliament, to debate it in both houses, with the aim of bringing a new constitution for the Kingdom of Swaziland into life. It is this process which forms the basis of the present application.

The Application

[5] Under cover of a certificate of urgency, the four applicants came to court to seek the present application to be heard urgently, dispensing with the rules of court regarding time limits and forms of service. The case was indeed enrolled for hearing at the end of October 2004, virtually simultaneously with the time that the parliamentary debating process was to commence. Much pressure was placed on the court to deal with the issue within very limited time since the application was brought at the eleventh honour, so to speak, and time became of the essence to decide whether the parliamentary debating process should be stayed or be allowed to proceed.

[6] After a hearing by the full court it was unanimously decided to dismiss the application and that reasons for the outcome would follow later, as it now does. This judgment was delayed due to various reasons including the year end recess and to allow the members of the court to formulate their contributions.

[7] The applicants sought a rule *nisi* calling upon the respondents to show cause on a date to be determined by the court why an interim order, with immediate effect pending the return date, should not be issued. The form of the order wanted by the applicants is formulated to the effect that the Parliament of Swaziland should be interdicted and restrained from debating the Draft Constitution of the Kingdom of Swaziland and/or passing it into law, pending the finalisation of civil

case 1671/2004. That case, as aforesaid, is a challenge to the constitution making process itself, which is not yet ready to be heard, and is against the first six respondents, brought by who? Is it the same four applicants?

THE LITIGANTS

[8] The first and third applicants are federations of Labour and Trade Unions, stated to be bodies corporate, while the other two are political entities. More about them follows hereunder.

[9] The identities of the respondents are self descriptive. The fourth respondent is stated to have been established by Section 2 of Decree No. 1 of 2002. The fifth respondent is stated to be "represented by His Majesty the King, as the highest executive authority of the Government in Swaziland." The Attorney General "is cited in his official capacity as the principal legal adviser to the fifth respondent, in terms of Section 2 of (the) Government Liabilities Act of 1972."

[10] The pending application has it that in order to adopt a national constitution, all stakeholders must be inclusive of the process, having a say in it by way of consensus in the social contract. The applicants therein contend that they were systematically excluded from participation. They also question the process leading up to the drafting of the constitution and "most of the provisions thereof. It is the continuation of the constitution making process and especially so the debating of the Bill in Parliament that they seek to be brought to a halt until such time that the pending matter has been determined.

> "It is applicant's respectful contention that Parliament should not be debating, deliberating or discussing the Draft Constitution, because the question of the constitutional process as well as adoption thereof is pending before this Honourable Court. Applicants contend that it is common cause that if a matter is pending before Court, it is *sub judice* and therefore not subject to discussion elsewhere until the Court has dealt with the matter with finality." (paras 38 and 38.1).

[11] The application further aims to show that the elements of an interim interdict are established. First, that they have a *prima facie* right to

participate as groups in the constitution making process, as they will also be affected by this national document. Secondly, that they will suffer irreparable harm if "the respondents", meaning Parliament itself, should debate and pass the draft constitution into law, since they will then "be denied the right to participate in the adoption thereof." It is averred that Parliament will not effect fundamental and meaningful changes, considering its composition and the fact that it lacks the necessary autonomy as a legislative institution". A further subparagraph (39.2(b)) follows, which is unintelligible. It reads that:

> "Irreparable harm and the Criminal Procedure and Evidence Amendments Act No. 5 of 2004" (sic).

[12] This criticism of Parliament is sought to be explained by stating that it endeavoured to repeal the Non-Bailable Offences Order which was earlier struck down by the Court of Appeal, indicating that Parliament "lacks the capacity to full appreciation (sic) its mandate". The applicants further hold that "Parliament needs to be capacitated on the contents of the draft constitution as well as on principles of constitutionalism before it endeavours to deal with such a serious task."

[13] Thirdly, the applicants contend a reasonable apprehension of harm, claiming that the respondents are "hell-bent to finalise the constitution making process by the 10th November 2004." For this, they refer to various announcements, conclusions and newspaper reports. They are critical of submissions by the people regarding the constitution, stating that a lack of civic education undermined the process at the recent proceedings held at the (Royal) Cattle Byre, resulting in the hailed popularity of the draft constitution being "highly questionable."

[14] Finally, for purposes of an interdict, the applicants say that they have no other remedy since once "the respondents were allowed to deliberate and pass the draft constitution into law, there is no way applicants can ever influence and participate in the constitution making process." This is said to be due to amendment clauses which

will preclude the applicants, as organised groupings, to influence future amendments.

[15] The balance of convenience is claimed to favour the applicants because of their pending application, rendering it *sub judice*, disallowing any discussions of the matter anywhere else.

[16] As grounds for urgency, the application is said to be due to no other remedy being available as the matter will be once the Bill has been debated and passed into law, with no redress at a hearing in due course as it will have been overtaken by events. Once enacted, the "constitution will be presumed that it reflects the aspirations of all the people of Swaziland and questioning it afterwards will definitely be a futile exercise."

POINTS OF LAW *IN LIMINE*

[17] The Attorney General, acting on behalf of all respondents, filed papers to oppose the order sought by the applicants.

[18] Rule 6(12)(c), which deals with application procedures, reads that:

> "Any person opposing the grant of an order sought in the Notice of Motion shall, if he intends to raise a question of law only, deliver notice of his intention to do so, within the time prescribed (in paragraph (b)) stating such question."

[19] The respondents solely rely on questions of law only, and have not filed any affidavits in response to the merits of the application itself. Eight such points are listed in the Notice, which will be dealt with *seriatim* hereunder, in different sequence as listed in the papers

URGENCY AND ENROLMENT

[20] The second and eighth points of the respondents go hand in hand. The Attorney General submitted that applications against the Government or officers of Government acting in such capacity, require 14 days in which a Notice of Intention to oppose may be filed and a further 14 days to file opposing affidavits unless the court

specially authorises shorter periods of time. For this, he relies on Rule 6(26). No such special shorter period was either asked for or ordered by this court.

[21] From what follows on the question of urgency itself, it is not necessary to determine if urgent applications which are brought against Government or its officials require this preliminary issue to first be dealt with separately or not, further more, it has become an academic question since the matter was in fact enrolled by the time this point was raised.

[22] On the issue of urgency it was submitted on behalf of the respondents that this application is not urgent in that the founding affidavit does not fully address the requirements of Rule 6(25)(a) and (b) of the Rules of Court. In this regard the court's attention was directed to a number of decided cases including the celebrated case of **Humphrey H. Henwood vs Maloma Colliery and another,** civil Case No. 1623/93. The cases of **H.P. Enterprises (Pty) Limited vs Nedbank (Swaziland) Limited,** Civil Case No. 788/99 (unreported) (per Sapire CJ, as he then was) and that of **Megalith Holdings vs RMS Tibiyo (Pty) Limited and another,** Civil Case No. 199/2000 (Unreported) (per Masuku J) were also cited on the requirements of the Rule. In the latter matter, Masuku J held at page 5 as follows:-

"The provisions of Rule 6(25)(b) exact two obligations on any applicant in an urgent matter. Firstly, that the applicant shall in affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Secondly, the Applicant is enjoined, in the same affidavit or petition to state the reasons why he claims he could not be afforded substantial redress at a hearing in due course. These must appear *ex facie* the papers and may not be gleaned from the surrounding circumstances brought to the Court's attention from the bar in an embellishing address by the Applicant's Counsel."

[23] In the H.P. Enterprises matter *{supra),* Sapire CJ held at pages 2 -3 that:

> "A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate that the observance of the normal procedures and time limits prescribed by the Rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but must give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow."

[24] In the alternative, it was submitted that if there is any urgency such urgency is self created in that the applicants deliberately neglected to prosecute Case No. 1671/2004 to finality whereas the applicants were served with the opposing affidavits in that matter as early as the 10th September 2004. At the time that the application was made they had not yet filed their replying affidavits and they have not given any particular reasons why they have not done so.

[25] Rule 6(25)(a) and (b) which governs urgent applications, provide as follows:

> *"(a) In urgent applications, the Court or Judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the Court or Judge, as the case may be, seems fit.*
>
> *(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course. "*

[26] It is therefore clear that the Court has to use its discretion whether or not to jettison the normal procedures set out in the rules and to hear the matter as one of urgency. This will depend upon the particular circumstances of the case, based on the allegations made by the applicant in his founding affidavit. It is also clear that the provisions of Rule 6(25)(a) and (b) quoted above are mandatory, it being sufficient for the Court to refuse to enrol a matter if the requirements

have not been satisfied. *In casu* paragraph 42 of the founding affidavit seeks to establish urgency as follows:

"<u>GROUNDS OF URGENCY</u>

42.1 No alternative remedy.

As already contended above, applicants submit that there is no other way through which they may have remedy. Once the Draft Constitution is debated and passed with law, the matter is closed.

42.2 No redress in the (sic) course.

Similarly, applicants contend that they cannot be afforded redress at a hearing in due course because, once the respondents are allowed to enact the constitution, it will be presumed that it reflects the aspirations of all the people of Swaziland and questioning it afterwards will definitely be a futile exercise.

a) It is Respondents' intention that the debate by Respondents of the Constitution has been sent to Parliament under Certificate of Urgency, and that a joint sitting of Parliament be convened the effect of which is that even the time allocated to Parliament to debate it is limited. Accordingly, a hearing in due course will not serve Applicants in any way as the main application will itself be overtaken by events."

It appears that in this regard the Respondents' contention is correct that urgency in this matter is self-created as shown by the lacklustre approach adopted by Applicants in prosecuting Case No.

1671/2004. This attitude is evidenced in the following averments found in paragraph 29 to 32 of their own founding affidavit:

"<u>Background</u>

On or about the 16th June 2004, the Applicants instituted proceedings against the first to sixth respondent under Civil Case No. 1671/2004.

On the 24th June 2004, the Applicants were served on the Respondents, who through the office of the sixth Respondent filed a Notice of Intention to oppose.

Subsequently, Respondents filed their answering affidavit on the 10th September 2004.

Applicants are yet to file their replying affidavits after which the matter will be ready for argument."

Thus, from the 10th September until the 25th October 2004, being the date of the present application, the applicants blithely state that they had not replied to the answering affidavit, without offering even an attempt to explain their dilatory conduct. Yet they wait until the very last minute, at the time Parliament is on the very verge of starting its debate of the draft constitution, to bring the present application to stop it from doing so.

It is not clearly justified on the papers why the matter was brought under a Certificate of Urgency in view of the above-cited averments. Counsel for applicants tried to offer an explanation for the delay in prosecuting this matter from the bar. We however ruled him out of order. It is clear though from the facts in applicants' own affidavit that they became aware that Parliament would debate the constitution long ago but they did not do anything about that until the 25th October 2004, when they launched this application, wanting it to be heard the following day. Paragraphs 39.3.2 to 39.3.4 of the applicants' founding affidavit attest to this fact.

[30] In our view the applicants approached the Court on an extremely urgent basis and it was incumbent on them to make a case justifying the urgency with which it was brought. In the present case as it has been shown above, the applicant has failed dismally to satisfy the requirement of Rule 6(25)(a) and (b) of the Rules of Court.

REQUIREMENTS FOR AN INTERIM INTERDICT

[31] To entitle an applicant to the exercise by the court of its discretion to grant interim re lief the applicant must show:

(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear, or if not clear, is *prima facie* established, though open to some doubt;

(b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant

if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy.

[32] At this stage the court is called upon to determine whether the applicants are entitled to an interdict pending the outcome of litigation. Generally an interdict *pendente lite* will only be granted in a situation where it is clear on the facts that the applicant will in the final analysis obtain a final interdict in the main application.

[33] With regard to (a) above the Attorney General representing the respondents referred the court to Section 4 of the Establishment of the Constitutional Review Commission, Decree No. 2 of 1996. This Section allows members of the public to submit individually and not in groups. It provides as follows:-

"4 Any member of the general public who desires to make a submission to the commission may do so in person or in writing and may not represent any one or be represented in any capacity whilst making such submission to the commission."

[34] The four applicants aver that they represent their respective organisations. The question is: can they submit as groups in light of Section 4 of this legislation? In our view the answer to this question is in the negative. Shortly, the respondents have not only disputed but *prima facie* dispelled the facts laid down for the basis of a *prima facie* case by the applicants.

[35] In **Ndauti vs Khanir and Others** 1947(4) SA 27 at page 35 Ettlinger A.J. stated as follows:

"There is said to be a *prima facie* case where the evidence is such that if believed it will be sufficient to prove the case sought to be made. But where in an application the facts are disputed, the applicant may make out a *prima facie* case if one looks only at his affidavit, while at the same time the respondent may make out a *prima facie* defence, in the sense that, if the respondents' affidavit is true the applicant has no case at all. While therefore the phrase *"prima facie* case" may be appropriately used in considering an applicant's affidavit alone, it is in my view inappropriate when used in relation to all the affidavits in an opposed application

in which the essential elements in the applicant's allegations are denied by the respondents."

According to this authority an applicant should not be granted an order without reference to the respondent's denial of the applicants' allegations, for if it was otherwise there would be no object in opposing an application for an interim interdict except on the ground that the applicants' allegations do not entitle him to the relief sought, and any person might obtain an interdict *pendete lite* on an allegation of a right no matter how fanciful and improbable it might be.

From the foregoing it is clear that the applicants cannot rely on the fact that they want to submit as groups because they do not have such a right, it having been taken away or declared to not exist by the provisions of Section 4 of the establishment of the Constitutional Review Commission of 1996.

Regarding (b) above where the right is disputed and is therefore open to doubt, as in the instant case, the court has a discretion, to be exercised equitably according to the magnitude of the doubt and the balance of convenience.

In Ndauti's case *supra* Ettlinger A.J. stated at page 36 that

"In my opinion the court has, in every case of an application for an interdict *pendete lite*, a discretion whether or not to grant the application and it should exercise this discretion upon a consideration of all the circumstances and particularly upon a consideration of the probabilities of success of the applicant in the action, and the nature of the injury which the respondent, on the one hand, will suffer if the application is granted and he should ultimately turn out to be right. For though there may be no balance of probabilities that the applicant will succeed in the action it may be proper to grant an interim interdict where the balance of convenience is strongly in favour of doing so, just as it may be proper to refuse the application even where the probabilities are in favour of the applicant if the balance of convenience is against the grant of interim relief... Where the damage to the applicant by the refusal of an interim interdict may be irreparable, an interim interdict may be granted though the probabilities of success in the action are against the applicant, and should ordinarily be granted if no damage will thereby be occasioned to the respondent."

For confirmation of this view see also **Nienaber vs Stuckey** 1946 A.D. 1049 at page 1053 per Greenberg, J.A.

It is our considered view that the applicants will not suffer irreparable harm because individual members do have a right to make their submissions, conferred upon them by Section 4 of the Establishment of the Constitutional Review Commission Decree, 1996. Applying these principles to the instant case it seems to us that on the affidavits filed of record the balance of probabilities of success in the main application are not in favour of the applicants. The balance, in our opinion rather favours the respondents.

For the foregoing reasons and conclusions, it is the finding of this court that the applicants have not satisfied the requirements of an interdict *pendete lite.* This point *in limine* should therefore also succeed.

JURISDICTION

A further point relating to jurisdiction was raised by the respondents. It reads that:-

"The applicants have failed in their Founding affidavit to make allegations to show that the court has jurisdiction. In other words, the applicants in their founding affidavit do not state that the court has jurisdiction to hear the application and grant the order that they seek."

A further subparagraph in the notice to raise points in *limine* is formulated as follows:

"1.1 the function of the court is to interpret enacted legislation and declare it invalid if such legislation has not been correctly enacted. Therefore the applicants have not shown that the court has the power to stop Parliament from enacting any legislation.

In support of the first of the above two objections reliance was placed by the Attorney General on the unreported judgment in Civil Case No.624/2000 of this court in the matter of Ben M. Zwane v The Deputy Prime Minister and Another. In that case Masuku J made reference to a number of textbooks on Civil procedure at page four of his judgment wherein he states the following:

"Herbstein and Van Winsen (supra), at page 364 state that founding affidavits must contain certain averments and that it is necessary to clearly state, amongst others that the Court has jurisdiction. On the other hand, Erasmus, "Superior Court Practice" at B-37 to 38, states as follows:-

"The facts must be set out simply, clearly and in chronological sequence, and without argumentative matter in the affidavits which are to support the notice of motion. The statement of facts must contain the following information:

(0 ....

(ii) the facts indicating that the court has jurisdiction."

The legal position stipulated by the learned authors above also finds support in Harms, in his works entitled "Civil Procedure in the Supreme Court", at page 79 and the cases therein cited. There, the learned author states as follows:-

"In any summons or founding affidavit, the necessary factual allegations relating to jurisdiction must be made. It is not sufficient to state the legal conclusion of jurisdiction".

[46] From the judgment of Masuku J it is clear that what needs to be stated are the necessary factual allegations relating to jurisdiction.

^ In other words information or facts pleaded indicating that the court has jurisdiction. As if an afterthought, the first applicant blandly states in paragraph 28 of his affidavit that "this court has jurisdiction to deal with the matter". What the textbooks do not say is that there merely must be a statement that the court indeed does have jurisdiction. There is a distinction between allegations of fact indicating that the court has jurisdiction and a statement that the court has jurisdiction. There is no statement of facts on which it is averred that this court does have jurisdiction, nor even a bland legal conclusion of jurisdiction.

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[47] In the present case it is clear that the cause of action arises within Swaziland which would ordinarily mean that the court has territorial jurisdiction to hear and determine the matter. The submissions by the Attorney General were further that the relief sought cannot be granted because this court has no power to stop Parliament from enacting any legislation.

[48] In advancing this argument the Attorney General acknowledged that this court may interpret enacted legislation and declare such legislation invalid if it has not been correctly enacted. The Attorney General's argument was also supported on the basis of the doctrine of the separation of powers. Indeed, we were not referred to any authority by the applicants for the proposition that this court has the power to stop parliament from performing its work, namely to consider and enact legislation. There is support for the proposition based on the doctrine of the separation of powers that the three main branches of Government, namely the executive, judiciary and legislature do not have authority to interfere in the affairs of the other branch unless the one branch has given such authority to either one or both of the remaining branches. This process usually will take the form of legislation. For example, in the case of the executive arm of Government the position strictly used to be that it could not be sued in the courts.

[49] The correctness of this proposition was correct in so far as the executive or its servants acted in their executive capacity. It would not extend to statutory functions vested by the legislature or Parliament on officials in the executive. Whenever officials failed to exercise their functions in accordance with the behests of the statute which conferred such power on them the courts always retained the power to review the legality of the exercise of those functions. (See Baxter, Administrative Law at Page 622-3). It had become possible as a result of the Government Liabilities Act and other similar legislation for the executive to be sued.

[50] Similarly, the concept of parliamentary privilege made it impossible for the courts to interfere in the conduct of its own affairs by parliament. Whatever the true legal position on the above examples, it does not appear to be competent for this court to issue an order against parliamentarians, who may not even be part of the proceedings, to refrain from debating a bill that was presented to it. There may be ancilliary issues relating to that aspect of the matter, namely whether Parliament as an institution can sue or be sued, and if so, who should then be cited.

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Termes de la Ley states the following with regard to jurisdiction in a court situation.

"Jurisdiction is a dignity which a man hath by a power to do justice in causes of complaint made before him" (Strand's Judicial Dictionary 3rd edition.)

Advocate Maziya argued that this court should not be bound by the decision of Masuku J in Ben M. Zwane v The Deputy Prime Minister and Another *(supra).* He went further, trying to persuade the full bench to overturn the decision in so far as it relates to the jurisdictional issues enumerated above. It is our considered opinion that there is no justification to change the established legal principles in that regard. We are not convinced that the decision of Masuku J is premised on an incorrect application of the law.

An essence of the premise of counsel for the applicants is that the South African legal position is different from that in the Kingdom due to the different territorial jurisdictions of the High Court in that jurisdiction, contrary to the local position, with the result that averment of jurisdiction should be dispensed with. We do not agree with this proposition, certainly not to the extent that new law must now be created by a new precedent.

[54] With regard to jurisdiction the court is concerned with the power or competency of this court to hear and settle a particular matter placed before it. The jurisdiction of the courts is regulated by primary and secondary legislation and also by the common law. We are aware of statutes which have a bearing on jurisdiction, the principal ones being the constitution, the High Court Act, the Magistrate's Court Act and in criminal matters the Criminal Procedure Act. In the absence of the abovementioned instances recourse is had to common law.

[55] Counsel for respondents have taken a rather technical objection to the question of jurisdiction by this court over the dispute i.e. failure by the applicants to aver in the founding affidavit that this court has jurisdiction. We say technical, because, even accepting that the applicants had so averred (see the remark above concerning paragraph 28 of the first applicant's founding affidavit) that in itself

would not endow the court with jurisdiction if in fact it is not empowered by one or more of the instances mentioned above i.e. legislation and common law.

[56] It is on this basis that we find ourselves faced with the stark question, "can the court be called upon to stop Parliament from debating certain issues in Parliament." It is our view that this court cannot stop Parliament from debating matters properly placed before it. For these reasons, this objection *in limine* should also succeed.

Locus Standi

[57] The legal standing of a litigant to enable it to approach court is a pre-requisite in any matter brought for adjudication.

[58] Pertinent to this objection *in limine* is the legal standing of the second and fourth applicants.

[59] In the founding affidavit of the first applicant, the second respondent is described as "The People's United Democratic Movement", (PUDEMO) with a stated principal place of business at a street address in Nhlangano Town. No more than that. In the supporting affidavit of Mr. Mario Masuku, its President, no further details are given.

[60] He does not refer to or enclose the constitution of PUDEMO, nor does he state the nature of the organisation, its aims and objects, or even whether he was empowered by it to bring the application on its behalf.

[61] It is common cause that PUDEMO is an organisation akin to a political party. Its counsel did not argue otherwise.

[62] With regard to the fourth respondent, it is again common cause that it is also a political body, with its principal place of business at an undisclosed place somewhere in Mahwalala Township, Mbabane.

[63] In his supporting affidavit, its vice President, Meshack Masuku, states that he is "duly authorised to attest to this affidavit." Again, there is not any allegation as to who in the organisation "authorised" him to do so, whether he acts on behalf of the organisation or not, what its aims and objectives are the number of members and so forth. He also does not incorporate a resolution or the constitution of the fourth applicant, wherein he is empowered to litigate on its behalf.

[64] Counsel for the applicants was at pains to persuade the court to adopt a rather unorthodox interpretation of the Constitution of Swaziland, more specifically of Decree No. 11 of the King's Proclamation of the 12th April 1973.

[65] Decree 11 reads that:-

> "all political parties and similar bodies that cultivate and bring about disturbances and ill-feelings within the nations are hereby dissolved and prohibited."

[66] No argument was advanced that the Decree itself is invalid and we take the law of the land to stand as we find it.

[67] In the best tradition of his noble profession, Advocate Maziya argued the stance of his clients as well as could be. It does however require an artificial and dissonant interpretation of the King's Decree to conclude as was proposed. The interpretation that was sought to be accepted is that Decree No. 11 of the Proclamation to the nation does not prohibit or dissolve all political parties in Swaziland, but that it only proscribes any political party, or similar body, which "cultivate and bring about disturbances and ill-feelings within the nations."

[68] Otherwise put, the argument is that it does allow political parties for as long as they do not propagate the mischief that is mentioned in the Decree. This position cannot be accepted by this court to be a logical and legally correct interpretation. The decree unambiguously prohibits and dissolves "all political parties" in the kingdom. It goes further, bringing under the same umbrella "organisations," which are not political parties *per se*, if they "cultivate and bring about" the stated mischief.

[69] The legal position, on a proper interpretation of the King's Decree of 1973, which presently is part of the Supreme Law of the Land and which could only be superseded by a new constitution, the debate of which by Parliament is sought to be brought to a halt in the present application, remains that for the time being all political parties were dissolved and prohibited as from the 12th April 1973. If there remained any doubt as to whether the applicants might not perhaps argue correctly and that the court is mistaken as to the issue of political parties in Swaziland, clarity is contained in the King's Proclamation itself, the second paragraph which reads:-

> "2(c) that the constitution has permitted the importation into our country of highly undesirable political practices alien to, and incompatible with the way of life in our society and designed to disrupt and destroy our own peaceful and

constructive and essentially democratic methods of political activity; increasingly this element engenders hostility, bitterness and unrest in our peaceful society."

[70] Whether this position is in consonance with modern day political thinking, or in line with the notion of virtually universally accepted principles of democracy and multi party political activities, or whatever else, is not the issue. This constitutional legislation, by way of a Proclamation by His Majesty King Sobhuza II in 1973, remains part and parcel of Swazi law until it is superceded or revoked. The courts cannot by any measure of objective legal interpretation completely ignore the clear and unambiguous legislation in order to follow to the interpretation that the applicants want to be given to Decree Eleven of the King's Proclamation. Whatever the effect of it might be and whatever the "political correctness" or constitutional desirability or otherwise of the decree may be, we cannot accede to the interpretation that the applicants wish to have construed. Political parties remain prohibited.

[71] Therefore, the two "political parties" or "movements" cannot approach the court with any measure of legal standing to seek any form of relief. Legally and technically, the second and fourth applicants cannot be given the recognition by the court that they require to have their matters adjudicated.

[72] This court emphasises that this is brought about *de lege ferenda* and not at the whim of the court itself. Constitutional provisions remain to be interpreted by the court and it is the wish of the court to expand rather than to narrow legal standing. It is however not the function of the court to intervene and assume the role of the legislative or executive branches of Government, by imposing interpretations of legislation that clearly and unequivocally would have the effect of a total disregard of the constitutional legislation of the land. It remains the duty and function of the court to uphold and apply the laws of the land and especially so when constitutional issues are decided.

[73] Wherefore the lack of *locus standi in iudicio* of the second and fourth respondents are decisive in the decision whereby they cannot be heard on the merits of the application.

[74] The position of the first and third respondents differ, but has the same consequence.

[75] Both are labour or trade union federations. Both claim to become part of the issue through what is stated in their applications. Neither deemed it fit to file their constitutions and neither sought to claim on behalf of which members the application is brought, or the entitlement to come to court as it may be termed.

[76] There is no allegation by either the Secretary Generals of the first or third applicants that their labour federations have legal standing to seek the relief that they bring for adjudication.

[77] The deponent of the supporting affidavit of the first respondent, Jan Sithole, states that his executive committee has resolved to make this application and authorised him to depose to the affidavit on its behalf. He also says that it is a body corporate, incorporated as a trade union, in accordance with the industrial laws of Swaziland and further that the third respondent is a similar body.

[78] Neither of these two bodies have shown their entitlement to either participate in the making or drafting of a new constitution, nor to impede parliament from debating the draft bill. By their own admission, they are creatures of statute, incorporated as trade unions in accordance with the Industrial laws of Swaziland.

[79] An ancillary question, which we do not need to decide in view of the abovestated deficiency, is whether the corporate status of these two respondents require them to show that resolutions were properly taken to authorise their leaders to litigate in the manner they seek to do. No mandate or properly taken resolutions are incorporated in the papers. The mere bland and bold statements that they are "authorised" does not dispose of the requirements.

[80] The argument of the respondents that the limitation of creatures of statute to remain within the ambit of their creational provisions pertaining to labour and workforce issues, even if extended to socio-economic rights enforcement, is sound. No acceptable contrary views, whereby labour federations are empowered to intervene in the making of a new national constitution, were argued before us. The political process of constitution making is not shown to be within the ambit of the spheres of their activities. As held above, they are also not empowered to make group representations on the draft constitution which is the exclusive preserve of individuals.

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[81] For the above reasons, we further find that none of the four applicants have legal standing to enjoin the court to entertain their application on its merits.

The Respondents

[82] No legal instrument was brought to our attention or placed before us from which the continued existence of first four respondents could be established.

[83] It is common cause that the Constitutional Review Commission and its chairman have long ago completed its mandate, rightly or wrongly. That body was superceded by the Constitutional Drafting Committee and its chairman. By all accounts, it completed its functional operation at the time the Minister, on command of the King, was to present the fruits of its labour to Parliament in the form of a Bill.

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[84] It is incumbent on an applicant to state the existence of a respondent against whom relief is sought. This was not done. It requires that the effectiveness of any potential order of court be anteceded by a party which is in existence and which fact is established clearly and unequivocally. Put differently, it cannot be expected of the court to establish if a party against whom relief is sought is alive and well, capable of giving effect to an order. This is especially relevant in the case of statutory creations like the commission and committee cited herein, together with their chairmen. Equally so, there is no averment as to how any of these bodies or persons, in their cited capacities, could have any influence over a debate by Parliament of the Bill in issue, which by order of court they are alleged to be empowered to prevent from happening.

[85] The "Government of Swaziland" has not been shown to be able to give any effect to the relief that applicants seek. The wide ambit of the term is vague and embarrassing. To further compound the issue, the applicants state that His Majesty the King, as the highest executive authority of the Government, is its representative.

[86] Much lively debate ensued in court regarding the citation of the Attorney General as the sixth respondent. In the end, it resulted in a most embarrassing situation when accusations of unspeakable import were banded about and caused a recess to be taken. The air was cleared during a meeting in chambers but the volatility of an overloaded furnace remained, forming an impediment to lucid argument by counsel. Such situations form indelible blots on the image of and respect for the judicial process.

[87] The fact of the matter is that the Attorney General is correctly cited. He is enjoined to be cited by statutory operation (Section 2 of the Government Liabilities Act of 1972) in a matter like this but nothing turns on this point. It is no more than a nominal citation, but the issue that remains unanswered is how he, as respondent, would be liable to ensure effect to be given to a potential order of the court herein. In any event, if not *ex abundanti cautela,* non-citation of the Attorney General would have been much more problematic, but only in the event that the applicants would otherwise have been successful. For

present purposes, his citation is of no more than academic interest and does not affect the outcome of the matter.

[88] The Minister of Justice and Constitutional Affairs, cited as seventh respondent, is the most appropriate person against whom relief of the present nature could be sought, if the objective was to prevent parliament to take cognisance of the Bill. It is this respondent who was tasked by Royal Order to present the Bill. However, it is not for the Honourable Minister to decide on the business of parliament itself. The averred mischief which the applicant seek to prevent is to "...interdict and restrain the parliament of Swaziland from debating the Draft Constitution of the Kingdom of Swaziland and/or passing it into law pending the finalisation of Civil Case No. 1671/2004".

[89] The process of parliamentary debate is separate issue from that of the presentation of a Bill. It might well be a fine line of distinction, but objectively, the application is not that the Minister is to be prevented from presenting a Bill. It is to prevent the debating of that Bill.

[90] The Attorney General convincingly argued that the actual body which is sought to be interdicted, parliament itself, is not a party in the proceedings. Nor is the "Parliament" of Swaziland a party in the pending proceedings. The result of the nonjoinder of Parliament, so the argument continues, is that it is a fatal omission not to include a citation of the actual entity against which relief is sought.

[91] The Clerk to Parliament (eighth respondent) is described as "a duly appointed administrative officer in terms of Section 26 of the Establishment of Parliament Order No. 1 of 1998."

[92] The scope and ambit of his abilities to influence the content of parliamentary debate was not canvassed before us. This court is not inclined to speculate on the effective appropriateness of his citation as respondent in the absence of either support for his abilities in the founding affidavits or of persuasive argument from the bar. In any event, as with the positions of some other respondents, the application does not stand or fall by their citation as respondents. It remains non-determinative for present purposes.

[93] It is our considered view, after a full consideration of all aspects before us, that the application has to be dismissed. We did order so, in view of the aforesaid reasons. Taken as a whole, there is a predominant body of factors which militate against the court entertaining the actual merits of the application, as is set out in the founding and supporting affidavits.

[94**]** It is therefore the order of this court that the application be dismissed in *limine*, with costs.

J.P. ANNANDALE, ACJ

J.M. MATSEBULA, J

S.B. MAPHALALA, J

K.P. NKAMBULE, J

A.J. SHABANGU, AJ