THE HIGH COURT OF SWAZILAND

HELD AT MBABANE — Civil Case No. 2792/2006

In the matter between

JAN SITHOLE N.O. (in his capacity as a Trustee of the National Constitutional Assembly (NCA) Trust	First Applicant
MARIO MASUKU	Second Applicant
THE PEOPLE'S UNITED DEMOCRATIC MOVEMENT (PUDEMO)	Third Applicant
DOMINIC TEMBE	Fourth Applicant
NGWANE NATIONAL LIBERATORY CONGRESS (NNLC)	Fifth Applicant
SWAZILAND FEDERATION OF TRADE UNION (SFTU)	Sixth Applicant
SWAZILAND FEDERATION OF LABOUR (SFL)	Seventh Applicant
SWAZILAND NATIONAL ASSOCIATION OF TEACHERS (SNAT)	Eighth Applicant

and

PRIME MINISTER OF THE KINGDOM OF SWAZILAND	First Respondent
GOVERNMENT OF THE KINGDOM OF SWAZILAND	Second Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS	Third Respondent
ATTORNEY GENERAL	Fourth Respondent
CHAIRMAN: CONSTITUTIONAL DRAFTING COMMITTEE (CDC)	Fifth Respondent
SPEAKER OF THE HOUSE OF ASSEMBLY	Sixth Respondent
PRESIDENT OF SENATE	Seventh Respondent

JUDGMENT

06/11/2007

BANDA, CJ

[1] This is an application brought in terms of Rule 53(1)(b) of the Rules of this Court. The first applicant is Mr. Jan Sithole suing in his capacity as a Trustee of the National Constitutional Assembly (NCA) Trust, a representative body corporate, representing a number of organized civil society organizations, including the applicants. The NCA is duly registered and incorporated as a trust in accordance with the laws of Swaziland whose principal objects are to promote, protect, foster, strengthen, and deepen the concepts of and protection of democracy, transparency, good governance, social justice, tolerance and constitutionalism in Swaziland.

The second applicant is Mr. Mario Masuku, a citizen of Swaziland and is suing both in his capacity as a taxpayer and a private citizen and as a member and President of the Peoples' United Democratic Movement (PUDEMO).

The third applicant is the Peoples' United Democratic Movement (PUDEMO), a political organization, whose office is situated at the SNAT Cooperatives Building at Manzini.

The fourth applicant is Mr. Dominic Tembe a citizen of Swaziland and is suing both in his private capacity as a taxpayer and citizen of Swaziland and as a member and Secretary General of the Ngwane National Liberatory Congress (NNLC).

The fifth applicant is the Ngwane National Liberatory Congress, a political body whose principal place of business is at Mahwalala Township, in Mbabane.

The sixth applicant is the Swaziland Federation of Trade Union (SFTU) a body corporate duly registered in terms of the Labour Laws of Swaziland and having its principal place of business at Mandlenkhosi Building in Manzini.

The seventh applicant is the Swaziland Federation of Labour (SFL). It is a body corporate duly registered as a trade union in accordance with the industrial laws of Swaziland having its principal place of business at SUFIAWU House, in Mbabane.

The eighth applicant is the Swaziland National Association of Teachers (SNAT) a body corporate duly registered in terms of the labour laws of Swaziland and

having its principal place of business at SNAT Centre opposite William Pitcher Teacher Training College in Manzini.

The first respondent is the Prime Minister of the Kingdom of Swaziland appointed in terms of Section 50(1) of the Establishment of Parliament of Swaziland Order No. 1 of 1992 and his offices being situate at Cabinet Offices, Hospital Hill, Mbabane.

The second respondent is the Government of Swaziland. The third respondent is the Minister of Justice and Constitutional Affairs and his offices being situate at Usuthu Road, Mbabane. The fourth respondent is the Attorney General of the Kingdom of Swaziland who is the principal legal advisor to all departments of the Government of Swaziland. The fifth respondent is His Royal Highness Prince David Dlamini who is being sued in his capacity as the Chairperson of the Constitution Drafting Committee (CDC) duly appointed in terms of Section 2 of Decree No. 1 of 2002.

The sixth respondent is the Speaker of the House of Assembly whose offices are at Parliament Building and is being sued in his official capacity.

The seventh respondent is the President of the Senate whose offices are at Parliament Building and is being sued in his official capacity.

[2] By this application the applicants are seeking an order to compel the 3rd, 4th and 5th respondents to dispatch to the Registrar of this Court the following documents:-

a) The record of all oral and written representations made to and received when discharging their functions and duties in terms of 1996 Decree No. 2 and 2002 Decree No. 1.

b) Any booklet, manual or guidelines on civic education published including the booklets, manuals referred to in paragraphs 1 and 2 of page 24 of the Constitutional Review Commission (CRC) report.

[3] Section 6 of the 1996 Decree is couched in the following terms:-

6(1) The proceedings of the Commission shall be recorded in such a manner and by such means as

the Commission may determine.

(2) Except for purposes of facilitating its work, the Commission shall not:-

a) make available any of its records or documents to any person other than to a member of the Commission, the Attorney General, experts assisting the Commission and members of the secretariat;

b) permit any other person other than a member of the Commission, the Attorney General, experts assisting the Commission and members of the Secretariat to have access to any of its records.

[4] Section 4 of the 2002 Decree is more or less similarly couched as follows:

"4. The Commission shall not:-

a) make available any of its records or documents

to any person other than to members of the Committee, the Attorney General, experts assisting the Committee and members of the Secretariat and

(b) permit any other persons than a member of the Committee, the Attorney General, experts assisting the Committee and members of the Secretariat, to have access to any of its confidentiality in the performance of their duties."

[5] These provisions of the two decrees are very explicit and precise and we find it difficult to understand how their import and meaning would have escaped the applicants' attention.

[6] The respondents have taken a preliminary objection to the application on the following grounds namely that:-

a) The applicants have no *locus standi* in the main application and that by extension they have no *locus standi* in this application.
b) Section 6 of Decree No. 2 of 1996 and Section 4 of Decree No. 1 of 2002 expressly provide that the CRC and the CDC shall not make any of their records or documents available to any person other than persons specifically mentioned in the Decrees.
c) The main application is not a review proceeding and hence there is no reason to transmit any records to the Registrar.

d) Assuming that the main application is a review proceeding the delay in instituting the application is unreasonable and therefore fatal to the applicant's case.

[7] It is common cause between the parties that there are only three issues which have been raised before us which require determination in this interlocutory application and these issues are the following:-

(1) Whether the applicants have the *locus standi* to prosecute this application and by extension the main application.
(2) Whether the proceedings in the main application is a review and finally
(3) Whether this Court has the power or jurisdiction to declare the whole Constitution of the Kingdom null and void and without force and effect.

[8] It is important that we first make this general observation namely that before the issue of the merits in the main application can be considered properly and fairly the preliminary points raised must be resolved and quite properly, in our view, the parties have agreed on the points which require determination in this interlocutory application.

[9] In any litigation, in order for justice not only to be seen to be done but to be manifestly seen to be done, the procedural rules which set in motion the wheels of justice must first be seen to have been fully satisfied. The procedural rules are prescribed to ensure that the wheels of justice have been properly set in motion and to insist that these rules should be followed is not, in our judgment, to stifle or deny a party his right to justice. We would therefore find it difficult to accept any assertion that when Courts insist that legal and procedural rules must be followed is to undermine the Courts' own independence by excessive application of technical rules.

[10] In the main application the applicants seek relief based on two legal grounds namely:

a) Declaring that the Constitution of Swaziland Act 001 if 2005 to be null and void and with no force or effect.

b) In the alternative, the applicants seek relief on the basis of Section 25 of the Constitution of Swaziland Act 001 of 2005 for a declaration that the Section should be interpreted broadly to mean that the people of Swaziland have a right to form, join and belong to political parties and organisations according to their free will and voluntary choice and that they are entitled to be part of any process, mechanism and structure to be established to manage free, fair, genuine democratic elections.

[11] It is curious to observe that Section 25 on which the applicants rely for the alternative relief is part of the very Constitution they seek to have declared null and void with no force and effect. It is a curious contradiction!

[12] We must observe at this early stage that after both counsel had closed their submissions to us and we had reserved our judgment, the applicants, on the following day, applied to amend their Notice of Motion. The respondents opposed the application to amend but after we had listened to counsel's submission on the matter we took the view that the proposed amendment would not prejudice the respondents and we granted the amendment. The respondents did not take up the opportunity to address the Court on the amendment. The effect of the amendment was to delete paragraphs 3.1.3 and 3.1.4 and substituting in their place with the following paragraphs:-

> *"4. Reviewing and setting aside, and if necessary, correcting the findings of the CRC which are set out in annexure "A" of the Notice of Motion.*
>
> *5. Suspending and setting aside the*

Constitution of Swaziland Act 001 of 2005 for a period of two years, and referring it to a broadly representative institution to correct its sections which do not give effect to the second respondents obligation under the African Charter and the NEPAD Declaration as well as under international human rights and international customary law."

[13] The effect of this amendment was to make the Court the reviewing tribunal rather than what it was before the amendment when the reviewing body was a tribunal which had yet to be established.

[14] As we have already observed in this judgment the respondents have raised preliminary objection to this application. The respondents have contended that the applicants have no standing in this matter and that they cannot, therefore, bring this application because they lack the necessary and legal interests in the proceedings as prayed. In prayers 1, 2 and 3 of the Notice of Motion the applicants seek to have the Constitution of Swaziland Act 001 of 2005 declared null and void with no force and effect. The respondents have submitted that the applicants and their members must show, what greater interest they have beyond

what the rest of the population of the Kingdom have, to arrogate to themselves the right to have the Constitution of the Kingdom annulled. The respondents have submitted that the applicants should show the greater interest that entitles them to dislodge the whole Constitution which is the Supreme Law of the country. The respondents have contended, therefore, that the applicants must show that they have the *locus standi;* that they have a right of direct and substantial interest in the subject matter and in the outcome of litigation.

[15] In the case of ***Roodepoort Maraisburg Town Council v Eastern Properties (Pty) Ltd*** *(1933) AD 87,* Wessels CJ expressed the principle of *locus standi* in the following terms:-

> *"...By our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers special damage or not he can show that he has a direct interest in the matter and not merely the interest which all citizens have."*

[16] And in the case of the ***Cabinet of the Transitional Government of South Africa*** (1988) 3 SA 369 AD and at 388 A – B the Acting Chief Justice Rabie stated the general principles in the following terms:-

> *"A person who claims relief from a court in respect of any matter must, as a general rule, establish that he has a direct interest in the matter (sic) in order to acquire the necessary* locus standi *to seek relief".*

[17] And so too in the Canadian case of ***Thorson v Attorney General of Canada*** (1975) 1SCR 138 the principles of *locus standi* were stated as follows:-

> *"The ratio of the judgments in the Ontario courts is that an individual has no status to challenge the constitutional validity of an Act of Parliament unless he is specially affected or exceptionally prejudiced by it. The plaintiff in this action had only the same interest as any other taxpayer in Canada, and any increased taxes resulting from the implementation of the Act would be borne by all the Taxpayers of Canada."*

[18] And significantly the court therein further stated,

> *"We think however, that to accede to the applicant's contention upon this point would involve the consequence that virtually every resident of Ontario*

could maintain action: and we can discover no firm ground on which the appellants claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any of the legislation directly affecting along with other citizens, in a similar way, in his business or his personal life."

[19] And again in the case nearer home of ***Lawyers for Human Rights (Swaziland) and Another v Attorney General*** unreported civil case No. 1822 of 2001 a full bench of this court dismissed the application on the grounds, *inter alia,* that the applicants had no direct and substantial interest in the subject matter of the application. That decision, which involved two Human Rights Organisations, was upheld by the Supreme Court of Appeal in Civil Appeal No. 34 of 2001. It is clear, therefore, that even if we were able to distinguish the High Court decision, which on the facts, we cannot, we are bound to follow the decision of the Supreme Court of Appeal which is the final Court of Appeal in this country. The Supreme Court of Appeal held that a litigant has *locus standi* only if he or she can show a direct and substantial interest in the subject matter. That decision represents, for now, the law of this country on the matter of standing.

[20] It seems to us that the applicants concede that they do

not, under the present status of the law, have standing but have urged this Court to extend the law on this issue, by adopting a liberal approach when interpreting what constitutes *locus standi.* The applicants have cited to us authorities from other countries in the Commonwealth where this approach is followed. The applicants have sought to make a distinction between litigation in constitutional matters and private law litigation. They have contended that a liberal approach is adopted in the interpretation of constitutional provisions. However the case of Lawyers for Human Rights before the Supreme Court of Appeal involved the interpretation of a Constitutional provision but they adopted the direct and substantial interest test.

[21] The respondents, on the other hand, have submitted that the principles of *locus standi* in constitutional matters depend on the wording of the Constitution of a particular country. They have submitted that the Constitution of Swaziland Act 001 of 2005 draws a distinction between the enforcement of the "bill of rights" provisions and the enforcement of the Constitution outside of the "bill of rights" and have categorised this distinction as "bill of rights" litigation and constitution litigation generally. The respondents

contend that Section 35(1) of the new Constitution deals with standing in what they have called “bill of rights” litigation and have submitted that since there is no provision that expressly deals with standing in what they have called constitutional litigation generally, the legislature must have intended to retain the common law principle of *locus standi* of direct and substantial interest test. It would appear that this view finds support in the Constitution of South Africa which seems to make a similar distinction between standing in “bill of rights” litigation and standing in the general constitutional litigation. Section 8 of the South African Constitution would appear to liberalise the matter of standing in the “bill of rights” litigation. The Constitution is silent in other constitutional litigation. In the case of the ***New National Party v The Government of the Republic of South Africa*** (1999) 3 SA 191 the Constitutional Court of South Africa held that the liberal rules of standing in Section 8 of the Constitution did not apply in general constitutional litigation. And the Solomon Islands case of ***Ulafaialu v Attorney General (2004) SBCA1*** confirmed the proposition that the requirements of standing in Constitutional matters will depend on the wording of the Constitution of particular countries. In the Solomon Islands Constitution, Section 18(1) provides as follows:-

"Subject to the provisions of subsection (6) of this Section, if any person alleges that any of the provisions of Section 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained) if 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".

[22] And compare those provisions with the provisions of Section 83(2) of the same Constitution which provides as follows:

"The High Court shall have jurisdiction in any application made by any person in pursuance of the preceding subsection or in any other proceedings lawfully brought before the court to determine whether any provisions of this Constitution has been contravened and to make a declaration accordingly."

"Provided that the High Court shall not make a declaration in pursuance of the jurisdiction conferred by this subsection unless it is satisfied that the interests of the person by whom the application under the preceding subsection is made for or, in the case of other proceedings before the court a party

to those proceedings are being or are likely to be affected."

[23] We note the similarities in the provisions of our Section 35(1) of the new Constitution to the provisions of Section 18(1) of the Solomon Islands' Constitution. It was held in the Solomon Islands case that Section 18(1) provisions applied to "bill of rights" litigation and that Section 83(2) provisions applied to breaches of the Constitution generally. The respondents have submitted that the reliefs which the applicants seek in their prayers 1, 2 and 3 in their Notice of Motion do not seek to enforce the "bill of rights" provisions but to invalidate the whole Constitution of the Kingdom. It is the respondents' contention that the direct and substantial interest test must apply to the three reliefs which the applicants seek from this court.

[24] The respondents have submitted that the main objective of the 1973 King's Proclamation was the proscription of organisations like the applicants and the respondents have contended, therefore, that the applicants must first purge themselves of this stigma of "illegitimacy". The respondents further contend that until these organisations have been duly registered they cannot be regarded as stakeholders in the Constitution making process. The respondents have submitted that there is no reference in the 1996 and 2002 Decrees to organisations like the applicants. The respondents have observed that while the applicants seek to rely for their cause on the provisions of paragraph 2(e) of the 1973 King's Proclamation it cannot have escaped the applicants' memory that they had never recognised that Proclamation as law. That Proclamation is

no longer part of the law of this country.

[25] The respondents have argued that while it is advisable for the court in constitutional matters to seek guidance from other jurisdiction it must do so with caution. In the case of ***Qozeleni v Minister of Law and Order & Another*** (1994) 2 SA 340 E Froneman J sounded the following warning:

> *"Although S.35(1) of the Constitution enjoins one to*
>
> *have regard to comparable foreign law where applicable in interpreting the provisions of Chapter 3 of the Constitution, this should be done with circumspection because of the differing contexts within which foreign constitutions were drafted and operate in, and the danger of unnecessarily importing doctrines associated with those constitutions into an inappropriate South African setting."*

[26] So too in the case of ***S v Makwanyane and Another*** (1995) 3 SA 391 cc where Chaskalson P said;

> *"Comparative "Bill of rights" jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence on which to draw … It is important to appreciate that (foreign law) will not necessarily offer a safe guide to the interpretation of the Constitution."*

[27] The respondents have, therefore, contended that "sufficient interest" test is inappropriate and in inapplicable to the Swaziland setting. They have submitted that "sufficient interest" test was introduced in the English Administrative Law in order to remedy the deficiencies that had been identified in that law and that those anomalies do not exist in the law of the Kingdom. They have submitted that the "sufficient interest" test was in fact introduced into the law by amending order 53 of the Rules of Court and was subsequently incorporated into S. 31(3) of the Supreme Court Act of 1981. Order 53 rule 3(5) provides as follows –

> *"The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates".*

[28] The respondents have also submitted that this Court has no power or jurisdiction to grant the order which the applicants are seeking of declaring the whole Constitution of the Kingdom null and void. They contend that the applicants have not cited any authority which gives this court the power to declare the Constitution which is the supreme law of the country null and void. The applicants have contended, on the other hand, that this court can make the order they seek by invoking the court's inherent power. The

respondents have countered that contention by submitting that there is no power under the common law which would give such power to this court to declare the Constitution null and void. The respondents submit that such power can only derive from another statute. The respondents find it difficult to imagine that a court, which is itself a creature of the Constitution, would have the power to annul the very Constitution that created it. They contend that this is unheard of and no authority has been cited to support that proposition. The respondents have submitted, therefore, that once a Constitution has come into being, it cannot be annulled and have contended that the applicants' prayers 1, 2 and 3 are bad in law. The respondents have drawn the court's attention to the procedure that is available in the South African setting between certification and annulment, and this came up in the case of ***Ex Parte Chairperson of the Constitutional Assembly in re Certification of the Constitution of the Republic of South Africa*** [1996] 4(2) 744. This case came before the Constitutional Court for the certification of the new constitutional text in terms of Section 71 of the Constitution of the Republic of South Africa. That Section required that the new constitutional text passed

by the Constitutional Assembly in terms of Chapter 5 of the Constitution, be certified by the Constitutional Court as having complied with constitutional principles (CP) set out in the Schedule 4 of the Constitution.

[29] It is interesting and instructive to note some of the statements made in the judgment of the Certification case which extends to almost 200 pages. The court held that it had a judicial and not a political mandate to certify whether all the provisions of the new text of the constitution complied with the constitutional principles. The court further held that it had "no power, no mandate and no right" to express any view on the political choices made by the Constitutional Assembly in drafting the new text. Nor did the court have any power to comment upon the methodology adopted by the Constitutional Assembly. The court further stated as follows:-

> *"Even if complaints that submissions of the Constitutional Assembly were ignored and that its deliberations at times lacked transparency were well founded, they would remain irrelevant to the court's task."*

[30] The court also held that,

> *"the issue as to which of several permissible*

models

should be adopted was not an issue for adjudication

by the Court – that was a matter for the political judgment of the Constitutional Assembly and therefore properly within its discretion."

[31] It is important to observe that the Constitutional Court of South Africa found that the Constitutional Assembly's function in drafting the new Constitution for South Africa was a political function on which they, as a court, would not comment because it was not their function. It is the Constitutional Drafting Commission (CDC) in Swaziland which drafted the Constitution of Swaziland and on the authority of the Constitutional Case of south Africa this Court would have no power to comment on the constitutional model which was adopted for Swaziland.

[32] It should be remembered that what is sought to be set aside in this application is not an ordinary Act of Parliament but the whole Constitution. The Tanzanian case of ***Mgmongu v Mwanwa*** (1993) 19(3) CLB 1393 is a case in which a Court struck down a piece of legislation which had infringed on fundamental human rights and freedoms. It did not involve the annulment of the whole constitution and does not provide a

precedent for this court to follow.

[33] The respondents have contended that the proceedings in the main application is not a review proceeding. They submit that both the CRC and the CDC were discharging a political and not judicial, quasi-judicial or administrative function and were not therefore amenable to review proceedings. They have contended that even if it is assumed that the two bodies discharged judicial functions or quasi judicial functions there was unreasonable delay to bring the application for review. The CRC and CDC were created in 1996 and had completed their work in 2002 and there is no explanation why the applicants should have taken four years to bring the action to challenge the manner in which the two bodies discharged their functions.

[34] The applicants have submitted that the basis of the relief they seek is on the wording of the King's Proclamation of 12th April 1973 particularly paragraph 2(e) as read with S. 80(2) of the 1978 King's Order-in-Council on the establishment of the Parliament of Swaziland No. 23 of 1978. Paragraph 2(e) of the King's Proclamation to the Nation of 12th April 1973 reads as follows:-

> "*that I and all my people heartily desire at long last,*
>
> *after a long constitutional struggle to achieve full freedom and independence under a constitution created by ourselves in complete liberty without outside pressures; as a nation we desire to march forward progressively under our own constitution*

guaranteeing peace order and good government and the happiness and welfare of all people".

[35] The applicants have called upon the respondents to dispatch to the Registrar of this Court the records of proceedings kept by the CRC and CDC in accordance with the enabling legislation. The applicants have contended that the records are important for their case as the entire contents of the Constitution are founded upon the recommendations, conclusions and findings made by the two bodies in the process of drafting the Constitution.

[36] The respondents, as we have already indicated earlier in this judgment, have refused to dispatch those records on the grounds that the applicants lack the necessary *locus standi* to sue because, in the exercise of their functions, the CRC and CDC were discharging a political mandate and that those functions were not reviewable. It is the applicants' contention that this court, in the exercise of its inherent power, can review decisions of other bodies when they are discharging judicial, quasi-judicial and administrative functions. The respondents have contended that the fundamental principle is that the body exercising such powers must have not performed its functions or have wrongly performed its authority or duty the result of which an

injured or aggrieved party has a cause of action within the jurisdiction of this court. The basis of the applicants' case is that the respondents and in particular the CRC and CDC failed to appreciate the nature of their mandate and had failed to apply their minds and as such they misconstrued the mandate they were given. Thus, the applicants contend, the respondents flouted the law and that the applicants are entitled to approach this Court for relief in terms of the principles guiding this Court in review applications. The applicants have submitted that a litigant may, at any time of the proceedings, call upon a party to produce documents. They have contended that this court is empowered in any proceedings to order any party to produce, on oath, any documents relating to the matter under consideration. The applicants contend that according to authorities, the respondents are not entitled to oppose this application because the provisions of Rule 53 are peremptory in nature and for that proposition they have cited the case of ***Van Vereringing van Bo-Grandze-Mynampt v President of the Industrial Court*** (1983) 1 SA 1143.

[37] The applicants have contended that even if it is accepted that the CRC and CDC were exercising an inherently political function in the Constitution making

process, the power to exercise those functions derived its authority from the King's Proclamation in terms of which all authority ought to be exercised whether that authority be political or otherwise. In the case of ***Ray Gwebu and Lucky Nhlanhla Bhembe,*** Case No. 19/20 of 2002 the Supreme Court of Appeal affirmed the supremacy of the 1973 Proclamation at the relevant time, when it held that –

> *"There is no doubt, however, and this was conceded*
>
> *by Mr. Maziya, that the King's Proclamation has operated since 1973 – it has become effective since then. Thus whether or not, it is any exaggeration to say that the "whole nation" supports it to attempt now to restore the 1968 Constitution would not only be impractical but may well result in sinking this Kingdom into an abyss of disorder if not anarchy."*

[38] It should be observed, however, that Gwebu's case was decided before the new Constitution came into force. It is the contention of the applicants that the respondents failed to comply with the spirit, object and purport of the Proclamation leading up to the promulgation of the Constitution and that they should have complied with the requirements and provisions of the Proclamation. They contend that that failure has

made the Constitution to remain not only illegitimate but also unlawful on the basis that it lacked compliance with the King's Proclamation.

[39] We have carefully considered the very detailed submissions made by both counsel as disclosed on the papers and orally. We are grateful to both counsel for the wealth of authorities that they placed at our disposal. The authorities cited have been of immense help to us in arriving at the conclusion we have made in this judgment.

[40] The jurisdiction of review proceedings in this Court are governed by the provisions of Rule 53(1) of the Rules of this Court. The provisions of that rule are in the following terms:-

> *Rule 53(1) "Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative function shall be by way of Notice of Motion directed and delivered by the party seeking to review such decision or proceedings to the Magistrate presiding officer or chairman of the court, the tribunal or board or to the officer, as the case may be, and to all other parties affected –*
>
> a) *calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or*

set aside and

b) *calling upon the magistrate, presiding officer, chairman or officer as the case may be, to dispatch within fourteen days of the receipt of the Notice of Motion, to the Registrar the record of such proceedings sought to be corrected or set aside together with such reasons as he is by law required or desires to give or make and to notify the appellant that he has done so."*

[41] It is on the basis of this rule that the applicants have grounded their application. The applicants have urged this Court, in as much as they contend it has power under Section 104 of the repealed 1968 Constitution, to test the validity of the new Constitution. It seems to us to be an extraordinary proposition to make that this Court should invoke the provisions of a Section of a Constitution which was repealed a long time ago. The applicants must, if they can, point to the provisions of the new Constitution or any legislation which gives this Court the power which they arrogate to it. Alternatively the applicants should identify to the Court which piece of legislation purported to save some

provisions of the 1968 Constitution as they contend. Indeed as the Supreme Court held in the Gwebu case " to attempt now to restore the 1968 Constitution would not only be impractical but may well result in sinking this Kingdom into an abyss of disorder if not anarchy".

[42] Under Rule 53 the body whose decisions are to be reviewed must have exercised judicial, quasi-judicial or administrative functions and the test to apply, under the law, is not whether a public body is a creature of a statute but rather whether the body in question exercised judicial, quasi-judicial or administrative functions. And this is one of the issues we have to determine in this application. The applicants have contended that because the respondents' mandate was to " enquire into and report on the matters mentioned" and since the CDC was mandated to " go through", " review", "consider" and "examine" their function was judicial and not political. It is not proper, in our view, to look at a word or words of a statute in isolation. The words must be looked at in the context in which they appear and are used. After considering the duties which devolved upon the two bodies from the Decrees which created them, there can be no doubt in our judgment, that the two bodies functions were political and not judicial, quasi judicial or administrative. We

are fortified in this finding by what the Constitutional Court of South Africa held in the Certification case. It will be recalled that the Court there held that the function of drafting a constitution was a political function on which the Court had " no power, no mandate, no right" to express any view on the political choices made by the Constitutional Assembly in drafting the new Constitution. Nor did the Court have any power to comment upon the methodology adopted by the Constitutional Assembly. The court further held that "even if the complaints that submissions to the Constitutional Assembly were ignored or that its deliberations at the time lacked transparency were well founded, they would remain irrelevant to the court's task."

[43] The Court also held that,

> *"the issue as to which of the several permissible models should be adopted was not an issue for adjudication by the court – that was a matter for the political judgment of the Constitutional Assembly and therefore properly within its discretion".*

[44] In addition, for there to be a duty to review the decision of a body, there must be proved that there was a disregard of important provisions of the statute or that

the body was guilty of gross irregularity or clear illegality in the performance of its duty. It is only on proof of such irregularity or illegality can the court be asked to review the proceedings complained of and, if proved, to set them aside or correct them. In the case of ***Johannesburg Consolidated Investments Co. v Johannesburg Town Council*** Innes CJ stated as follows:-

> *"But there is a second specie of review analogous to the one with which I have dealt, but differing from it in certain well defined respects. Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them."*

[45] The applicants have not contended that the respondents disregarded, in discharging their functions, any important provisions of the statute which created them nor have they suggested that the respondents were guilty of gross irregularity or clear illegality. All the applicants have stated is that the respondents misconstrued their mandate and that they did not follow the object, intent and purport of the enabling

legislation. They have argued that the review proceedings would enable them to discover whether the respondents' findings and conclusions reflect what the people said. It must be observed that the applicants have not shown in what respects the respondents misconstrued their mandate and failed to follow the object, intent and purport of the legislation; nor indeed have the applicants stated what were the views of the people which were not reflected in the findings and conclusions of the respondents except to express the hope that the people's views would be discovered after the review proceedings. This, in our judgment, sounds very much like a fishing expedition.

[46] The summary of our findings, therefore, is the following. We are satisfied and find that the applicants have no *locus standi* to bring this application and by necessary extension they would have no standing to prosecute the main application. We are also satisfied and find that there is no power inherent or statutory which this Court can invoke in order for it to declare the Constitution of Swaziland Act 001 of 2005 null and void with no force and effect. What is disappointing in the matter is that the applicants have not suggested what would happen in the event that their prayer to annul the Constitution

was upheld. All the applicants say in their amended Notice of Motion in paragraph 5 is as follows:-

> *"Suspending and setting aside the Constitution of Swaziland Act No. 001 of 2005 for a period of two years and referring to a broadly representative institution to correct its sections which do not give effect to the second respondent's obligations under the African Charter and the NEPAD declaration as well as under international human rights and international customary law."*

The applicants have not stated where the executive legislative and judicial powers would reside and how and by whom would those powers be exercised. The proposed "broadly representative institution" would presumably be mandated only "to correct its Section (of the Constitution) which do not give effect to the second respondents' obligation under the African Charter and the NEPAD declaration as well as under international human rights and international customary law" and they do not state what are the obligations the respondents had to discharge under those treaties.

[47] It is to be observed that it was held in the Gwebu case (supra) that unincorporated international agreements and treaties may be used as aids to interpretation but may not be treated as part of municipal law for purposes of adjudication in a municipal court.

[48] And finally we are satisfied and find that there is no legal basis proved to invoke this Court's jurisdiction for a review proceeding. The provisions of Rule 53(1) which require that a body whose decision is to be reviewed must have exercised judicial, quasi judicial or administrative functions have not been satisfied.

[49] We would therefore dismiss this application with costs.

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R.A. BANDA, CJ

I agree

_____
S.B. MAPHALALA, J

I agree

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M.D. MAMBA, J