IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 2931/2008

In the matter between:

JAN SITHOLE (In his capacity as a Trustee of the National Constitutional Assembly Trust) AND 7 OTHERS — Applicants

Versus

THE PRIME MINISTER OF THE KINGDOM OF SWAZILAND and 9 OTHER RESPONDENTS — Respondents

Coram: Maphalala, PJ;
Annandale, J;
Mamba, J.

For the Applicants: Mr. T. Maseko

For the Respondents: Attorney General

JUDGMENT - INTERLOCUTORY INTERDICT APPLICATION

17th September, 2008

Annandale J.

INTERLOCUTORY INTERDICT APPLICATION

[1] During the course of hearing of argument in the further interlocutory application, aimed at joinder of the EBC

(Elections and Boundaries Commission) and the JSC (Judicial Service Commission) as respectively the 9th and 10th Respondents, and further to declare the EBC null and void - the subject matter of the main judgment herein, yet a further interlocutory application was brought before the full court. This time, the applicants sought the elections itself to be interdicted, in an application certified to be urgent.

[2] In order to urgently deal with this further aspect of the application initiated as long ago as 2006, but brought under case number 2931 of 2008 instead of 2792 of 2006, all other matters before the three members of the Bench had to be set aside in order to deal with a last minute effort to derail the election process which was scheduled to commence the very next day.

[3] It was therefore no surprise that the Respondents, and in particular the 9th and 10th Respondents, which at that time were still in the process of contesting their joinder in the main application, had no time to file affidavits in answer to the new issue brought into the fray and relied solely upon legal objections *in limine* which were ably argued from the bar.

[4] In order to retain perspective, it needs to be recalled that some two years ago, the applicants launched legal proceedings aimed at nullifying the Constitution of Swaziland. It took a different turn when the relief sought was amended, shifting the focus to a suspension of the Constitution, coupled with certain interim measures.

[5] That application was heard by a differently constituted full bench of the High Court, which dismissed the matter,

essentially on the basis that the applicants lacked *locus standi in judicio,* also expressing its doubts as to the prospects of success in the main application. In the course of its judgment in the interlocutory application, the High Court held (per Ban da CJ) at paragraph 19 (page 15 of unreported CIVIL CASE NO. 2792/2006, with the same citation as in this matter, save for the omission of the 9th and 10th Respondents) that:-

> "*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.*"

It went on to conclude at paragraph 46 (page 35) that:-

> "*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 extention they would have no standing to prosecute the main application.*"

[6] Being dissatisfied with such an adverse definitive finding and seeking to liberalize the question of legal standing, which was also dealt with adversely by the High Court, the applicants took the matter on appeal to the Supreme Court of Swaziland. In appeal case no. 35/2007, a full bench of that court equally ruled on the matter, confirming the decision of a full bench of the High Court.

[7] On appeal, it had to be decided whether the High Court erred by holding that the appellants had no *locus standi* to challenge the Constitution of Swaziland, in addition to a

similar finding by a single judge of the High Court which came to an equal conclusion, albeit in a different context.

[8] The decision by Maphalala J was akin to the present further interlocutory application, brought by the very same applicants wherein, as a matter of urgency, the same refrain as now, and again pending the outcome of the main application then, now the further interlocutory application, the then forthcoming municipal elections were sought to be interdicted. It was then opposed by the respondents *in limine,* as it is yet again the position, that the matter was not urgent and that the applicants, in particular the third and fifth applicants (PUDEMO and the NNLC) had no *locus standi* to bring the application.

[9] In its judgment, the full bench of the Supreme Court (per Tebbutt JA) dealt with both appeals, emanating from the full bench of the High Court as well as that by Maphalala J. It reviewed the applicable case law, both domestic and international.

[10] Referring to Lawyers for Human Rights (Swaziland) and Another v Attorney General (Civil Appeal 34 of 2001, a full bench decision), the court cited the dictum on *locus standi,* with approval, where it was held that:

> "That decision represents for now, the law of this country on the matter of standing".

It also referred to the authority relied upon by the High Court, Roodeport - Maraisburg Town Council v Eastern Properties (Pty) Ltd 1933 AD 87, per Wessels CJ at 101:"... provided he can show that he has a direct interest in the

matter and not merely the interest which all citizens have".

[11] In similar vein, the Supreme Court also referred with approval to another often cited *dictum* of Wessels CJ in Dalrymple and Others v Colonial Treasurer 1910 TS 372 at 392:

> "Courts of law have required the applicant to show some direct interest in the subject matter of the litigation or some grievance special to himself (emphasis added).

In Canada, the Supreme Court held in Tharsen v Attorney General of Canada *et al* (No. 2) (1974) 43 DLR 1 that:

> "*...to accede to the applicant's contention upon this point,* (ad: the same interest as any other taxpayer, my insert) *would involve the consequence that virtually every resident of Ontario could maintain action ...*"

In America, Shapiro and Tresolini postulated in their work entitled "American Constitutional Law" that:

> "*An individual has standing to challenge the constitutionality of a law only if his or her personal rights are directly affected by operation of the statute. To have standing, one must show that* "*not only that the statute is invalid but that he (the party invoking judicial power) has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally*" (emphasis added) (cited with approval in Frothingham v Mellon, Secretary of the

Treasury *et al* 262 US 447 and 448 and Ashwander *et al* v Tennesse Valley
Authority *et al* 297 US 288 (1935) at 347).

It was thus held in the United States that a plaintiff must show something more than a "generalised grievance" but and "injury to themselves".

[14] Our own Supreme Court dealt with these aspects, on appeal, including *locus standi,* which derives from the doctrine of legitimate expectation, in the context of various international precedents, including Cabinet of the Transitional Government for the Territory of South West Africa v Eins, criticised by Loots in the SAJ on HR 1994 at p52, by stating it to have resulted in "*The Appellate Division itself missed a golden opportunity to liberalize the law of standing for the purpose of constitutional litigation*".

[15] Our Supreme Court did no differently when then holding, at page 26 (para 45 *in fine):*

> "*Be that as it may, our law is still that as set out in the Lawyers for Human Rights case,* supra".

We refer to this appeal case for two reasons - firstly, it is in the very same case which came before this court, in yet another interlocutory application, to interdict the primary and secondary elections scheduled during August and September this year, pending the final determination of the issues in the same matter which was already dealt with by a full bench of the High Court and the Supreme Court, both courts holding that the applicants lack *locus standi in*

iudicio. Secondly, this court is bound by the legal principle of *stare decisis,* which permits this court to deviate from a previous decision by a full bench of the High Court only in the event that it is found that the previous decision is patently wrong, but which precludes the High Court, however constituted, to decide contrary to a decision of the Supreme Court. This doctrine is inherent to its cousin, the rule of law and its father, legal certainty.

[16] Moreso, the interdict sought to prevent the election process from taking its course, is interlocutory to the main application which has been before the courts of law for a considerable period of time, and which main application is held out to be the issue that is first to be finalised and determined before the election process could be permitted to precede. It is thus not only the principle of *stare decisis* which has general application but it is the very same pending matter which has already been pronounced upon in anteceding interlocutory applications. This further reduces the scope for a broadening of the legal standing of the applicants, which is now sought to be applied, in order to grant the interdiction of elections, primary and secondary.

[17] In their Notice of Motion dated the 31st July 2008, the applicants, all eight of them, seek an order in the following terms :-

> " 1 .Waving the normal time limits and forms of service stipulated by the Rules of this Honourable Court and hearing the matter as one of urgency;
>
> 2. Calling upon the respondents to show cause, if any,

on a date and time to be determined by this Honourable Court, why:

The respondents, particularly the ninth respondent, their agents or principals should not be interdicted and restrained from proceeding with the electoral process, including the holding of primary and secondary elections scheduled for the 2nd and 3rd August 2008, as well as the 17th (sic) September 2008, pending the final determination of the issues under case No. 2792 of 2006. Alternatively;

Staying the whole electoral process pending the final determination of case No. 2792/2006;

(b) That paragraphs 2.1 and 2.2 operate as an interim interdict with immediate effect pending the return date.

(c) Costs of the application.

(d) Further or alternative relief."

Notably, the date referred to under prayer 2.1 is patently incorrect, stated to be the 17th September, whereas in fact His Majesty the King of Swaziland, in Legal Notice number 132 of 2008, gazetted the date of the secondary elections to be on the 19th, not the 17th, September 2008, as per the provisions of Section 4 of the Elections Order of 1992. Nothing turns on this obvious error, which has also not been argued before us. It is a typographical error and no more.

In an accompanying "Certificate of Urgency" the attorney of the applicants embellishes the urgency of the application as follows:-

"3.1 The question of the holding of free and fair democratic elections is pending before the full bench of this Honourable Court under case No. 2792 of 2006, and it is only logical and fair that the process of nomination is conducted upon the final determination of the issues before court.

(e) The holding of elections without allowing organised political associations and organisations will have the effect and is tantamount to the breach of the Constitution and the rule of law, given that there is present no law that prohibits the existence of political parties as citizens voluntary associations with a view to contest democratic elections, as envisaged by the Constitution.

(f) In my view the conduct of the nominations at the exclusion of the organised political groupings will effectively disenfranchise many citizens who are members of the applicants, who desire to participate under the auspices of the freely formed democratical organisations as envisaged by section 50 of the Constitution. Disenfranchisement of citizens will in itself be a violation of the citizens' Constitutional rights to vote and to be voted for without lawful justification."

It is immediately apparent that whereas the main application which was initially instituted sought the entire constitution to be nullified, thereafter amended to seek a two year suspension of it, is now invoked to justify the apprehended harm. It is also apparent from this introduction that the real and underlying stated problem of the applicants remains to be a complaint that although political parties are no longer banned as it used to be, they remain on the outside perimeter of the political playing field

and seek to be not only acknowledged but empowered to contest elections on a party political basis - a multiparty political system, as sought in the "main" interlocutory application.

As is held in the "main" interlocutory application, dealt with in the main judgment, it is not the role or function of the judiciary to bring about major alterations to the Constitution of the Kingdom, which expressly states the political system to be Tinkhundla based, where individual merit of members of the legislature is the key concept, contrary to a democracy where party political considerations are the first and foremost consideration. That this is a fundamental difference in the concept of how a democracy functions bears no argument.

[20] Thus, in context, the interdict against the election process seeks of the judiciary to hold the whole process in abeyance, pending the outcome of an anticipated decision that indeed the political system is ordered by the courts to evolve into a multi party system, contrary to the present system, without the intervention of the legislature. It is precisely this aspect which is the problematic issue in both the interdict and "main" applications - it fails to distinguish the functions exercised as a result of the separation of powers between the legislature, executive and judicial arms of Government. The banner under which the applicants seek to circumvent the involvement of Parliament to bring about their desired change in the political system by subterfuge - they require of the judiciary to interpret the Constitution in such a manner that it would result in holding that the political system as determined in the Constitution itself is wrongly stated, that indeed it should not be Tinkhundla based but on a party political basis.

The separation of powers, which grants independence to the

judiciary, does not also include the ability to order a different political system of Governance, as per the dictates of the Constitution. The role of the judiciary, in this context, is to interpret the Constitution and pronounce upon the validity of certain acts, for instance the powers of His Majesty under Section 4 of the Elections Order, 1992 (Order No. 2 of 1992), to proclaim general elections of elected members of the House of Assembly, which follows upon the dissolution of Parliament. Our role is also manifestly to uphold the tenets, provisos and essence of the Constitution, not to change it into something else.

What the applicants therefore seek, in essence, is to interdict the general elections of elected members of the House of Assembly, Tindvuna Tetinkhundla and Bucopho, heralded in the Gazette to take place on the 2nd and 3rd August (Nominations); the 23rd August (Primary Elections) and the 19th September 2008 (Secondary Elections), as well as the respective campaigning process for secondary elections and the counting and announcement of results.

Instead, the stated objective of the "Main" interlocutory application, following the failure of previous interlocutory applications in the very same matter, is to have political parties, especially the 3rd and 5th applicants (PUDEMO and the NNLC (Ngwane National Liberatory Congress and the People's United Democratic Movement) override the current political system dictated by the Constitution and participate in the election process on a party political basis. Section 79 of the Constitution unambiquously states that:

> "*The system of government for Swaziland is a democratic, participatory,* Tinkhundla- *based system which emphasises devolution if state proven from*

central government to Tinkhundla *areas and individual merit as a basis for election or appointment to public office.*"

Further provisions of the Constitution is clearly devoid of any reference to elections being conducted on a political party basis, as opposed to individual merit under the *Tinkhundla* system of elections and governance.

[24] From the onset, it requires to be recorded that this court is neutral in so far as the political aspirations of the peoples of this Kingdom is concerned - our function is not to determine the political system as is sought, but to interpret the Constitution and enforce its tenor and spirit. Still, it would be folly to hide in towers of ivory and be insensitive to progressive inputs of politically-minded persons and organisations which seek to change the present system. That change is inevitable has been demonstrated in countless countries, kingdoms, empires of all continents over the centuries. Equally so, change is achieved by various means - violence, anarchy, civil strife and wars, through the ballot box, but most properly, through democratic expressions of desire for change, more particularly through democratically elected representatives who form majority political voices of change, transformed into Constitutional amendments. Political landscapes peacefully and harmoniously change through majorities in the legislature, empowered by the people who voted them in power. That is part and parcel of the electoral process, yet again invoked by the Head of State. We emphasize that it is not for any judiciary to bring about fundamental changes to the political system of any state - it remains the exclusive domain of the legislative arm of Government.

[25] Reverting to the aspect of legal standing, the main legal objection raised by the respondents: it is imperative to note that absence of standing does not only follow the aforementioned precedents in this matter. One further aspect which was argued before us is the conspicuous omission of any averment in the interdict application, by any of the eight applicants or any individual member of the groupings, that anyone of them is a legally registered voter.

The importance of this is that only legally registered voters and candidates may participate in the election process and who have vested rights in the manner in which the elections are conducted. To have a direct and substantial interest in a forthcoming election, is the first and foremost requirement to have that right be given the protection of the law through the courts, if need be, to hold the process in abeyance or otherwise put, to interdict the elections until some or other wrong has been addressed.

There is a further fatal defect in the interdict application which also militates against standing. It is trite that nobody needs any authorisation to depose to an affidavit, but when the deponent does so on behalf of another, it becomes a horse of a different colour. Either the deponent has to be properly authorised, or the entity on whose behalf the affidavit is presented, has to confirm its contents. In the present application, there is neither of these.

[28] The Notice of Motion dated the 31st July 2008 by which the application was made, states it to be done "on behalf of the abovenamed applicant" (sic). Patently, it is meant to be on behalf of all eight applicants and not only one. It is also trite that an application requires motivation and support in

the form of a founding affidavit, unless *viva voce* evidence is presented for the same purpose.

[29] The application to interdict the electoral process is founded on the affidavit of one Thamsanqa Hlatswayo who holds himself to be the Secretary General of the Ngwane National Liberatory Congress (NNLC), the 5th applicant. He goes on to state that he is "duly authorised to sign this affidavit on behalf of all the applicants".

[30] It is this aspect which in itself is fatal to the application. Hlatswayo has not been authorised by the 5th applicant to act on its behalf as its resolution ("NCA6, pi28, volume 1 of the record.) authorises a different person to do so - Ntombi Nkosi, not Hlatswayo. Neither has any of the other applicants authorised Hlatswayo to speak on their behalf, through his affidavit. The supporting affidavit of Mario Masuku does not cure the defect either. Further examples are found in "NCA3" (p81) where the 3rd applicant, the People's United Democratic Movement (PUDEMO) authorised Bonginkosi Ignitius Dlamini, not

Hlatswayo to depose to its affidavits. "NCA 7" (pl29) authorises Archie Sayed and not Hlatswayo to sign papers on behalf of the 6th applicant, the Swaziland Federation of Trade Unions (SFTU). Likewise, the Swaziland Federation of Labour (SFL), the 7th applicant, authorised Vincent Ncongwane, not Hlatswayo, to act on its behalf ("NCA 9", pi52). Ditto with the 8th applicant, the Swaziland National Association of Teachers (SNAT), per "NCA 11" (p 168) and Dominic Nxumalo, not Hlatswayo.

[31] These resolutions all have one common denominator - people other than Thamsanqa Hlatswayo are authorised to

depose to affidavits on their behalf. Hlatswayo has not even been authorised by his own organisation, the NNLC, to bring the application for an interdict on its behalf. The same applies to Dominic Tembe, the 4th applicant, who also did not authorise Hlatswayo, likewise with the 1st applicant. In so far as the first applicant is concerned, it is even worse, as his own status is rather ambiguous. He holds himself to be acting "in his capacity as a trustee of the National Constitutional Assembly - Trust", but whether he comes to court *nomine officio,* duly authorised by the so called Trust, and whether the trust has any business to engage in judicial proceedings such as the present is equally unclear. In any event, neither Sithole, nor the NCA or any trust has authorised Hlatswayo to bring the application on their behalf.

It is for the aforestated reasons that two members of the full court hold that yet again, the applicants still remain without legal standing to prosecute the interdict against the election process. But, even in the event that we could be wrong to hold so, there are further insurmountable obstacles which would still preclude the granting of the relief sought by the eight applicants.

In applications for interlocutory interdicts, the *onus* remains on the applicant to establish the necessary requisites in order to be granted his prayer. From Roman Law, where its origins were founded, such as the provisional interdiction of an *opus novum* (Digesta 39.1), it was developed and refined in Roman Dutch Law, especially by van der Linden in the Koopmans Handboek (3.1.4.6 - Interdictien). In 3.1.4.7 of the Handboek, which is similar to 2.19.1 of Judicieele Practijcq, he sets out three requirements for the *mandament poenaal:* firstly, a clear right

on the part of the applicant, secondly an act of interference committed on the part of the person to be interdicted or, indeed a well-grounded apprehension that such an act will be committed and lastly, the unavailability of any other ordinary remedy by which one can be protected with the same result.

[34] In his work titled Interlocutory Interdicts, Prest traces the further history in the development of this remedy in our legal system, which culminated in the decision of the Appellate Division of South Africa in Setlogelo v Setlogelo - 1914 AD 221. Therein, at p. 227, Innes JA stated the requirements, which in essence still remains valid in our own law, i.e. a clear right, which when only *prima facie* established but open to some doubt, the test then to apply is whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant; secondly, an injury actually committed or reasonably apprehended; and lastly, the absence of similar protection by any ordinary remedy.

[35] In LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969(2) SA 256(C) at 267 A - F, Corbett J (before becoming CJ) restated the requirements for an interlocutory interdict as follows, at 267 A - F:

> "Briefly these requisites are that the applicant for such temporary relief 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."

For present purposes, it suffices to state that it is not necessary to delve deeper into the origins and developments in our legal system as to how these requirements came into being and how, for instance, the balance of convenience comes into the picture as separate and substantive requirement.

[36] It is the first requirement, that of a *prima facie* right, the onus of proof to establish it which rests upon an applicant, which forms yet another barrier against the application to interdict the election process. The first and foremost requisite for an applicant to establish, as stated above, is that it has a *prima facie* right. It is more than just a moral right - it must be a strict legal right, as was held by De Villiers JP in Pretoria Estate and Market Co. Ltd and Another v Rood's Trustees 1910 TPD 1080 at 1084 and a long line of decided cases thereafter, up to the present. For an interlocutory interdict *pendent elite,* it is not necessary to establish a clear right, which is what the applicants assert themselves to have. A *prima facie* right which is open to some doubt, accompanied with 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, goes a long way towards deciding the application in favour of an applicant as the balance of convenience then also comes to be considered. However, before the balance of convenience comes to be decided, the threshold that first has to be established is that of a *prima facie* right.

[37] In the ordinary course of events, the court is limited to only what is placed before it at the time when an interdict is applied for, without knowing what is yet to follow in the main matter, save for some pointers. Accordingly, we were in a better position to evaluate whether a *prima facie* right has been established, even if open to some doubt.

[38] In the present matter, the court has been placed in a better position to decide this aspect than what is usually the case. Usually, the matter which is yet to be decided in the main application is still moot and comes to be heard in due course. Presently, this court had already heard full argument by the applicants on the merits, as well as on preliminary legal points in respect of the main application by the time that the application for the interdict was made. Judgment had not yet been reserved by then since the Respondents still had to be heard but the court was fully aware of the extent to which the applicants contentions supported the main application, the outcome of which is pronounced simultaneously with this aspect, in the judgment on the merits of the application. Thus, the court already had knowledge of the strength of the applicants case at the time when the applicants motivated the interlocutory interdict.

[39] Having heard able argument by counsel on both sides and having read the papers filed of record, it was the considered view of two members of the full court that the applicants did not pass the threshold test. It therefore precluded, in our view, the granting of the interdict. What the applicants relied upon as being their stated right to protection against the election process was not sufficient to find it to have been *prima facie* established, and doubly so - both in the application for the interdict as well as in the main application, which itself is yet another interlocutory

application in the main and initial application, they stand to fail.

[40] Finally, in the event that the court could yet again have erred in holding that no *prima facie* right had been established, the balance of convenience would then have had to be decided.

[41] The balance of convenience clearly falls to be decided, if it would have come to that point, against the granting of the relief. In the event that the election process had to be suspended by an interdict *pendente lite,* the entire electorate would have been adversely affected, deprived of being able to exercise their fundamental political and constitutionally enshrined right to vote. By the time when the application for an interdict was made, there literally remained only hours before the primary elections were due. Parliament had already been dissolved and elections by necessity have to be conducted within 60 days thereafter. When the "main" interlocutory application was in the process of being heard, the dates of the elections had not yet been announced. It was done while the matter was before the court. It was an inevitable and foreseeable occurrence, to announce the dates of the elections. The applicants could have and must have known it would be done at any time and they could have brought the application for the interdict sooner than the last minute. In any event, that aspect caused difficulties and problems but in itself, the timing of the application has no bearing on the outcome of the matter.

[42] As mentioned above, not one of the applicants or members of their organisations, stated him or herself to be a registered voter. On the other hand, hundreds of thousands other citizens did register to vote. It is those voters who would have been adversely affected by a derailment or suspension of the election process, which adversely impacts against a balance of

convenience in favour of the applicants. It also hardly needs to be stated that the concept of constitutional democracy is in its infancy, yet to be further developed in the Kingdom. The international eye is focussed on Swaziland in all of its facets. To now put the first post constitution elections on hold and prevent the electorate from casting their votes, however imperfect the applicants hold the process and the system to be, would also not advance the prospects of a decision on the balance of convenience in their favour.

[43] It was thus, when the application for a interdict was dismissed, for the aforestated reasons, that the majority of the court so decided. The pronouncement of these reasons could obviously not have been done simultaneously and by necessity had to follow.

[44] There is no reason that has been argued before us to avoid an adverse costs order against the applicants.

[45] In the event, the urgent application brought under Notice of Motion dated the 31st day of July 2008, is ordered to be dismissed, with costs.

J.P. ANNANDALE, J

I agree

S.B. MAPHALALA, PJ