SWAZILAND HIGH COURT

CIVIL CASE NO. 2783/2008

BETWEEN

SWAZILAND COALITION OF
CONCERNED CIVIC
ORGANISATIONS TRUST **...** **FIRST APPLICANT**

COMFORT MDUDUZI MABUZA
(IN HIS OFFICIAL CAPACITY AS A TRUSTEE OF
SWAZILAND COALITION OF
CONCERNED CIVIC ORGANISATION TRUST) ... **SECOND APPLICANT**

HENRY TUM DU PONT
(IN HIS OFFICIAL CAPACITY AS A TRUSTEE OF
SWAZILAND COALITION OF
CONCERNED CIVIC ORGANISATION TRUST) ... **THIRD APPLICANT**

MANDLA INNOCENT HLATSHWAYO
(IN HIS OFFICIAL CAPACITY AS A TRUSTEE OF
SWAZILAND COALITION OF
CONCERNED CIVIC ORGANISATION TRUST) ... **FOURTH APPLICANT**

JAN JABULANI SITHOLE
(IN HIS OFFICIAL CAPACITY AS A TRUSTEE OF
SWAZILAND COALITION OF
CONCERNED CIVIC ORGANISATION TRUST) ... **FIFTH APPLICANT**

MUSA PETROS DLAMINI

(IN HIS OFFICIAL CAPACITY AS A TRUSTEE OF
SWAZILAND COALITION OF
CONCERNED CIVIC ORGANISATION TRUST) **SIXTH APPLICANT**

AND

ELECTIONS AND BOUNDARIES COMMISSION... FIRST RESPONDENT

CHIEF GIJA DLAMINI. **SECOND RESPONDENT**

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MZWANDILE FAKUDZE. **THIRD RESPONDENT**

NKONSINGUMENZI DLAMINI. **FOURTH RESPONDENT**

GLORIA MAMBA. **FIFTH RESPONDENT**

NCUMBI MAZIYA.. **SIXTH RESPONDENT**

JUDICIAL SERVICE COMMISSION. SEVENTH RESPONDENT

ATTORNEY-GENERAL OF THE KINGDOM OF SWAZILAND- **EIGHTH RESPONDENT**

GOVERNMENT OF THE
KINGDOM OF SWAZILAND. **NINTH RESPONDENT**

MINISTER OF JUSTICE AND
CONSTITUTIONAL
AFFAIRS... **TENTH RESPONDENT**

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CORAM: MAPHALALA J
MABUZAJ
AGYEMANGJ

FDR THE APPLICANTS: ADVOCATE P. KENNEDY SC

(INSTRUCTED BY RDBINSDN BERTRAM)

FDR THE RESPONDENTS: J.M. DLAMINI -ATTORNEY-GENERAL

JUDGMENT

AGYEMANG J:

The first applicant (hereafter referred alternately as the Swaziland Coalition of Concerned Civic Organisations Trust or the Trust), is described as a charitable trust with a Trust Deed registered under Notarial Deed of Trust No. 2 of 2003. The other applicants, who have commenced these proceedings jointly with the first applicant and have alleged themselves to have brought the suit in its name and on its behalf, are trustees of the first applicant.

The first respondent (hereafter referred to as the Commission or the EBC) is the organization tasked *inter alia,* with organizing elections in the Kingdom of Swaziland. The second to sixth respondents are members of the first respondent. The seventh respondent, which has the responsibility of giving advice to the King on the appointment of members of the first respondent, the eighth respondent who has been cited as the representative of the Government, the ninth respondent which is the Government of the Kingdom and the tenth

respondent, the Minister responsible both for Justice and Constitutional Affairs, are all cited by reason of their possible interest in the outcome of this case.

In this application the applicants are seeking the following; being, orders:

1. Declaring that the purported appointment of the second, third, fourth, fifth, and sixth respondents as members of the Elections and Boundaries Commission (the first respondent) is unlawful and invalid;

2. Declaring that the Elections and Boundaries Commission is currently not constituted lawfully;

3. Declaring that second, third, fourth, fifth, and sixth respondents are not eligible for appointment as members of the Elections and Boundaries Commission

4. Declaring that all actions and decisions purportedly taken by the first respondent as purportedly composed of the second, third, fourth, fifth, and sixth respondents are unlawful and invalid in consequence of the unlawful and invalid purported appointment of such respondents;

5. Declaring that the first respondent and its members have no legal right or power to exclude or preclude persons or groups such as the Swaziland Coalition of Concerned Civic Organisations Trust from providing voter education to members of the public and that the first respondent's lawful function in relation to voter education is to facilitate the provision thereof and not to provide such voter education on an exclusive basis;

1. Ordering such respondents as may oppose the application to pay the costs jointly and severally the one paying the other to be absolved including certified costs of counsel as per High Court Rule 68 (2);

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2. Granting further or other relief.

I must say at the outset that the applicants abandoned Prayer 4 in argument which in consequence will not be included in this judgment.

From the arguments of learned counsel for the applicants, it is reasonable to say that the aforesaid prayers: 1-3 and 5-7 are in a nutshell and in fact, two-pronged. More particularly, that the first three prayers amount to a challenge of the action of the executive branch of government in the person of the King in the manner in which he purported to make certain appointments to the Commission. This is the challenge: that the manner in which that constitutional duty was carried out was allegedly not in accordance with the various provisions of S. 90 of the Constitution of the Kingdom of Swaziland (hereafter referred to as the Constitution), and thus in violation thereof.

That leg of this application thus seeks a declaration on the ineligibility of the second to sixth respondents to be appointed to the office of members of the first respondent, the consequential nullification of their appointments and the effect thereof on the composition of the first respondent.

The second leg is for the court to make a declaration that the first respondent is not entitled to bar any or other entities such as the first applicant, from conducting voter education.

In a rather prolix and surprisingly argumentative one hundred and fourteen-paragraph founding affidavit, which included legal arguments and personal opinions improperly tagged onto factual matters, the second applicant, a trustee of the first applicant, purporting to have done so with the consent of the other trustees of the first applicant, alleged a number of things on behalf of the first applicant. These included a charge that the wording of Legal Notice 32 of 2008 by which the appointments were purportedly made was vague, improper and in contravention of S. 90 (5) of the Constitution which prescribes *inter alia,* the

specifying of the duration of the appointments. Commenting on the wording more particularly, the deponent alleged that the operative expression therein contained: "for a period not exceeding twelve years" may be subject to abuse, as it creates no certainty of tenure. This, he said may lead to the circumstance where the fear of termination might put pressure on the members so appointed to compromise their independence, a quality *sine qua non* in an election-supervising body.

The deponent also alleged that in contravention of S. 90 (2) of the Constitution, the purported appointments were not made on the advice of the Judicial Service Commission. This, he supposed from newspaper articles that allegedly indicated that the advice given to the King by the Judicial Service Commission was not followed. He asserted that the lapse of time between when the advice was given and the time the appointments were made, gave credence to this suspicion.

The deponent furthermore set out the following points of complaint alleging that each person purportedly appointed was ineligible for such appointment, or was otherwise disqualified, in that:

RE THE SECOND RESPONDENT:

i. He was at the time of his appointment, an employee of the Swaziland Water Services Corporation, a statutory body falling under the control of the Government per its Minister in terms of the Water Services Corporation Act 1992, and thus, a public officer as defined under S. 261(1) of the Constitution to mean: "...any office of emolument in the public service". This allegedly made him ineligible for appointment as a member of the first respondent in accordance with S. 90 (3) of the Constitution. Furthermore, the second respondent was also at the material time, a member of the

Land Management Board, appointed under S. 212 (1) of the Constitution, as well as a chief, another public office of emolument in the service of the Crown.

a. His independence as Chairman of the first respondent was allegedly compromised for he was a holder of the office of a chief, an office which is described as a footstool of the King and Ingwenyama.

b. That remarks he had allegedly made had indicated that he had no respect for the democratic institutions set up under the Constitution, cases in point being that he had once barred journalists from attending a meeting of the first respondent under his chairmanship and had also criticized the protection of human rights.

c. That he had no legal qualifications qualifying him to be a Judge of the Superior Courts, nor did he have the "relevant experience" or "demonstrable competence in the conduct of public affairs", the prescribed qualification for appointment.

RE: THE THIRD RESPONDENT

ii. That he was at the material time of his appointment (and even after the fact), Deputy Attorney-General of the Kingdom of Swaziland. His appointment thus allegedly contravened the provisions of S. 90 (3) of the Constitution for, in that office he was a public officer, not being a judge or magistrate. Furthermore, that he was alleged not to have the relevant experience for the office of member of the first respondent.

RE: THE FOURTH RESPONDENT **iii.** That she was at the time of her appointment a rural sociologist employed by the Ministry of Agriculture. This was said to mean that she was at the material time, a public officer not being a judge or a magistrate and thus, ineligible for appointment as prescribed under S. 90 (3) of the Constitution. Furthermore, she was

alleged not to have the experience relevant for the office of member of the first respondent. Her pedigree was also said to disqualify her, for she was the daughter of one Prince Mahlaba, a long time advisor to the King. This circumstance was said to mar her impartiality and affect her independence, a *sine qua non* for that office;

RE: THE FIFTH RESPONDENT **iv.** That he was also a public officer not being a judge or a magistrate and thus disqualified from appointment under S. 90 (3) of the Constitution and in any case, allegedly lacking in the relevant competence and experience for that office.

RE: THE SIXTH RESPONDENT

v. That as an employee of the Swazi National Treasury at the time of his appointment, he was a public officer, disqualified from appointment under S. 90 (3) of the Constitution. Furthermore, he was alleged to be a close aide to the King which position was said to mar his impartiality and affect his independence and moreover, he allegedly lacked the relevant experience and competence of the office of member of the first respondent.

Another complaint by the deponent was that the first respondent so constituted, had been subject to interference by the executive in contravention of S. 90 (13).

Buttressing this point, he alleged that the tenth respondent while announcing the appointment of the members thereof, had stated that the first respondent would not perform one of its constitutionally-mandated functions being: the

review and determination of boundaries of the Tinkhundla; an assertion that was never refuted by the first respondent.

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On the second leg of complaint in this application, the deponent averred also, that the first respondent had purported to preclude the first applicant which had civil education (including voter education) as one of its objects, from carrying out such, to its prejudice. This the first respondent had allegedly done although S. 90 (7) (b) of the Constitution merely conferred the duty of facilitating voter education on the first respondent. The deponent alleged that the second respondent, appointed chairman of the first respondent had indicated at a chiefs forum that the first respondent had the exclusive duty of carrying out voter education. Furthermore members of the Royal Swazi Police in apparent agreement with this viewpoint, had allegedly sought to prevent operatives of the first applicant from carrying out a voter education exercise.

The respondents filed an answering affidavit which was limited to addressing the allegations regarding the office of Deputy Attorney-General held by the third respondent at the time of his appointment and beyond. In the said affidavit, the third respondent who deposed to it, averred that at the time of his appointment, no terms and conditions of service had been put in place for members of the Commission and that it was for this reason that he had continued to draw a salary from his previous office as Deputy Attorney General until June 2008

although the appointment was announced on March 8 2008. He alleged also that the case he was alleged to have conducted as Deputy Attorney General on 10 of March 2008 (as contained in the founding affidavit of the applicants), was in fact argued long before the 8th of March 2008 and that it was the judgment that was delivered on the 10th of March 2008 when he had ceased to be a public officer.

The third respondent/deponent also refuted the allegation that the first respondent had precluded the first applicant form conducting voter education. He added that in fact, the first respondent recognizing its role of facilitation of voter education had established a working relationship with Non-Governmental Organizations for this purpose. He deposed further that the first respondent did not send the Police at any time to disrupt a voter education exercise conducted by the first applicant as alleged. Nor did the first respondent mean that it had exclusive right to conduct such when it cautioned chiefs that the fact of their having been sensitized should not be seen as entitling them to teach on elections.

The respondents also filed a five-point Notice to Raise Legal Points upon which arguments were made.

More particularly the respondents contended that the first applicant lacked *locus standi injudicio* in the present matter.

In argument, learned counsel for the respondents contended that the first applicant was not the valid charitable trust it purported to be although duly

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as an entity, political in nature.

To buttress his point, learned counsel contended that the assertion of the first applicant in its founding affidavit that its objects encompassed among other things the right of members of the public to participate in democratic processes which included voter education, and its conduct in the present proceedings by which it sought to attack the appointment of members of the first respondent, did not qualify it to be a charitable trust within the meaning assigned to such in ***Marks v. Estate Gluckman 1946 AD 289 at page 303:*** being, an "establishment whose object is the promotion of piety, the relief of necessitous persons, the diffusion of education and culture and the advancement of science and arts..." Learned counsel thus alleged it to be a political organization masquerading as a charitable trust and thus unenforceable.

Learned counsel reinforced his point with cases such as ***The Bonar Law Memorial Trust v. The Commissioners of Internal Revenue 17 Tax Cases 508 (KBD) (1933),*** **and** ***ex parte Doornfontein - Judiths Paarl Ratepayers Association 1947 (1) SA 476 (WLD),*** where organizations which carried out political activities or had political objects and

purported to be charitable trusts were held to be political entities and unenforceable as charitable trusts.

Learned counsel thus urged the court to hold the first applicant to be a political organisation and to dismiss the present application.

It was the contention of learned counsel for the respondent also, that a trust such as the first applicant was alleged to be, was not a legal person or *universitas* and therefore, had no capacity to bring the present suit. Nor he contended, could the co-applicants who had brought the suit in the name of the first applicant, competently do so when they had purported to bring the suit jointly with the first applicant.

He thus contended that the joint application by the first applicant and its trustees had rendered the whole suit bad and thus ought to be dismissed.

On the capacity of the first applicant's trustees to institute the present suit, learned counsel drew the court's attention to two documents both of which were described as annexure B1 and purported to be resolutions for the institution of this suit. One was signed by one trustee and the other signed by four trustees. Learned counsel contended thus that the suit was not properly authorized by a resolution signed by all the trustees and was thus defective, rendering it a nullity.

Learned counsel for the respondents contended also that the applicants who had not indicated any actual prejudice they had suffered by or through the appointment of members of the first respondent, had not demonstrated their standing or interest in the declaratory reliefs they were seeking in this application which principally challenges the validity of those appointments. Nor, he argued, were they entitled to challenge a violation of the Constitution, as the Constitution was not promulgated for the special benefit of the applicants.

Citing the cases of ***Eagles Landing Body Corporate v. Molewa NO 2003 (1) SA 412 at p. 36 T; South African Cooling Services (Pty) Ltd v. Church Council of the Full Gospel Tabernacle 1955 (3) SA 541 (D) at p 543 C-F,*** for

the persuasion of the court, learned counsel contended that the demonstration of a substantial and direct interest in the suit was a *sine qua non* to imbue the applicants with the *locus standi in judicio.*

Regarding the prayer sought in this application to void the activities so far of the first respondent as constituted, learned counsel cited S. 16 of the *Interpretation Act No. 21 of 1970* to assert that such acts could not be nullified even if the first respondent is held to be wrongfully constituted. At the hearing of the application as stated earlier, learned counsel for the applicants abandoned relief 4 sought which was concerned with this matter.

It is for these reasons that learned counsel for the respondents urged the court to dismiss the instant application.

Having heard counsel for the respondents on the legal points raised *in limine,* and also the reply thereto by learned counsel for the applicants it is our view that the present application must fail in relation to prayers 1-3 aforesaid.

Prayer 5 which seeks a declaration that the first respondent is not entitled to bar other entities from carrying out voter education must however, succeed.

We say this regarding prayers 1-3, upholding the objection raised *in limine* on the lack of *locus standi* of the applicants, but not for the reasons learned counsel for the respondents labored to demonstrate for we found many of the arguments canvassed by him, largely misconceived. We however do so, relying on the matter of capacity canvassed by the applicants themselves in their arguments.

But before we go ahead to discuss our reasons for so holding, we will dwell shortly on why we declined the invitation of learned counsel for the respondents to agree with him on the matters he raised in argument. More particularly, these matters deserve some comment:

It was argued by learned counsel for the respondents, that the use in the first applicant's Deed of Trust of the singular word "object" as well the plural in the description of the objects of the first respondent, registered as a charitable trust, and the very language used in the description of the said object(s); "civil educational purposes within the Kingdom of Swaziland including promotion and protection of civil and human rights of the general public" rendered it vague, indeterminate and uncertain, and thus incapable of enforcement. We do not find merit in that assertion.

It is our considered view that the Trust Deed adequately set out what was described as the "principal objects" of the first respondent.

The Trust Deed states: "The object of the Trust is to create a Fund for public and civil educational purposes within the Kingdom of Swaziland including promotion and protection of civil and human rights of the general public of Swaziland and other objects as the Trustees in their discretion may deem fit and acceptable on the understanding that this shall be a Charitable Trust..."

It seems to us that the objects as set out have sufficient clarity and we have no difficulty in construing that such encompasses various civic educational activities such as voter education. As to the language, including the matters left to the discretion of the trustees in the description of the objects thereof, we are guided by the case of ***Estate Villet v. Estate Villet 1939 CPD 152*** where the court upheld a trust stated to be for "such charitable institutions or other deserving objects or persons in needy circumstances as the trustees should think fit", to uphold the instant Trust. The language has sufficient clarity. We hold

therefore that the Trust is not thus rendered unenforceable by reason of its objects as contended by learned counsel for the respondents.

Nor are we persuaded by the argument of learned counsel, that the first applicant cannot pass the test of a charitable trust merely because it included among its objects, the carrying out of civil education (which enterprise is said to include voter education). Although charities, as described in such cases as ***Marks v. Estate Gluckman (supra)*** appear to be limited to organizations set up for the pursuit of religion, science, education and culture, relief of poverty, et al, the list has been held not to be exhaustive. From time to time, new areas of endeavour have been held to qualify a body as a charity as demonstrated in the Canadian case of ***Alliance for Life v. M.N.R. (C.A) 1999 CanLII 8152 (F.C.A.)*** cited for the persuasion of the court. It is our view, that the objects of the first applicant including *inter alia,* the carrying out of civil education, including voter education do not sin against the nature of the charitable trust or alter it into a political organization. Indeed, in ***In Re Koeppler Will Trusts, see: [1986] 1 Ch. 423 (C.A)*** trusts set up towards the formation of an informed public opinion and "the promotion of greater cooperation in Europe and the West", which included the setting up of a conference centre and the conducting of interactive seminars were held to be charitable. Per Slade LJ: "even when they touch on political matters they constitute so far as I can see, no more than genuine attempts in an objective manner to ascertain and disseminate the truth".

While we have doubts whether the object of promoting and protecting human rights included in the "principal objects" of the first applicant standing alone, falls within the ambit of objects of a charitable organisation (even where that meaning is somewhat stretched to accommodate most causes beneficial to the public), we have no doubt that the inclusion of "public and civil educational purposes" will qualify the first respondent to be a charity which will not fail merely because doubtful causes were tagged on to it. We find reinforcement in

the case of ***Ex parte Henderson and anor NNO 1971 (4) SA 549 (D) at 553H-554C*** where gardening and sporting, tagged onto public causes did not operate to nullify the charitable nature of a bequest.

Neither, in our view, will a suit seeking the interpretation or enforcement of the Constitution, by a body duly registered as a charitable Trust transform it into a political organisation, although it may be arguable whether such an adventure be within the scope of its objects. The argument that this application ought to be dismissed because it was brought by and in the name of the first respondent a charitable trust, for being a political organisation is thus in our judgment, without merit and ought not to be countenanced.

Furthermore, while agreeing with the contention of the respondents that the first applicant, a Trust created by Notarial Deed whose management and control, as well right and defence of suit among others, had been vested in its trustees was not a *unlversitas* and thus could not institute an action in its own name, in our view, an action brought in the name of the Trust by the co-applicants as trustees is competent for that purpose. There is no gainsaying that a Trust registered under a Notarial Deed has no legal capacity to bring legal proceedings as it is not a legal persona but "merely consists of an aggregate of assets and liabilities", see: ***S v. Peer 1968 (4) SA 460 p461 A-B NPD.*** The trustees however, in whom are vested the assets and liabilities of a Trust, and who are duly empowered under the Trust Deed as in the present instance to institute legal process in its name, may do so for, see: per ***Steyn CJ*** in ***CIR v. Macneillie's Estate 1961 (3) SA 833 (AD) at 840 F-H.***

It was further contended on behalf of the respondents, that the resolution empowering the second to sixth applicants to bring the suit in the name of the first applicant was fatally defective in that it was not contained in a single document. And indeed, there were two documents both designated "Annexure

B1" said to contain the said resolution, one was signed by one trustee and the other by four.

Although clearly not the ideal circumstance, the fact that the application proceedings were brought on the authorisation contained in two documents and not one, does not nullify same, for in one document or two, the trustees acknowledged the suit.

As aforesaid, although not a juristic person which could sue by itself, an action could be maintained in the name of the first applicant and for it and it is trite learning that being an artificial *persona,* such suit could not be commenced in its name and on its behalf unless an authorisation by its trustees by way of a resolution was passed. The two documents "Annexure B1" placed before the court, constitute evidence that such procedure was complied with. Indeed, far less would have sufficed for evidential purposes as long as there was evidence of such compliance for in the ordinary course of things, per ***Joubert's The Law of South Africa 3 Ed. Civil Procedure and Costs p.74 at pp138,*** "the annexing of a copy of the resolution itself is not always necessary but sufficient proof under the circumstances that the application was properly authorized should be laid before the court. ...the doctrine of unanimous consent may provide sufficient authority", see also ***South West Africa National Union v. Tjonzongoro and ors 1985 (1) SA 376 SWA*** citing with approval, *Dowson & Dobson Ltd v. Evans & Kerns (Pty) Ltd 1973 (4) SA 136; Thelma Courts Flats (Pty) Ltd v. McSwigin 1954 (3) SA 457.*

In the present instance, there was ample evidence of acknowledgment of the suit contained in the confirmatory affidavits filed by the other trustees in agreement with the averments of the second applicant. There exists then enough evidence that the suit was authorized by the trustees duly empowered to pass the requisite resolution. The argument canvassed by learned counsel for the respondents that the suit was thus fatally defective for this reason, is in consequence untenable.

Because the first applicant is not a legal person therefore, the suit brought by it in its own name must however fail for lack of legal capacity to maintain same.

It is further our view that the contention of the respondents that the applicants had no *locus standi,* in that they did not demonstrate that they had suffered an injury regarding the appointments of the second to sixth respondents thus having a direct and substantial interest in the declaratory orders they seek in the present instance, is also wholly misconceived.

We have held that prayers 1-3 contained in the notice of motion must fail and we say so for these reasons:

Those prayers seek an interpretation and enforcement of Ss.90 (2), (3) (c), (5), (6) and (13) of the 2005 Constitution which provides for *inter alia,* matters regarding the appointment of members of the Elections and Boundaries Commission.

Here follows a reproduction of the said relevant provisions:
"S.90

(2): The members of the Commission shall be appointed by the King on the advice of the Judicial Service Commission;

(3)(c): A person shall not be appointed a member of the Commission where that person ...is a public officer other than a judge of a superior court or a magistrate;

(5): The members of the Commission shall be appointed for a period not exceeding twelve years without the option for renewal;

(6: The Chairperson, Deputy Chairperson and other members of the Commission shall possess the qualifications of a Judge of the Superior Courts or be persons of high moral

character, proven integrity, relevant experience and demonstrable competence in the conduct of public affairs;

(13): in the exercise of its functions under this Constitution, the Commission shall not be subject to the direction or control of any other person or authority"

This right to seek such interpretation and enforcement is implicit in the right to uphold and defend the Constitution provided under S.2 and is exercisable for that purpose. Contrary to the assertions of learned counsel for the respondent, an applicant coming under the said provision need not show any injury or other interest save community of interest with the Constitution. It is for this reason that the right is reserved unto the King and Ingwenyama and every citizen of the land.

This right to seek the enforcement and interpretation of the Constitution by a citizen of Swaziland provided for in S. 2 (2) thereof, is in contradistinction to the right of any person to bring an action under S. 35 (1) of the Constitution before the High Court regarding the infringement of the fundamental rights of that individual or group or any detained person they represent. Under S. 35, the aggrieved person must show that any of his rights stated in SS. 14 - 34 Chapter III (Protection and Promotion of Fundamental Rights and Freedoms) have been tampered with, infringed or otherwise adversely dealt with, to maintain a suit.

This continues the established principle in our jurisprudence that unless a man has suffered a wrong, sustained injury, had his right infringed, incurred some damage, or that there is a threat of such, he has no right or interest or standing to bring an action before the court. Regarding suits by persons seeking to enforce the provisions of statutes, it has been held also that the *locus standi* of a person to seek the enforcement of provisions of a statute derives from whether that statute was enacted in the person's interest or that of his class, see: ***Dalrymple and ors v. Colonial Treasury 1910 TS 372, 379;*** also per ***Millin J in***

Wise Poka v Johannesburg C.C and ors 1938 WLD 212 at 219. The applicant/suitor thus must ordinarily demonstrate that he has a direct and substantial interest in the right the subject of the infringement in order to maintain action before our courts.

Not so in the case where an application is brought under S. 2 (2) of the Constitution. This distinction is discussed at length in the recent High Court case of ***Swaziland National Ex-Miners Workers Association and anor v. Minister of Education and ors Civil Case No. 336/09 (Unreported) at p 17,18.***

We reproduce the relevant portion of S. 2 (2) of the Constitution which the applicants have relied on for legal capacity in the instant proceedings:

"S.2 (2): The King and Ingwenyama and all the citizens of Swaziland have the right and duty at all times to uphold and defend this Constitution..."

What does one do to exercise this right or to comply with this duty of upholding and defending the Constitution? There is no gainsaying that the upholding and defence of the Constitution includes the right to seek the interpretation and enforcement of provisions of the Constitution in a judicial forum, where there is a perception that same have been, are being or are danger of being infringed and the Constitution thus violated.

But the pertinent question is: who has the right and duty to do so?

The answer is: the King and Ingwenyama, and the citizen of Swaziland.

Therein lies the difficulty of permitting the present applicants who have sued not by themselves as citizens of the land, but in their official capacities as trustees and thus, in the name of a Trust, to maintain the suit regarding prayers 1-3.

This is because the said prayers seek an interpretation and enforcement of the aforesaid provisions of S. 90 of the Constitution regarding who is qualified to be appointed a member of the first respondent. This exercise includes the interpretation of the relevant provisions of S.90 in the determination of the pertinent questions: What are the relevant qualifications? Who may be said to be a public officer? What is included in the expression "relevant experience and demonstrable competence in the conduct of public affairs? What should be the wording of the duration of the appointment which will not sin against the spirit of the Constitution as regards the independence of the Commission's members? Upon the answers obtained, the court may have to make orders in line with the prayers sought in order that the provisions of the Constitution may not be violated.

These amount to a challenge of an executive act and form the subject of an application brought under S. 2 (2) of the Constitution for the upholding and defence of the provisions of the Constitution. As aforesaid, an applicant coming under the said provision, need not show any prejudice, injury suffered or threatened, standing, or interest save community of interest with the Constitution arising from the fact of citizenship .

It is our view that the present suit cannot be maintained because same has been brought in the name and also on behalf of the Swaziland Coalition of Concerned Civic Organizations Trust, an organisation registered under Trust Deed as a charitable trust and which is thus not a citizen of the Kingdom of Swaziland as envisaged by the provisions of S. 2 (2) of the Constitution.

We say this because it is our view that a "citizen" as opposed to a "person" must necessarily be a natural person who can enjoy and exercise civic rights and responsibilities such as exercising his franchise by voting, being entitled to hold a passport, among other things. While Chapter IV of the Constitution: the chapter on citizenship, does not define who

a citizen of the Kingdom is, Ss 40 -48 thereof provide for citizenship by birth, operation of law, descent, marriage, registration, *et al.* The requirements therein stated leave no doubt that it was the natural person that was within the contemplation of the drafters of the Constitution when they set out provisions regarding the citizen of the Kingdom.

The Swaziland Citizenship Act 1992 further reinforces this assertion for it also provides for citizenship by birth, marriage, *KuKhonta* and registration. Of these four, citizenship by registration which is the only mode by which an artificial person could possibly have been included under the provisions of the Act, excludes such by the requirement therein prescribed of a good character, ability to speak SiSwati or English or the taking the Oath of Allegiance. This demonstrates that artificial persons are not citizens within the purview of the said Act.

It is thus our view that the intendment of the framers of the Constitution was to reserve the right to uphold and defend the Constitution as provided under S.2 (2) to the King and Ingwenyama and to every natural person qualified under the Constitution to hold citizenship of the Kingdom of Swaziland. This right we have held to include seeking redress in a judicial forum to challenge perceived acts of violation of the Constitution.

Beyond a reading of S 2 (2), Chapter IV of the Constitution on citizenship and the Citizenship Act, we are reinforced in our opinion by the obvious intendment of the drafters of the Constitution gleaned from the construction of words used in the entire S. 2 of the Constitution. It is worthy of note that whilst in S.2 (3) of the Constitution which creates the offence of treason for the commission of certain acts including the overthrow of the Constitution, the drafters used the word "person", they used in the same section 2, the word "citizen" when they vested the right and responsibility of vigilance against violations of the Constitution. The word "person" is defined in the Interpretation Act (supra) (whose operation and application are continued under the Constitution), to include "a local

authority, a company incorporated and registered under any law, any body or persons corporate or unincorporate". This may perhaps include a trust such as the first applicant is.

The word "citizen" however has a restricted use and wherever it appears in Chapter IV of the Constitution, is clearly limited to natural persons. If the framers of the Constitution had intended artificial persons (included in the definition of "person" contained in the Interpretation Act) such as a trust to be vested with the right of vigilance regarding the Constitution, it is doubtful that the two words, "citizen" and "person", different in meaning and application would have been used in the same paragraph: section 2 of the Constitution.

What is the significance of this? It is our view that whereas the acts that are proscribed and said to amount to the offence of treason may be committed by

both natural and artificial persons, the task of ensuring that the Constitution is not violated has been given only to natural persons who qualify under the provisions on citizenship contained in Chapter IV thereof.

In consequence we hold that this suit has been brought by the second to sixth applicants as trustees for the Trust which is not a natural person and is thus not a citizen of Swaziland within the meaning and intendment of S.2 (2) aforesaid.

The instant application which relates to the interpretation and enforcement of S.90 of the Constitution in so far as it invokes the jurisdiction of this court arising out of S.2 (2) of the 2005 Constitution, cannot thus be maintained before this court.

It is unfortunate that the present applicants, many, if not all of whom could have maintained this suit seeking prayers 1 - 3 in their own right and in their personal capacities as citizens of Swaziland vested with the right of vigilance against the overthrow of the Constitution, chose to cede their right to an organisation without the requisite *locus standi in judicio* in the instant case.

Mindful of the admonition of the Court of Appeal in ***Shell Oil (Pty) Ltd v Motorworld (Pty) Ltd IIA Sir Motors Appeal Case No. 23/20006 24 at 40,***
regarding the upholding of technical objections, we must assert that holding that prayers 1-3 in this application must fail because they were not brought by a competent party or in its name, should not be seen as the upholding of a mere technicality. We have said before now that although the respondents raised the issue of the capacity of the applicants to maintain this action, they did not in fact

27 raise the matters now being considered by the court regarding competency. Finding it needful so to do, the court has had to examine the capacity relied on by the applicants themselves which unfortunately excludes them from the challenge they are mounting to executive acts by the present application.

Although the general trend these days is for questions of *locus standi* to be relaxed in cases of public interest and Constitutional interpretation, the question of the capacity of the present suppliant - the Trust (which sued by itself and in respect of which the co-applicants sued), cannot be disregarded. In our view, it is crucial to the determination of the competency of the challenge mounted because as aforesaid, an application under S. 2 (2) such as Prayers 1-3 constitute, is *sui generis,* as the applicant unlike in the ordinary suit, need not show prejudice, injury, standing or interest required in an ordinary suit, his *locus standi* being derived solely from the fact of citizenship.

Same cannot thus be considered lightly. An applicant who alleges real or threatened infringement of provisions of the Constitution and seeks redress therefor, must himself show compliance with and bring himself within the provisions of the Constitution.

Having pronounced on the lack of competence aforesaid, we see no real point in delving at length into a consideration of the merits of prayers 1 - 3 to determine what might have been. Even so it may perhaps be remiss of us not to comment albeit in a cursory fashion on some matters canvassed in the application.

It seems to us that of the matters raised in challenge of the executive act of making the appointments complained of, the only matter that was apparently meritorious was the matter of the (dis)qualification of the members of the Commission. Regarding that, it seems to us that the interpretation canvassed by learned counsel for the respondents that the disqualification of a public officer not being a judge or magistrate, meant that such person was eligible and only ceased to be a holder of that office upon appointment and thereupon became ineligible, is artificial.

Although in the duty of the court to do substantial as opposed to technical justice, the court often adopts the purposive rule of interpretation where the ordinary grammatical usage of a word (to which recourse must first be had), may lead to absurdity, it is apparent that the construction of the expression: "A person shall not be appointed a member of the Commission where that person ...is a public officer other than a judge of a superior court or a magistrate" to mean that a public officer ceased to hold such office upon appointment to the very office from which he is precluded, is clearly absurd.

A challenge thus, regarding any of the persons purported to have been appointed, should they be found to in fact hold such office of public emolument which is defined by S. 261 of the Constitution to constitute a public office, ought without any argument, to succeed.

But not so the assertion that certain persons had no "relevant experience and demonstrable competence in the conduct of public affairs" which assertion is not

supported by any averment of fact showing lack of experience or competence. To assert that because a person has worked in academia, or as a rural sociologist or as an engineer or counsel for the Crown, his/her experience is not relevant to the appointment in question is to shirk the responsibility of substantiation of an allegation which is a *sine qua non* to a suppliant before the court. So it was with the argument made by the applicants for and on behalf of the Trust.

The first respondent is a new body set up under the Constitution. What experience would be regarded as relevant?

Should such be limited to persons who had served on an election-supervising or similar body only? It seems to us that the said challenge regarding persons who had worked in various sectors of the Government of the Kingdom is untenable and unless cogent evidence of lack of competence or inexperience in any area of responsibility was presented to the court, it ought not to be countenanced.

The applicants in their founding affidavit spoke at length of matters such as the length of the appointment of the members of the Commission and said that such was vague and sinned against the language of construction in that there was no certainty and moreover that such circumstance would compromise their independence.

The legal challenge to the wording which may or may not have had merit, (very little was said on this), aside, it was to say the least startling that the founding affidavit which should have contained factual averments rather speculated in

30 such a long-winded and meandering manner on the possibility of the independent judgment of the members purportedly appointed being impaired for undefined reasons.

Same could be said of the tongue-in-cheek averments regarding various associations that some individual appointees allegedly had with the King or his court. Would this court be doing its duty for example if it held that certain people were disqualified from appointment merely because of their dealings with King and court? These matters are clearly not included in the provisions of S. 90, the interpretation and enforcement of which the present application was brought.

Of some disquiet also was the averment that the executive arm of Government had interfered with the dealings of the first respondent which allegation was not supported by any cogent evidence. It seems to us that an assertion without more, that the lack of rebuttal by the first respondent to the statement allegedly made by the tenth respondent that the

former would not concern itself with the Tinkhundla boundaries amounted to an interference with its duties, was insufficient to merit a finding of the fact of interference upon which to make a finding of the breach of a constitutional provision.

In our jurisprudence which requires a person who makes an assertion to prove same, it would have been different if some evidence had been presented to show for example, that when the first respondent set about the duty of redefining the Tinkhundhla boundaries or intimated its intention to do so, the executive had either stopped it, or in any way impeded the exercise.

It is in our view premature at this point when no such matter existed, for the applicants to allege executive interference relying merely on the matter of assertions made by a Government official concerning the dealings of the first respondent regarding Tinkhundla boundaries.

Moreover, when the applicants had positively asserted that the King had not complied with the constitutional requirement of making the appointments on the advice of the Judicial Service Commission, it was unfortunate that they acknowledged that their assertion was a mere surmise gleaned from newspaper reports and also the suspicion that the matter of an alleged delay between the furnishing of the advice to the King and the making of the appointments apparently engendered. It was even more so that the applicants, clearly unarmed with the facts they apparently relied on and being thus on a fishing expedition, rather prayed the court to get the respondents to give information as to the content of the advice of the Judicial Service Commission which they said had not been followed.

Indeed many of the allegations and matters included in the founding affidavit were not factual at all. Some of it was pure conjecture, others were expressions of opinion and yet others, so argumentative in nature that they clearly sinned against the express provisions

of *Rule 6 (1) of the High Court Rules* which provides that it is the facts upon which an application relies for relief that should be contained in an affidavit.

While the citizenry rightly expects that the courts of the land charged to be the watchdog of the Constitution will not be manned by timorous souls who, afraid of their own shadows, fail in their first duty of upholding the Constitution, it also expects that such persons will be fair, just, and analytical when approached for the resolution of conflict and for matters pertaining to the discharge of their duty. A court must therefore be given tools upon which to make a sound judgment. That task is not carried out when the court is provided with nebulous assertions built upon the speculation of suppliants and unsubstantiated allegations clearly founded upon suspicion and surmise instead of on fact, as obtained in many instances in the present application. This is a court of law, and suppliants before it must come before it ready to make assertions founded on fact and not surmise or mere suspicion.

It is only in such a case that the court can grant reliefs and make declarations that not only have force but have integrity as well.

But as we have said before now, these are merely comments that we believed ought to be made touching albeit superficially, on matters we will not go into for lack of the capacity of the suppliant being the Trust, in whose name and on whose behalf the application has been brought regarding prayers 1-3 of the present application.

With regard to prayer 5, which relates to the second challenge aforesaid however, we find that the arguments advanced by the applicants on behalf of the Trust have merit. We must point out that regarding this prayer, the applicants

(suing for the Trust) have shown a real threat to the Trust's activities stated in the Trust Deed to be among its objects being, the conduct of voter education. Relying on perceived injury to the Trust therefore, this prayer does not invoke the court's jurisdiction to grant relief

under S.2 (2) of the Constitution (where no injury or standing or interest need be shown) which has been discussed at length.

This part of the suit is thus maintainable by the applicants suing on behalf of the Trust which stands to suffer prejudice.

It is pertinent to say that even if as stated by the respondents and canvassed by learned counsel, the second respondent's assertions in a public forum for chiefs about the first respondent having the exclusive duty of conducting voter education was his own personal opinion and not that of the first respondent, and even if the act of interfering with the conduct of a voter education exercise by operatives of the first applicant by the Police was not at the instance of the first respondent, it will be proper having regard to all the matters stated in regard thereto, for the court to make the declaration the applicants seek in prayer 5 of this application.

This is in line with the provisions of S. 90 (7) (b) of the Constitution which confers the duty of facilitating voter education on the first respondent. Regarding the use of the word "facilitate" in relation to the conduct of voter education, we were singularly unmoved by the arguments of learned counsel for the respondents that such meant supervision and oversight such that all persons wishing to conduct such an exercise ought to do so with the permission of the first respondent. That, in our view does violence to that word which in its ordinary grammatical usage means: to make easy or easier.

It seems to us that any misconception whether on the part of the Police or other Government entities, or the first respondent, must be put to rest by the making of a declaration as contained in prayer 5 of this application.

Prayer 5 is accordingly granted.

Prayer 4 stands withdrawn.

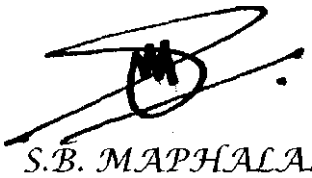
Prayers 1, 2, and 3 of this application are dismissed.

No order as to costs.

DATED THE 26th DAY OF MARCH 2009.

HIGH COURT JUDGE

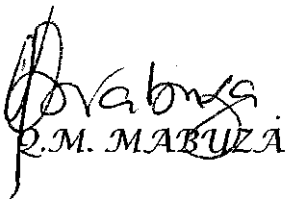
I agree



S.B. MAPHALALA

PRINCIPAL JUDGE

I disagree



R.M. MABUZA

HIGH COURT JUDGE