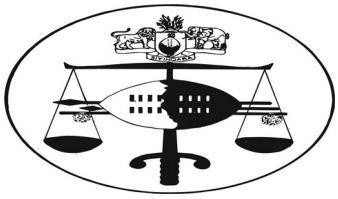

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1145/12

In the matter between:-

THE LAW SOCIETY OF SWAZILAND **Applicant**

and

THE SPEAKER OF THE HOUSE OF ASSEMBLY **1st Respondent**

HONOURABLE NONHLANHLA DLAMINI N.O. (MP) **2nd Respondent**

THE ATTORNEY GENERAL N.O. **3rd Respondent**

Neutral citation: *The Law Society of Swaziland v The Speaker of the House of Assembly & 2 others* (1145/12) [2012] SZHC171 (9th August 2012)

Coram: MAMBA J
HLOPHE J
OTA J

For the Applicant: Adv. Mr. B. Skinner & Adv. Mr. B. M. S. Bedderson

For the Respondent: Mr. M. Vilakati

Heard: 25th July 2012

Date handed down: 9th August 2012

JUDGMENT

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[1] On or about the 25th June 2012, the Applicant, a statutory body established through the Legal Practitioners Act No.15/1964, instituted proceedings under a certificate of urgency, seeking primarily and among other reliefs, an order of this court in the form of a rule nisi, operating with immediate and interim effect, calling upon the Respondents to show cause why they should not be interdicted and restrained from investigating or probing its members for allegations of misconduct as well as from inviting members of the public to lodge complaints against members of the first Applicant with them.

[2] On its first mention in court, the matter served before the Honourable Justice Dlamini who granted the order sought and postponed the matter to the 16th July 2012 for argument. It having been noted that it was a constitutional matter, the matter was, in line with the practice in this court, allocated to a full bench comprising the three judges who eventually presided over it.

[3] In support of the prayers sought, there was filed a founding affidavit by the current president of the Law Society, Titus Mlangeni who sets out the background to the application and expatiates on the reasons or grounds why the Applicant should be granted the reliefs it sought.

[4] He in fact states that sometime in June 2012 (from the papers it is around 14th June 2012), Parliament, in the form of the House of Assembly, established a select committee, whose mandate was to probe and/or "investigate allegations of unprofessional conduct of lawyers suspected of mismanaging Trust Accounts and enriching themselves through fraudulent means."

[5] Mr. Mlangeni contends that before the establishment of the said select committee the Applicant, as the entity empowered by the Legal Practitioners Act No. 15/1964 to safeguard the interests of the Legal Profession including to discipline its errant members through a Tribunal established in terms thereof, was never engaged and or notified that the mechanism established to deal with the issues of errant practitioners was dysfunctional nor was it called upon to give an explanation on any issue complained of which could have led to the probe.

[6] A letter written by the Applicant advising the Speaker of the House of Assembly that the select committee had no power to carry out or conduct the probe it had been

established to carry out or conduct yielded no fruits. The letter in summary informed the Speaker that the Applicant had read from the print media that a certain select committee had been established to probe lawyers who “stole public funds”. The Speaker was advised to seek advice from the Attorney General on the propriety or otherwise of the select committee, particularly because the issues it sought to investigate were issues that had specifically established statutory or legal mechanisms to deal therewith. The letter further warned that other than the possible denigration of the concerned lawyers there was no foreseeable value in the exercise.

[7] Following the failure to receive a response to the letter concerned, and in line with developments observed surrounding the matter, which included comments by the second Respondent who had been appointed chairperson of the select committee to the effect that they would not be intimidated by lawyers as well as a public invitation by the second Respondent to members of the public who had complainants against lawyers to submit same to the select committee as well as the setting of a date for the commencement of the sitting of the select committee, as the 25th June 2012, the Applicant instituted these proceedings seeking the order set out above.

[8] Mr. Mlangeni contended that the select committee had no power in law to conduct the probe it intended to, including that it would lack the capacity to carry out such an exercise. Because of these considerations, it was contended that the whole exercise was aimed at naming and shaming the Applicant's members without anything being achieved. It was contended further that the Respondent's exercise, via the select committee, was to denigrate the dignity of Applicant's members.

[9] Owing to the contention that the Respondents had no power to do what they intended to do, the Applicant contended further that the decision of the House of Assembly in establishing the select committee in question was unlawful, irrational, unreasonable, arbitrary, illegitimate and ultra vires.

[10] It was contended that the establishment of the select committee and the duties it was meant to carry out was illegal and unconstitutional as it was established contrary to the provisions of the Legal Practitioners Act which gave the power to discipline legal practitioners to the Applicant and the Tribunal established to do so in terms of the Act as well as against the Constitution which ensured through section 32 thereof that the members of the Applicant as professionals were entitled to pursue or practice their profession as well as section 18 which emphasized a person's right to dignity.

[11] The Respondent who opposed the application filed an Answering Affidavit attested to by the Speaker to the House of Assembly, Prince Guduza, who was supported by means of a Supporting Affidavit attested to by the second Respondent, in her capacity as the chairperson of the select committee complained of.

[12] The Respondents denied that Parliament had no power to establish the select committee it had established. It was contended that this exercise was carried out in terms of section 129 of the Constitution read together with the Parliamentary Privileges Act and the Standing Orders as well as inkeeping with Parliamentary Practice and Procedure Common to all legislatures in the Commonwealth to appoint committees to investigate into any matter that Parliament had legislated on.

[13] The Respondents contended further that the application was not served properly and as envisaged by section 8 (4) of Parliamentary Privileges Act of 1967 read together with section 130 (3) of the Constitution. It was argued that both sections prohibit the service of court process within the precincts of Parliament particularly when Parliament was not in recess because that was a “sitting” which the aforesaid sections of the Act and the Constitution referred to above prohibit.

[14] It was further contended on behalf of the Respondents that even if the service could be found to have been proper, the institution of the proceedings at this stage and before parliament had exhausted its processes was premature. It was contended that courts should be slow in interfering in incomplete Parliamentary processes. This it was contended was in line with the doctrine of separation of powers. Courts were only allowed to interfere in incomplete processes where the allegedly unconstitutional conduct on the part of the Legislature would result in immediate and irreversible harm and where it would cause substantial damage.

[15] As concerns the privilege of parliament as expressed by means of the certificate filed by the Speaker of the House of Assembly, it was conceded that this court had the power to ascertain if indeed the issue complained of was a matter of privilege. It was contended that because the matter being investigated was a ripe matter for such an exercise, this court had no power to intervene in these proceedings and therefore the Privilege claimed, which was investigating the self regulation of the Applicant was appropriate. It was prayed therefore that at the least this court stays these proceedings pending finalization of the exercise by the select committee.

[16] Although Mr. Vilakati conceded during his argument that some of the terms contained in the documented terms of reference were beyond the permissible scope of Parliament, he contended that there were those that fell within the permissible confines. He cited specifically the term to investigate causes for the Law Society's failure to enforce discipline and uphold ethics (self regulation) as well as that meant to investigate the alleged loopholes in the Legal Practitioner's Act as examples of legitimate terms of reference.

[17] For this reason and as we understood Mr. Vilakati, he was contending that the select committee had to be allowed to at least investigate those terms which on the face of them appeared permissible.

[18] Because of the conclusion we have reached on the question of service, the point raised on service is not relevant. This view is further fortified by the fact that the parties filed all their papers and said all they could say in the matter. We are therefore of the view that we do not need to deliberate on whether or not this court can condone service conducted outside the provisions of the Constitution.

[19] We agree with Counsel for the Applicant that the point as raised by the Respondents could be attributed to a misreading of the sections of both the Parliamentary

Privileges Act and the Constitution. This is because in this matter the return indicates that the person with whom the application was left, as a means of service, threw the deputy sheriff out of her office as she believed that he could not in law serve a court process within the parliament premises.

[20] The true position is that court processes cannot be served only when Parliament is sitting. This means that if Parliament is not sitting there would be nothing wrong with serving a court process within its precincts. We believe we are correct in our view because it was not in dispute that proceedings are conceivable against Parliament which would not be if such a process would then not be served within Parliament premises at any point, particularly when it was not sitting.

[21] It transpired that the term “sitting” of Parliament is itself a term of art which required an interpretation. According to the Applicant’s it means the time during which parliament carries out its normal business, whilst the Respondents contended that “sitting” means a period during which Parliament sittings are held before a recess, otherwise known as a session.

[22] We are of the considered view that the interpretation ascribed to the term “sitting” of Parliament by the Respondents is not real because if proceedings are

conceivable against Parliament, it cannot be that an aggrieved party would otherwise wait for the end of a session, which could come after months before he or she can institute proceedings against Parliament.

[23] According to section 261 (1) of the Constitution, the term “sitting” is defined in the following words; “sitting means in relation to a chamber, a period during which that chamber is sitting continuously without adjournment, and includes any during which the chamber is in committee.” This definition of sitting makes it clear in my view that the meaning attached to it by the Respondents can only lead to absurdity if followed and is not the one to be adopted herein.

[24] On the matter at hand there is neither allegation nor proof that the house was “sitting” at the time of the service, which makes it impossible for this court to speculate. In the circumstances of the matter it is worthy of note that whatever the position is, as regards service, and what the Constitution provides, none of the parties has suffered any prejudice as all papers were filed and are before court.

[25] It is not in dispute that actions of parliament ought to conform to the Constitution as the Supreme law of Swaziland and that any such actions which do not conform to the Constitution fall to be struck down by this

court. In ***Speaker of the National Assembly v De Lille and Another 1999 (4) SA 863 (SCD)*** the court reaffirmed the position in the following words:-

> *"No Parliament however bona fide or eminent its membership ...can make any law or perform any act which is not sanctioned by the Constitution."*

[26] This means that the actions of Parliament in establishing the select committee to "investigate allegations of unprofessional conduct of lawyers; suspected of mismanaging Trust accounts and enriching themselves through fraudulent means" has to pass the test as to whether or not they conform to the existing laws and the Constitution.

[27] The legal profession, of which the Applicant's members are an integral part, is governed by the Legal Practitioners Act of 1964. By means of this Act, the Legislature found it appropriate to create a mechanism to regulate its affairs including the power to discipline errant members of the Applicant. To this end there was established the Law Society of Swaziland which was given certain functions to perform, together with the Disciplinary Tribunal and its procedure which includes the manner of lodging complaints against a legal practitioner. This court is not aware of any other mechanism duly established by law for dealing with

complaints against legal practitioners other than that referred to above and it has not been alleged by the Respondent that there exists any.

[28] The closest there was mentioned; was the power of Parliament to establish select committees in terms of Section 129 of the Constitution. A thorough reading of this Section does not however in our view entitle Parliament to regulate the legal profession which power it expressly gave to the Applicant to carry out through the mechanism established in terms of the Legal Practitioners Act of 1964. To this extent the actions of Parliament in establishing the select committee concerned are ultra vires both the Legal Practitioners Act and the Constitution of Swaziland.

[29] The establishment of the select committees by section 129 of the Constitution relates to committees to carry investigations for purposes of amending legislation or coming up with Bills to initiate legislation.

[30] In fact the contention by the Respondents that they are entitled to carry out the exercise concerned over looks the existence of the doctrine of Separation of Powers which ensures that the executive does not perform the duties of either the Judiciary or the Legislature and vice versa. That is to say each arm performs its own functions separate from those of the other.

[31] We therefore agree with the submissions by Applicant's Counsel, Mr, Skinner, that Parliament or the select committee has no power to exercise judicial or quasi – judicial powers as such powers are only a preserve for the Judiciary. In particular that, the exercise by the select committee in so far as it purports to investigate legal practitioners or "lawyers" for Acts of Corruption or mismanagement of Trust accounts takes the matter nowhere in as much as it will not be empowered to adjudicate whether a particular attorney accused of either fraud, misappropriation of a client's money or corruption was guilty or not, in the case of that particular attorney denying such an allegation. It will not have this power because no law empowers it to adjudicate over disputes. If there is no law empowering it to do so, it means that it would be acting outside the law if it purported to do so and that ought not happen where the rule of law principle is respected and upheld. Clearly the select committee cannot be allowed to conduct an exercise in futility at the expense of the Applicant's members if it can neither adjudicate a dispute that arises nor punish the offender if identified. That is why it would be appropriate for Parliament or any member thereof, if it or he is aware of any unlawful conduct by members of the Applicant or any one for that matter to report such unbecoming conduct to the lawfully established structures to deal with such conduct; it only reserving to

itself the power to amend the Legislation establishing such structure if it is of the view same is dysfunctional in its current form.

[32] The decision of Parliament in question cannot stand in the present matter because the members of the Applicant are practising a profession which is a right guaranteed in the Bill of rights as expressed in terms of Section 32 of the Constitution of Swaziland. There is no dispute that the Constitution per section 35 entitles anyone whose rights, as guaranteed in the Bill of rights, are being violated to approach this court for an appropriate remedy. Section 14 of the Constitution on the other hand, enjoins all the arms of government including the legislature to respect and uphold the rights and freedoms enshrined in the bill of rights of which Practising a profession is one.

[33] It was argued by the Respondents that this court has no power to interfere in an incomplete parliamentary process. I understood the Respondent's Counsel to be saying that this court can only pronounce on the propriety of its actions after it has completed its exercise and not prior.

[34] Whilst this argument may apply in a case where one tries to stop the enactment of legislation which is a core function of Parliament, it cannot stand in a case like the

present. The point is whether in this matter the actions of Parliament are lawful and inconformity with the Constitution. Where they are not, the courts have to intervene at the instance of an aggrieved party, and do not have to wait for the completion of a patently, illegal exercise particularly where it is in violation of a right guaranteed in the Bill of Rights. We therefore have no doubt that the case of ***Glenister v The President of the Republic of South Africa and others 2009 (1) SA 287 (CC)*** is distinguishable from the present one. In a nutshell, the action sought to be stopped then was the consideration of certain Bills of Legislation which is an exercise that Parliament was entitled to do, unlike in the present case where it seeks to carry out an exercise we have found, it is by law not entitled to carry out.

[35] That Parliament's exercise of its powers and functions is subject to conformity with the Constitution was expressed in the Zimbabwean case of ***Smith v Mutasa and Another NNO 1990 (3) SA 756*** which is highly persuasive in this court, when ***Dumbutshena CJ*** stated the following at ***page 761 G – H.***

> *"The Constitution of Zimbabwe is the Supreme Law of the land. It is true that Parliament is supreme in the Legislative field assigned to it by the Constitution, but even then Parliament cannot step*

outside the bounds of the authority prescribed to it by the Constitution."

[36] The learned judge went on to quote the following words from a Judgment of the ***Indian High Court***, per ***Gajendragadkar CJ*** referred to in a document called Special Reference No. 1 of 1964 [1965] 1 SCR 413 at 445 G –H;

> *"If the legislatures step outside the Legislative fields assigned to them, or acting within their respective fields, they trespass on the fundamental rights of the citizens in a manner not justified by the relevant articles dealing with the said fundamental rights, their legislative actions are liable to be struck down by courts in India. Therefore, it is necessary to remember that though our Legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution."*

[37] Although these excepts are about the Constitutions of Zimbabwe and that of India as regards the supremacy of the Constitution there can be no doubt that it applies with similar or equal force to our situation in Swaziland where Section 2 of the Constitution provides that same is the Supreme Law of Swaziland to the effect that any law

inconsistent therewith is, to the extent of such in consistency, null and void.

[38] The privilege claimed by the Applicants in this matter cannot stand because the actions of Parliament in establishing the committee oversteped the constitutional limits as shown above. Mr. Vilakati stated that the select committee was set up to do what is legitimately within the powers of the Legislature which is to investigate the self regulation of the Legal Profession. Mr. Vilakati goes on to argue that the appointment of the committee is to take stock of the model of regulation of the legal profession which parliament put in place.

[39] These submissions by Mr. Vilakati are however not supported by the Terms of Reference annexed to the Answering Affidavit and to the Replying Affidavit. The motion adopted by Parliament instructed the Subcommittee to investigate a list of issues which include investigating; allegations of unprofessional conduct; allegations of mismanagement of Trust Accounts by Lawyers; mismanagement of the Fidelity Fund; allegations of fraud in the processing of MVA claims as well as alleged involvement of lawyers in corruption and the divisions in the Law Society, to mention but a few.

[40] There were only two items in the entire terms of reference which on their face seemed to suggest that the select committee was entitled to investigate for purposes of preparing or amending legislation. These are the term that the select committee is established to investigate causes for the Law Society's failure to enforce discipline and uphold ethics as well as the one that states it is to investigate the alleged loopholes in the Legal Practitioner's Act.

[41] Even if it was true that these terms are permissible, it was submitted that they cannot be conducted under the intended exercise because they cannot be separated from the purpose for which the select committee was established, to which Mr. Skinner referred to as an instruction to the select committee whilst Mr. Vilakati chose to refer to it as a motion which is stated in the following terms:-

> *"To move that the Hon. House appoints a select Committee of five (5) members to investigate allegations of unprofessional conduct of lawyers, suspected of mismanaging Trust Accounts and enriching themselves through fraudulent means. Consequently,(sic) table a report within eight (8) weeks."*

[42] Whether the foregoing is an instruction or a motion is not important but what is, is that it spells out what the purpose of the entire exercise is. We agree that the two items referred to above cannot be divorced from the purpose for which the committee was established so as to be dealt with in isolation. We are of the view that Parliament will be entitled, in a properly constituted exercise, to consider the flaws in the mechanism aimed at regulating the legal profession if there are any, but it can only do so for purposes of amending the relevant Legislation.

[43] Consequently it is not possible to sift from the present terms those that are permissible from those that are not. We agree with Mr. Skinner that if the court does so, it would be reestablishing the select committee for Parliament and redrafting the terms of reference for it. This the court ought not do. For these reasons the argument for the sifting of the terms of reference cannot succeed as well.

[44] This being the case we have come to the conclusion that the Applicant's application succeeds and we make the following order:-

1. The rule nisi issued by this court on the 25th June 2012 be and is hereby confirmed.

2. The Respondents be and are hereby ordered to pay the costs of only the application referred to as the main application; and not those of the interlocutory application for the postponement.

3. The said costs shall include the costs of counsel.

Delivered in open Court on this the ……day of August 2012.

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N. J. HLOPHE

JUDGE

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M. D. MAMBA

JUDGE

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E. A. OTA

JUDGE