IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO.1057/2023**

In the matter between:

BONGANI MABUZA T/A GOLIDE LASIKHOVA WINE AND MALT **Applicant**

And

THE HONOURABLE MINISTER MANQOBA KHUMALO **1st Respondent**

THE MINISTRY OF COMMERCE,INDUSTRY AND TRADE **2nd Respondent**

MONTIGNY (USUTU FOREST PRODUCTS LTD COMPANY) **3rd Respondent**

THE ATTORNEY GENERAL **4TH Respondent**

Neutral citation: *Bongani Mabuza t/a Golide LaSikhova Wine and Malt & The Honourable Minister Manqoba Khumalo and 3 others .1057/2023 SZHC .(24th August 2023)*

Coram: *Justice J.Magagula J*

Justice M.Langwenya J

Justice S.M. Masuku J

Dated heard: *17th July 2023*

Delivered: *24th August 2023*

Fly note: *Constitutional law- Constitutionality of section 11 bis of the liquor licence Act, 1964 (as amended)*

Summary: *The Applicant has moved the court to declare section 11 bis of the Liquor Licence Act, 1964 (as amended) void for being inconsistent with section 152 read together with section 33 of the constitution. Section 11 bis states that an applicant or objector aggrieved by the decision of the Board in respect of the grant or refusal, renewal, removal or transfer of a licence ...may within twenty one days of such decision, appeal to the Minister whose decision hall be final and shall not be questioned in any court.*

Held: *To the extent that the latter part of the provisions oust the revisional and supervisory jurisdiction of the courts and in casu the High Court, it is inconsistent with the cited provisions of the constitution. It is to that extent declared unconstitutional and void per the dictates of section 2 of the constitution.*

JUDGEMENT

S.M. MASUKU J.

Brief background

[1] On the 12th May 2023, the Applicant filed an urgent application to this court constituted by a single Judge of the High Court (Her Ladyship K.Manzini J) it terms of section 150 (2) (a) of the Constitution Act,2005 ('the constitution').

[2] The Applicant in the main application sought the granting of a *rule nisi* to issue calling upon the 1st Respondent to show cause on a date to be determined by the court why the following orders should not be made final;

> *'3.1 Staying operation of revocation of the licence of Applicant by the Honourable Minister through a letter date the 2nd May 2023 pending the final determination of this review.*
>
> ...
>
> *4. Reviewing, correcting and setting aside the revocation of the Applicant's licence issued by the Honourable Minister of Commerce and Trade through a letter dated the 2nd May 2023, with immediate effect from date of the order or judgement of the Honourable Court.*
>
> *5. Declaring section 11 bis of the liquor licence Act of 1964 as inconsistent with the constitution and thus unconstitutional from date of the Judgement.'*

[3] It appears from the parties' heads of argument, as well as the Arguments before us (the full bench) that at the inaugural hearing of the matter before

Her Ladyship K.Manzini J in this court, the Applicant contended that the 1st Respondent has unilaterally issued a decision which violated his constitutional rights and such was done without affording him the right to be heard. The Applicant further contended that section 11 *bis* of the Liquor Licences Act 1964 ('the Act') is inconsistent with the section 152 read together with section 33 of the constitution which confers the High Court with the necessary jurisdiction to determine this matter. That the decision therefore, ought be declared a nullity and *void abinitio*.

[4] On the 15th June 2023, Her Ladyship K.Manzini J issued an order on the urgent application in the following:

'The matter is stayed pending the determination of prayer 5 of the Notice of Motion by the Constitutional Court. The status quo is to be maintained in the interim. Point of law raised by 1st,2nd and 4th Respondents is hereby upheld. Matter is referred to the Registrar in terms of section 150 and 151 of the Constitution of Eswatini 2005 for determination of the constitutional issue and challenging of section 11 bis of the Liqour Licence Act, 1961 as contrary to the spirit of the constitution.(the referral order)

[5] The Result was that in his administrative and supervisory responsibilities as head of the Judiciary (*see* section 139 (5) of the constitution), His Lordship the Chief Justice constituted an enhanced bench or full bench of the High Court (this court) to determine if there is any contravention of the provisions of the constitution aforesaid by section 11 *bis* of the Liquor Licence Act as referred by the order of Her Ladyship.

[6] The matter was scheduled to be heard by the full bench on the 28th June 2023 for setting of the hearing date and this court gave the parties the 17th July

2023 for arguments after an administrative directive on the filing of their heads of argument and book of authorities.

[7] It became necessary for this court to set out the brief background for two reasons. The first, is to clarify the role of the court in the matter before it. The second is to give reasons on a ruling on a preliminary point that was raised by the 1st,2nd and 4th Respondents ('the Respondents') both in their supplementary heads and in argument when the matter was called.

Referral of matters of Importance and/or that are in the Public Interest to a Full Bench.

[8] Although this is not a question that stands to be determined before this court, it deserves to be canvassed *en passant* to clarify that the court is not in this matter sitting as a review or appeal court for its own order per K.Manzini J (15the June 2023) but sits as an enhanced constitutional court as envisaged by section 151 (2) (a) and (b) of the constitution. To mention the obvious, the constitution empowers the High Court to generally, hear and determine any matter of a constitutional nature and specifically, to enforce the fundamental human rights and freedoms guaranteed by the constitution. *See* Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane (470/2012 SZHC 144 (18 July 2013). Cited in Bernard Nxumalo and another vs Principal Secretary - Ministry of Agriculture and 2 others(42/2021) [2022] SZSC 21 (09 June 2022).

[9] At the risk of repeat, the order of the court per K.Manzini J on the 15th June 2023 was to stay the review proceedings, maintain the *status quo* in the interim in the notice of motion pending the determination of a declarator in prayer 5

which is sought to declare unconstitutional section 11 *bis* of the Act inconsistent with the constitution. The court referred the declarator to the Registrar of the court to set up an enhanced bench for the determination of the constitutional issue in prayer 5.

[10] The court pronounced that the point of law raised by 1st, 2nd and 4th Respondents is upheld. This part of the court order became the subject matter of preliminary points raised at the hearing before us and in the supplementary heads of the 1st,2nd and 4th Respondents. The point was heard and this court gave its ruling of which reasons are set out below.

[11] To conclude on the role of this court on the matter before us and the question of when are such referrals made, I find the Judgement of the High Court by His Lordship Justice T.Dlamini in the recent case of the Chief Justice of the Kingdom of Eswatini N.O and Another v. The Clerk of Parliament and 3 others (906/2021) [2022 SZHC (8 April 2022) insightful. It may be noted that at the time of this judgement it was subject matter of appeal in the Supreme Court. *See* also its exposition in the case Bernard Nxumalo (*supra*).

[12] In, The Chief Justice of Eswatini (*supra*) the applicants being the Honourable Chief Justice and the Judicial Service Commission sought to interdict a Parliamentary select committee constituted by the House of Assembly to investigate alleged gross maladministration, abuse of power and embezzlement of estate monies at the Master of the High Court's offices. A preliminary issue arose between the parties concerning the composition of the court, where the applicants contended that the matter was one to be heard by a full bench of the court whilst the Respondents contended that a single Judge is empowered by law to hear and determine a constitutional point. The parties had a disagreement on this point hence the court was called upon to make a

determination on the issue. The court after considering various constitutional provisions in that regard concluded that the matter was of national importance and of public interest, it thus required a full bench of the court.

[13] The Supreme court in the Bernard Nxumalo case (*supra*) had occasion to explore if there is legal requirement or law that guides the referral of deserving cases to the full bench of the High Court. At paragraph 36 of the Judgement the court has had this to say, per, Masuku AJA (concurring SB Maphalala JA and A.Lukhele AJA;

'[36] I have found no legal requirement on our jurisdiction that guides referral of deserving matters to the full bench of the High Court. The general practice is that constitutional matters are referred to the full bench by consent of the parties or in some instances by the Judge in the exercise of his/he discretion on circumstances of the matter before the court. This would happen where His Lordship Chief Justice has not done so himself. It would seem that matters of significant importance and or public importance are referred to the full bench. Section 150 (3) of The Constitution Act 2005 of the Kingdom of Eswatini ('the constitution') contemplates that there are matters best suited for the adjudication by a full bench which is constituted by three Justices. By the same token, it is generally accepted practice in our jurisdiction that constitutional matters find their way to be heard by the full bench. Our jurisdiction compared to others such as the (South African) one does not have a Constitutional court division but we regard a full bench set-up for constitutional matters as a constitutional court. (see, reasoning of Honourable T.Dlamini J in the Chief Justice of the Kingdom of Eswatini N.O (op.cit) (underlining added).

[14] The Supreme court concluded the exposition of legal authorities and jurisdictional comparison with other countries thus;

... '[41] The upshot from the latter decisions cited above can be summarized as (i) Section 151 (2) (a) and (b) of the constitution empowers the High Court to generally, hear and determine any matter of a constitutional nature and specifically, enforce the fundamental human rights and freedoms guaranteed by the constitution (Nombuyiselo SIhlongonyane v Mholi Joseph SIhlongonyane(470/201 3A) [2013] SZHC 144 (18 July 2013), (ii) Matters of importance and/or that are in the public interest are preferable to be heard by all bench or extended bench (see Langa and others vs Hlophe (697 of 2008) [2009] ZASCA 36 (31ST March 2009), (iii) In our jurisdiction just like that of Kingdom of Lesotho there is no designated constitutional court, it has however, generally been accepted that the constitution envisages that when the High Court exercises its constitutional jurisdiction it sits as a constitutional court (Section 150 (3) and section 35) enforcement of protective provisions). (see The Chief Justice of the Kingdom of Eswatini (op.cit) and Chief Justice *and another vs Law society (C of A(AIV)no.59/2011 [2012] LSCA 3 (27TH April 2012), (iv) the referral may be done on application of either of the parties or by consent of the parties or by decision of the court hearing the matter and or by the court mero muto. The referral is discretionary in our jurisdiction on account of the fact that no specific provision obtains and it can be carried out by the court after considering the importance of the constitutional issue to be determined (see Nombulelo Sihlongonyane (supra), (v) the referral can be carried out at any stage of the proceedings at which the constitutional issue arises, (vi) Issues envisaged by Section 35 that are anchored in chapter 111 of the constitution relating to the*

protection and promotion of fundamental human rights calls for determination by a full bench. In The Chief Justice of Eswatini N.O (supra), the question referred arose as a preliminary issue that was raised by the parties whilst in Nombuyiselo Sihlongonyane (supra) it was referred by the single Judge mero muto on account of what he termed a constitutional provision that required to be investigated thoroughly'.

[15] The order of K.Manzini J sitting as a single Judge of this court per section 150 (2) (a) and the administrative directive of His Lordship the Chief Justice set up a full bench for this matter to be heard. This court is therefore fully clothe with the constitutional authority to hear and determine the constitutional issue as raised by the Applicant.

[16] Having clarified the role of the court on the constitutional matter before it, I now turn to the reasons this court rejected the preliminary point raised by the 1st,2nd and 4th Respondents both in their heads of argument and in argument when the matter was called.

[17] To what I can best describe a typical after thought and an onslaught propelled by the 1st,2nd and 4th Respondent at the eleventh hour on the day of the argument, when they asked that this court dismisses the referred constitutional point on account that the court was now *functus officio*.

[18] I describe it in this manner because although the Respondents contended that when K.Manzini J issued the referral order she granted the Respondents leave to file supplementary heads on the matte. The supplementary heads of argument were served, filed, argued in the lateness of the hour at 09h00 that very morning when the matter commenced. That alone was enough to cause a headache for Applicant's attorneys because the supplementary heads and

arguments raised matters of material substance. According to the Applicant, the point was raised for the first time in supplementary heads at that late hour. It gave the Applicant no time to consider the points and respond although constrained to so do.

[19] The Respondents alleged that the Applicant's main application was *inter alia* for a review of the decision of the 1st Respondent and to declare section 11 *bis* of the Act as inconsistent with the constitution and unconstitutional. He Respondents took the point in the main that section 11 *bis* outsted the court's revisional jurisdiction over the matter. The Respondents contended further that this court, invoked in its review jurisdiction, lacked the requisite jurisdiction to grant the declarator sought. This they contended that *in limine*, the declator sought was incompetent before the court. They concluded by submitting that the point was upheld by the court in the referral order. This therefore meant that the order was final and is not susceptible to alteration by any other judge(s) of this court. The court was therefore *functus officio*. This meant the end of case including the referred constitutional point.

[20] We dismissed the Respondents point and the reasons are as follows; According to rule 6 (12) (c) of the High Court rules any person opposing the grant of an order sought in the Notice of Motion shall, if he intends to raise a question of law only, deliver a notice of her intention to do so within the time prescribed in the rules stating such question of law.

[21] The Respondents point raised in the supplementary heads and in the arguments before this court is a jurisdictional point of law which called upon the court to first determine the effect of the referral order and secondly if such pronouncement was a decision not susceptible o alteration by another Judge of the same court.

[22] It is trite law that jurisdictional points of law are substantive and in most circumstances of cases they are dispositive of the matter without the need of getting into the merits Perhaps, this may have been one case if the point was brought by notice under rule 6 (12) (c) that would have given the parties and the court an opportunity to vet the points and the court to decide on them.

[23] Despite this the matter came to court on the 28th June 2023 where all the administrative directives in preparation for the date of argument (17th July 2023 were set, the Respondents had the opportunity of raising the point of law as envisaged by the rules, alternatively leave of court. They left it till the date of arguments on the 17th July 2023. The rule allows such point to be raised by notice and not on supplementary heads of argument at the eleventh hour on the day of argument. This point was therefore considered as not properly raised thus dismissed after the court's short adjournment.

[24] The Respondents proposed further in support of their point *in limine* that the Applicant ought to have challenged the constitutionality or otherwise of section 11 *bis* first before reviewing the 1st Respondent's decision. In any event, they say section 11 *bis* of the Act was valid at the time of the Minister's decision.

[25] No authority was ventured by the Respondents in support of their point. The court however, has it in authority that since the promulgation of the constitution of the Kingdom of Eswatini, the constitution reigned as the supreme law of the land. Since 2005, The Kingdom became a constitutional state, 'it incorporated the doctrine of the rule of law by enacting the constitution. Such incorporation comprehends the principle of legality. It is

central to the concept of the Constitutional State that the Law Giver and the Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law." *See* the *dictum* by Steyn JA (concerning Banda C.J,Browde,Tebbut and Zietsman JJA) paragraph 17 in the case of The Prime Minister of Swaziland and others vs MPD Marketing and Supplies (Pty) Ltd and Others Appeal case No.18/2007.

[26] The position as we understand it, is that from the date of the promulgation of the constitution, any other law inconsistent with the Supreme law of the land, to the extent of its inconsistency is void. (Section 2 (1) of the Constitution).

[28] The last but one objection *in limine* raised by the Respondents before the main constitutional challenge was that the relief sought by the Applicant is incompetent becaused the court approached in this review powers lacks the requisite jurisdiction to grant a declarator.

[29] The Respondents relied on two decided case law. A local full bench judgement of Robert Mshwephezane Mabila v The Director of Public Prosecutions and 10 others(153/2016) [2021] SZHC 108 (July 20210 and a judgement from the High Court of Namibia main division. Gecko salt (pty) Ltd and Minister of Mines and Energy (HC-MD-CIV –MOT-REV - 2017/00307) NAHCMD 187(12TH June 2019).

[30] The Robert Mshwepheza Mabila case (*supra)*came before the court as a review application. After the closure of the pleadings and during the Applicant's reply in argument on the points of law the court quirred whether it was legally permissible of the court to review a piece of legislation. Counsel for conceded that the proper thing to do would be for the Applicant to seek a

declaratory order that impugned decree be declared invalid. He then applied for leave to file a supplementary affidavit amending his review prayer in the notice of motion. The application was granted by the court and similarly an opportunity was given to the respondents to respond.

[31] The respondents in that case opposed the interlocutory amendment application mainly on the ground that it introduced a totally new cause of action and that it would not only delay the proceedings but also cause an injustice to them. The applicants acknowledged that the amendment introduced a new cause of action, but submitted that it would not cause an injustice to the respondents.

[32] The court remarked that 'As a general rule, the court may allow an amendment of any pleading at anytime or state during the course of the hearing and before judgment provided that such amendment would not cause prejudice or an injustice to the other side which cannot be cured or compensated by an appropriate order for costs or a postponement...' in the present case,(Robert Mabila) no reason whatsoever has been advanced by the applicant why the intended or proposed amendment did not form part of the initial notice of motion or why it is sought to be made at this stage of the proceedings or hearing.'*(underlining added)*.

[33] In the Gecko Salt (Pty) Ltd case (*supra*) the court was faced with a similar application for leave to amend a Notice of Motion. The applicant brought review proceedings in which he sought, as the main relief, an order to review and set aside the decision by the first respondent, the Minister of Mines and

Energy, relating to the transfer of some three mining licences from the forth Respondent. The licences were described as mining licences 82D,82E and 81F. The applicant, mid-stream the case wished to amend its notice of motion by inserting a new prayer 3 to read:' 'That it be declared that the mining licences 82D,82E and 82F have been abandoned and therefore lapsed' (*underlining added)*

[34] The respondents in Gecko Salt (*supra*) objected to the amendments by *inter alia* pointing out that the applicant waited for the pleadings to close before it sought a far-reaching and independent declaratory relief. They argued further that if the amendments were allowed, they would be severely prejudiced because it would introduce a new cause of action which they were not called upon to meet.(*underlining added*)

[35] When dealing with the respondents' objection on the amendment, the court in Robert Mabila (*supra*) cited the Gecko salt case and said, 'the court in that case refused to grant an application to amend a review application whereby the applicant sought to introduce an entirely new cause of action in the form of a declaratory order. (*underlining added*).

[36] The court in Gecko salt stated that; "I should immediately say that I do not agree with the contention that the amendment sought is not substantial and therefore does not require a detail explanation. In my view, the amendment sought is substantial. A declaration is a distinct and independent relief from a review. Different requirements and consideration apply to each relief, that is, a declarator and review. With regards to a declarator the court approaches the question of a declaratory in two stages; firstly, the court enquiries: is the applicant a person interested in any existing, future or contingent right or obligation? Secondly, and only if satisfied at the first stage, the court decides

whether the case is a proper one in which to exercise its discretion. With a review relief the court exercises its inherent power, e.g if a public body exceeds its powers, the court steps into set aside the impugned act or decision."

[37] There is a markedly difference between what fell to be decided in the Robert Mabila and Gecko Salt (*supra)* with what obtains before us. In the two former cases, the court was dealing with a belated amendment of the notice of motion from a review to a declarator prayer. The amendment, it was held was substantial in its nature in that it introduced a new cause of action distinct and independent even in substantive law. A review and declarator have different requirements and approaches. It was observed in both cases that the amendment was not supported by detailed explanation for its lateness and facts to justify and fully support the changes. It was not allowed because it was to cause prejudice to the objecting parties which could not be cured or compensated by an appropriate order for costs. There is no proposition established in those two cases that a court sitting in its review powers lacks the requisite jurisdiction to grant a declarator, in support of the Respondent's contention.

[38] In *casu* the scenario is different. The Applicant sought two main prayers upfront. Firstly, to review correct and set aside the revocation of his liquor licence by the 2nd Respondent (Minister) in prayer 4. Secondly, a declarator that section 11 *bis* of the Liquor Licence Act 1964 (the Act) is inconsistent with the constitution and therefore unconstitutional*(sic)*.

[39] There is therefore no amendment of the notice of motion that is sought by the Applicant from a review to a declarator. The Applicant has in *casu* pleaded his grounds for the review in the founding affidavit. At paragraph 12 of the

founding affidavit for example he states. "The essence of my grounds for review is that there were various procedural irregularities which took place leading up to the decision of the 2nd May 2023. The rules of natural justice were flagrantly disregarded... The provision of section 33 (of the constitution) were glaringly flouted.' The 1st,2nd and 4th Respondents denied the contents of the paragraph and averred that the Applicant was afforded his right to administrative justice.

[40] In paragraphs 14.1 to 14.4 the Applicant averred in detail the reasons why section 11 *bis* of the Act is inconsistent with section 152 read together with section 33 of the constitution which confers the High Court with the necessary supervisory and revisional jurisdiction over any lower adjudicating authority such as that of the 1st Respondent. The Respondent's deny these averments and state in paragraph 16 of their answering affidavit that the constitutional relief sought (in the declarator) is badly framed such that the court cannot grant any relief.

[41 Notwithstanding what the Respondents aver in the preceding paragraph, the deponent turns around at paragraph 20 of the same affidavit and state; "I admit that this court is a superior court and has review jurisdiction in respect of any administrative decision whereupon another party aggrieved and that it is upper guardian of rights enshrined in the constitution (*sic*). The point being made here is that the Respondents themselves demonstrated that the Applicant has pleaded fully facts that support both the review and the declarator in this case for which they were able to respond to in full.

[42] The conclusion on this point is that Robert Mshephenzane Mabila (*supra*) and Gecko Salt (pty) Ltd (*supra*) do not support the Respondents contention that

the court, approached in its review powers lack the requisite jurisdiction to grant a declarator. This point therefore stands to be dismissed.

[43] I now come to the main issue before us. The Applicant has moved the court to declare Section 11 *bis* of the Act void for being inconsistent with Section 152 read together with section 33 of the Constitution. He averred that section 152 confers upon the court powers to exercise review and supervisory jurisdiction over all subordinate courts or any lower adjudicating authority. Section 33 (1) gives a person appearing before any administrative authority to be heard and be treated fairly. Any person who is aggrieved by any decision taken against him by that administrative authority, has the right to apply to a court of law.

[44] In brief the Applicant is a proprietary of a wine and malt styled 'Golide Lasikhova wine and malt' at the 3rd Respondent's leased premises. He applied for a renewal of his liquor licence with the Liqour Licencing Board under the Ministry of Commerce Trade Industry (2nd Respondent). The Board granted him the renewal of the licence. Apparently, the 3rd Respondent appealed the decision of the Board to the Minister (1ST Respondent) whom is to have taken a decision to reverse the Boards' decision. The Applicant submitted that he was taken aback by the 1st Respondent's decision because he had not been furnished with the ruling of the Board and the appeal itself to be able to appraise himself with the grounds raised on appeal.

[45] He then filed an application before this court to review correct and set aside the 1st Respondent's decision and to also challenge the constitutionality of section 11 *bis* of the Act of which 1st Respondent relied upon to hear and determine the appeal.

[46] Section 11 *bis* of the Act states;

> *'An Applicant or objector aggrieved by the decision of the Board in respect of the grant of or refusal to grant, renew, remove or transfer a licence as in respect of any conditions or privileges attached to a licence may within twenty one (21) days of such decision, appeal to the Minister whose decision shall be final not to be questioned in any court.* (underlining added).

[47] The issue lies with the latter part of the provision which states that the 1st Respondent's decision shall be final and not be questioned by any court of law. Is this consistent with the constitutional provisions that bestow review and supervisory powers on the High Court? The court also enjoys both inherent common law powers and statutory powers of review.

[48] The Respondents submitted in opposition- that in accordance with section 11 *bis,* the 1st Respondent's decision is final and shall not be challenged or be questioned in any court of law. The Applicant should have challenged the constitutionality of Section11 *bis* first before reviewing the 1st Respondent's decision. In any event they say section 11 *bis* of the Act of 1964 was valid at the time of the Minister's decision. We have dealt with the latter points earlier in this judgement what remains is the former.

[49] The question that the court had to grapple with in deciding this point is why is it all important that the High Court is vested with the powers to review decisions and proceedings of officers performing judicial, quasi-judicial or administrative functions such as the ones conferred to the 1st Respondent by section 11 *bis?* It is no doubt that the High Court is embedded with constitutional powers, the inherent common law powers, statutory powers and the powers in the rules of court to review decisions and proceedings of

officers performing administrative fuctions. The High Court also has powers to enforce the protective provisions in chapter 111 of the constitution,

[50] In The Prime Minister of Swaziland (*supra*) the Applicants in the court a *quo* had sought and obtained a relief declaring that the decision of the cabinet of the Government of Swaziland (Eswatini) and the action of the 1st Respondent (The Prime Minister) in proclaiming a decision that all the companies in the MPD group of companies be 'blacklisted' and prohibited from doing any business with the Government of Swaziland (Eswatini) or any Government agency or any parastatal body in Eswatini to be unlawful and of no force and effect.

[51] The court a *quo* held that 'there was no legal power and rational for the exercise of power by the Prime Minister/cabinet in taking the decision to blacklist the Applicants. The Appellants challenged the finding on a variety of grounds on appeal. We need not delve in those in *casu.*

[52] Before analysing the submission of counsel in that case Justice Steyn JA citing a South African Constitutional court case of Fedsure Life Assurance V Greater Johannesburg TMC 1999 (1) SA 374 (CC) 400 at page 399-40 and in that regard also cited a Canadien Supreme court *dictum* that held;

"Simple put the constitutionalism principle requires that all government action comply with the constitution , The rule of law principle requires that all government action must comply with the law, including the constitution". The court then concluded as follows: " they (there entites) may not transgress its provisions; indeed, their sole claim to exercise lawful authority vests in the powers allocated to them under the constitution and can come from no other source."

[53] Justice Steyn JA proceeded to cite with approval the statement in Boulle, Harris and Hoexter; constitutional and Administrative Law: Basic Principles (Juta, Cape Town 1989 at 98 to the effect that:

"The basic justification for judicial review of administrative action originates from the constitution. In the constitutional state there are, by definition legal limits to power and the courts bestowed with judicial authority, which incorporates the competence to determine the legality of various activities including those public authorities."

[54] Several provisions of our constitution such as Section 152 read together with section 33 referred to by the Applicants in *casu* as well as other provisions are with respect domatic to the statement above.

[55] By way of illustration, the review powers of the High Court besides being embedded in the constitution are also in terms of the common law, section 4 of the High Court Act 20 of 1954 as assisted by High Court Rule 53. Section 4 endows the High Court with 'full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice within Eswatini..."The Act does not define 'Subordinate court; nor do the Rules. Rule 53 (1) speaks of 'decision or proceedings of any inferior court and of any tribunal, board or officer performing, judicial, quasi- judicial or administrative fuctions' as decisions and proceedings reviewable by the High Court. The Supreme Court of Eswatini has held that all these entities that are mentioned under Rule 53 may be subsumed under the expression "subordinate court of justice'. In terms of section 4 (1). *See* Derrick Dube and Ezulwini Municipality (91/2016) [2018] SZHC 49 (30 November 2018) at paragraph 49.

[56] As stated earlier several constitutional provisions in our constitution bestow the High Court with the powers of reviewing decisions or proceedings of officers performing quisi- judicial or administrative functions like that performed by the 1st Respondent in *casu.* Does section 11 *bis* oust the constitutional provisions?

[57] The Applicant submitted that section 11 *bis* is inconsistent with section 33 of the constitution which gives a person appearing before any administrative authority the right to be heard and to be treated; justly and fairly in accordance to law. That person has a right to apply to a court of law in respect of any decision with which he is aggrieved.

[58] The Applicant submitted further that section 152 of the constitution bestow the High Court with review and supervisory powers over all...or any lower adjudicating authority and may in the exercise of that jurisdiction issue orders and directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers.

[59] Section 35 (1) (2) provides for the enforcement of protective provisions in Chapter 111 of the constitution. A person in the shoes of the Applicant may apply to the High Court for redress in the event of an infringement of any of his rights in the chapter. The High Court is bestowed with original jurisdiction thereto.

[60] Section 151 (1) states that the High Court has unlimited original jurisdiction in civil and criminal matter at the date of commencement of the constitution. Subsection (c) bestows the High Court with revisional jurisdiction at the date of commencement of the constitution subsection (d) bestows such additional revisional jurisdiction as may be prescribed by or any other law for the time

being in Eswatini. Sub-section (2) (a) bestows the High Court with powers to enforce the fundamental human rights in freedoms guaranteed by the constitution.

[61] That said, section 2 (1) of the Constitution states that;

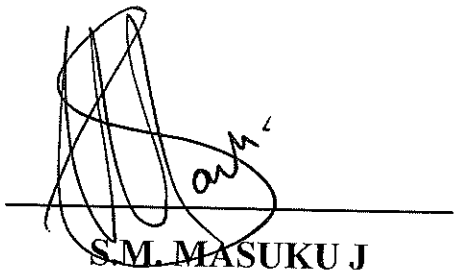
"This constitutions is the supreme law of Swaziland (Eswatini) and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void."

[62] In a sharp contrast with section 2 (1) of the constitution, section 11 *bis* of the Act gives the 1st Respondent powers to determine appeals from Applicants or objectors aggrieved by the Board's decisions in respect of a grant, refusal, renewal, removal or transfer of a licence. The latter part of the section states;... *"appeal to the Minister whose decision shall be final not be questioned by any court"*.

[63] To the extent that the latter part of the provisions oust the revisional and supervisory jurisdiction of the courts and in *casu* the High Court, it is inconsistent with not only section 152 read together with section 33 of the constitution but also with section 35 (1) (2), section 151 (1) (c) and (d) of the constitution as referred above in this judgement.

[64] It is inescapable therefore, for this court to conclude that the latter part of section 11 *bis* that reads; "appeal to the minister whose decision shall be final not to be questioned by any court"ousts the High Court's jurisdiction and is inconsistent with the cited provisions of the Constitution. It is to that extent declared unconstitutional and void *per* the dictacts of section 2 of the constitution.

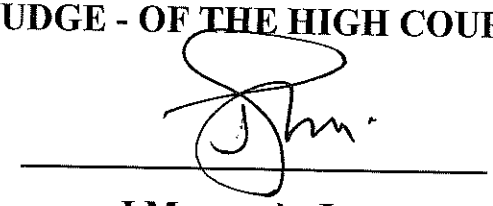
[65] Costs to be costs in the course of the main review application



S.M. MASUKU J

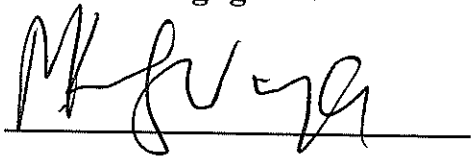
JUDGE - OF THE HIGH COURT

I agree:



J.Magagula J

I agree:



M.Langwenya J

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For the 1st,2nd,4th Respondents: M.Hlawe with N.Gule from the Attorney General's Chambers

For the 3rd Respondent: M.J.Hillary from M.J.Hillary Attorneys.