IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Cri. Case No. 19/2002

Case No. 20/2002

In the matter between

RAY GWEBU 1st Appellant

LUCKY NHLANHLA BHEMBE 2nd Appellant

Vs

REX Respondent

Coram LEON, JP

BROWDE, JA

STEYN, JA

TEBBUTT, JA

BECK, JA

For 1st appellant Mr. N. Maseko

For 2nd appellant Mr. M.C.M. Maziya

For the Crown The Attorney General

JUDGMENT

BROWDE, JA

The two appeals which came before us arose in the following manner. Each of the appellants was charged before the High Court with an offence in respect of which Decree No. 3 of 2001 ("Decree No. 3"), reinstating and/or validating the Non-Bailable Offices Order No. 14 of 1993 (as amended) provided that persons so charged may not be admitted to bail. The appellants, contending that Decree No. 3 was constitutionally invalid, each brought an application for bail to the High Court. The

learned Chief Justice in his judgment stated that the applications were viewed by the parties as test cases, having far reaching constitutional implications. For that reason he determined that the applications should be heard by a bench of two judges. As a result the two applications came before Sapire, CJ and Masuku J who, since the same principles of law were in issue in both matters, heard them together. Each judge a quo delivered a judgment and although they adopted somewhat different approaches to the problem there was agreement that the applications be dismissed. It is against that order that these two appeals have now been argued before us and we too have heard the matters together. In his judgment Masuku, J, with reference to the order sought by appellant Bhembe that the King of Swaziland lacks the power to legislate by decree

and lacked such power when Decree No. 3 was promulgated, set out in careful and extremely helpful detail the material events in the constitutional history of this Kingdom.

It appears from such history that Swaziland was a British Protectorate until 6 September 1968 when she gained independence from Britain. At independence there was put in place a Westminster-type constitution which provided for all aspects of Government, civil liberties, the rights and powers of the Ngwenyama, the role of traditional institutions and stipulated a procedure for amending the constitution.

Five years later, on 12 April 1973 His Majesty, King Sobhuza II issued what was termed the Proclamation to the Nation ("the King's Proclamation").

In that Proclamation the King announced that after giving "great consideration to the extremely serious situation which has now arisen in

our country", he had come to various conclusions. Included among them was that the 1968 constitution had failed to provide the machinery for good government and for the maintenance of peace and order, and that it was indeed the cause of unrest, insecurity and dissatisfaction with the state of affairs in the country. He went on to enlarge upon his criticism of the constitution and to say that it permitted the importation of political practices which were, inter alia, designed to disrupt and destroy "our own peaceful and constructive and essentially democratic methods of political activity."' There was, announced His Majesty, no constitutional way of effecting the necessary amendments to the constitution which in any event prescribed a method of amendment which was "wholly impracticable."' Therefore, and because, as he put it, "as a nation we desire to march forward progressively under our own constitution " he declared as follows :-

".....in collaboration with my Cabinet Ministers and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all Legislative, Executive and Judicial power is vested in myself and shall, for the meantime, be exercised in collaboration with a Council constituted by my Cabinet Ministers. I further declare that, to ensure the continued maintenance of peace, order and good government, my Armed Forces in conjunction with the Swaziland Royal Police have been posted to all strategic places and have taken charge of all government places and all public services. I further declare that I, in collaboration with my Cabinet Ministers, hereby decree that:-

A. The Constitution of the Kingdom of Swaziland which commenced on the 6th September, 1968, is hereby repealed;

B. All laws with the exception of the Constitution hereby repealed, shall continue to operate with full force and effect and shall be construed with such modifications, adaptations, qualifications and exceptions as may be

necessary to bring them into conformity with this and ensuing decrees."

I return later in this judgment to consider the nature and effect of the King's Proclamation and particularly to the constitutionality or otherwise of Decree No. 3. Suffice it to refer at this stage to the following provisions of the 1968 Constitution. Section 2 provided as follows:-

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

Section 134 made provision for the amendment or alteration of the Constitution providing that such amendment or alteration was to be passed in a joint sitting of the Senate and House of

Assembly summoned for the purpose as laid down in the Schedule to the Constitution. As pointed out by Masuku J, no provision was made for the repeal of the Constitution as this was never envisaged by the drafters of the Constitution. The learned judge then referred to the only power to make laws which was conferred on the King and Parliament by the Constitution; this was Section 62(1) which reads:-

"Subject to the provisions of this Constitution, the King and Parliament may make laws for the peace, order and good government of Swaziland. "

It is abundantly clear that the King, in the new political dispensation which he decided to introduce in the King's Proclamation, showed scant regard for the Westminster-type Constitution of 1968. In his abrogation of it he rode roughshod over some of its fundamental provisions and in doing so usurped power for himself which was not contemplated when Britain's Protectorate came to an end. It is

noteworthy, however, and this will be more specifically dealt with later in this judgment, that the King's Proclamation saved Sec. 104 of the 1968 Constitution which provided that the High Court of this country had unlimited original jurisdiction in criminal and civil matters.

It is convenient at this stage to deal with the attack levelled at Decree No. 3, i.e. that it is null and void and of no force or effect in as much as it is inconsistent with Articles 1, 7(b) and (d) of the African Charter on Human and Peoples' Rights as ratified by the Government of the Kingdom of Swaziland on 15 September 1995 ("the Charter") .

In his Heads of Argument, which are comprehensive and indicate that a good deal of research preceded their drafting, Mr. N. Maseko, who appeared for the appellant Gwebu, referred us in detail to the provisions of the Charter. The preamble sets the tone of the Charter and indicates its aims and objectives. It "reaffirms" the African States' pledge to "coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation, having regard to the Charter of the United Nations and the Universal Declaration of Human Rights. "

This clear dedication to the upholding of human rights and the Member States' (including, of course, this Kingdom's) firm intention to give effect to them is contained in Article 1 of the Charter which reads :-

"The Member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them. "

With that solemn pledge in mind Mr. Maseko referred us to Article 7 of the Charter, and particularly 7(1)(b) and 7(1)(d) which read:-

"1. Every individual shall have the right to have his cause heard. This comprises

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal

(d) The right to be tried within a reasonable time by an impartial court or tribunal. "

It was submitted by Counsel in the court a quo and again before us that the presumption of innocence is violated by the aforementioned Non-bailable Offences Order. In this regard he referred us to the Proclamation of Decree No. 3 the relevant Section of which reads:-

Laws that have a constitutional bearing

2.(1) All Orders-in-Council and Acts of Parliament that would otherwise be invalid on the sole ground that they are inconsistent with the Proclamation to the Nation of 12th April 1973 are hereby validated to that extent, unless repealed or amended by this Decree or any other law.

(2) Notwithstanding section 104 of the 1968 Constitution (Repealed with savings) and/or any other law, the Non-Bailable Offences Order No. 14 of 1993 (as amended) is hereby reinstated and/or validated. "

It follows from the provisions of the Non-Bailable Offences Order that once charged with a scheduled offence the accused is committed to be imprisoned until his case has been heard and the verdict pronounced. This is clearly contrary to the presumption of innocence and is consequently, to that extent, inconsistent with the Charter. Mr. Maseko

has submitted that, on that ground alone, Decree No. 3 should be struck down. The Charter has not, however, been incorporated in the domestic law of Swaziland and the question therefore arises whether counsel's submission is tenable.

I have already referred to the provision in the Charter that Member States agreed to give effect to the rights enshrined in the Charter by undertaking to adopt legislative or other measures to give effect to them This appears to be an acknowledgement that incorporation is required before the Charter becomes effective as part of the law of the member states.

This is in accordance with decided cases, of which there are many.

In Pan American World Airways Inc. vs S.A. Fire and Accident Insurance Co. Ltd 1965(3) SA 150(A) at 161 B - D the Appellate Division of South Africa held.

"Apart from this, there is a further difficulty in the way of the appellant. It is common cause, and trite law, I think, that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in the municipal law except by legislative process.....In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject. "

See, too, Maluleke v Ministry of Internal Affairs 1981(1) SA 707

(BSC)at 712H

Tshwete vs Ministry of Home Affairs (RSA) 1988(4) SA 586(A)

Swissborough Diamond Mines vs Government of R.S.A. 1999(2)

SA 279(TPD)

On this aspect of the matter I would also refer to authorities for the proposition that if there is a dispute involving interpretation of the Constitution itself, it may be helpful to employ the contents of treaties or the like, entered into by the Government, as an aid to that interpretation. Thus in Azapo and Others vs President of the Republic of South Africa 1996(4) SA 671(CC) Mahomed DP (as he then was) at page 688 said:-

"The issue which falls to be determined in this court is whether Section 20(7) of the Act is

inconsistent with the constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the constitution itself, on the grounds that the lawmakers of the constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law. International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment. " (my emphasis)

Another eminent judge who expressed similar views was AGUDA JA in the Court of Appeal of Botswana in the case of The Attorney General of the Republic of Botswana v Unity Dow 1992(BLR) 119. He said:-

"I take the view that in all these circumstances a court in this country, faced with the difficulty of interpretation as to whether or not some legislation breached any of the provisions of Chapter II of our constitution which deal with the fundamental rights of the individual, is entitled to look at the international agreements .....to ensure that such domestic legislation does not breach any of the international agreements ... save upon clear and unambiguous language. " (my emphasis) This clearly demonstrates that unincorporated international agreements may be used as aids to interpretation but not treated as part of domestic law for purposes of adjudication in a domestic court.

Mr. Maseko attempted to overcome this obstacle by submitting, albeit tentatively, that there was some ambiguity lurking behind the use of the word "notwithstanding" in the phrase "notwithstanding any provision of any law." I can see no merit in this submission as the word is, in the context of the phrase, perfectly clear.

It follows from the above reasoning that counsel's contention that, because it contravenes the spirit of the Charter, the Non-Bailable Offences Order as re-enacted by Decree No. 3 of 2001 should be struck down places reliance on the provisions of the Charter which is not legally tenable. The court a quo therefore correctly dismissed the prayers of the appellants based on the alleged inconsistency of the King's Proclamation with the African Charter on Human and Peoples Rights.

Before leaving the subject of the Charter it is appropriate to refer to the attitude of the Government of this country to a democratic political dispensation. We are given to understand that a new Constitution is in the process of formulation and perhaps it will be helpful if I point out the following in relation to another member state's attitude to international human rights norms as are incorporated in the Charter. In Botswana, Section 10 of the Constitution entrenches the presumption of innocence of every person charged with a criminal offence. In the case of The State vs Moathlodi Marapo Criminal Appeal No. 15/2002 Tebbutt AJP in delivering the judgment of the Court of Appeal of Botswana struck down the Section of the Penal Code which, in terms similar to the Non-Bailable Offences Order 1993, unequivocally imposed a total prohibition on the grant of bail to persons charged with rape. The learned Judge said:-

"Such rights (referring to Constitutional Rights) are jealously guarded and the development, extension and preservation of them are cornerstones of the intellectual processes of democracies throughout the world and are embodied in the laws and judicial pronouncements of such countries as the United States, the United Kingdom, the many members of the European Community and neighbours of Botswana such as South Africa. This trend has been particularly marked in the sphere of those rights personal to the individual and especially the right to personal

liberty. This court as far back as 1992 has recognised that Botswana is one of the countries in Africa where liberal democracy has taken root (see the Dow case supra at 168 B - C) and international human rights norms should receive expression in the constitutional guarantees of this country. The court is accordingly required to balance the concept of the public interest against the right of personal freedom and to determine the precedence of the one in relation to the other by reference to the mores of the community and by using an assessment based on proportionality. "

The norms to which Swaziland has pledged its adherence and which no doubt reflect the mores of the community are contained in the Charter, and should be reflected in the Constitution. This is necessary if this Kingdom is to fulfil its obligation, solemnly undertaken, "to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the Charter. "

At this juncture no such legislation or measures are in existence and consequently, as I have already said, this part of the argument on behalf of the appellants cannot succeed.

I turn now to consider the other argument addressed to us on the validity or otherwise of Decree No. 3. Mr. M.L.M. Maziya presented us with a meticulously prepared and logically argued case on behalf of appellant Bhembe. Also, and in the best traditions of counsel as an officer of the court, he has provided us with copies of all the decrees,

King's Orders-in-Council, text books and other references to case law and authoritative articles. We are indeed indebted to him for what was clearly a time-consuming but extremely helpful effort.

In precis counsel's main argument went as follows. The 1968 Constitution Chapter IX Part 1, Section 104(1) reads:

"The High Court shall be a superior court of record and shall have

(a) unlimited original jurisdiction in civil and criminal matters."

The King had no power, so the argument went, to repeal the 1968 Constitution and therefore the purported repeal of that Constitution by the King's Proclamation was constitutionally invalid. He pointed to Section 2 of the 1968 Constitution which reads :-

"This Constitution is the Supreme Law of Swaziland and if any other law is inconsistent, that other law shall, to the extent of the inconsistency, be void. "

On that basis counsel submitted that the orders-in-council and decrees which were purportedly promulgated in the exercise of powers vested in the King by the King's Proclamation - and which included Decree No. 3 - are all invalid and of no force or effect. If that is so, the argument proceeded, there is no valid reason why a judge of the High Court with the jurisdiction defined in Sec 104(1), should not grant bail to persons charged with any offence, if the circumstances warrant it.

This submission is predicated on the alleged ineffectiveness of the King's Proclamation and, in my view, overlooks the background to the Proclamation and what occurred in this country after its promulgation.

The King's Proclamation was promulgated on the declared basis that the Westminster system was unsuitable for the needs of this country. There was, according to what is expressly stated (without any foundation laid for the averment), "no constitutional way of effecting the necessary amendments to the Constitution" and the King in collaboration with his Council of Ministers therefore decided to introduce a new Constitution by a method which ignored the provisions of the Constitution of 1968. This was because the King and his Council were of the view that "the method prescribed by the Constitution (for effecting amendments) was impracticable (why so is not expressed) and will result in the very disorder any Constitution is meant to inhibit." What we must accept is that because of the political circumstances prevailing at the time, the King and his council were of the considered view that to follow the procedures laid down in the 1968 Constitution was not feasible. What then occurred, namely the promulgation of the King's Proclamation accompanied by the deployment of the army and police to "strategic places" and the taking charge of all government places and all public services, amounted to a revolutionary seizure of power. It was illegal, but the question one must ask is whether that necessarily means that the Government should not thereafter be regarded as a lawful Government with the powers vested in it by the "new" Constitution. In the celebrated case of Madzimbamuto v Lardner-Burke and Another (1968) 3 ALL ER 561(PC) at 573 Lord Reid observed that

"It is a historical fact that in many countries - and indeed in many countries which are or have been under British sovereignty - there are new regimes which are universally recognised as lawful but which derive their origins from revolutions or coups d'etat. The

law must take account of that fact. So there may be a question how or at what stage the new regime became lawful".

What occurred in this country after the King's Proclamation seems to have been at least a tacit acceptance by the population of the King's usurpation of power, which there is little doubt it was. As far as we know there was no counter-revolution or any violent opposition to the new dispensation. It seems that the repeal of the 1968 Constitution was probably regarded by the populace as inevitable since it was generally accepted that it was inappropriate to the traditional way of life of the Swazi. This attitude was expressed as follows by the then Minister of Finance:

"Such revision is in the best interests of Swaziland and a suitable revision will lead to a much better degree of stability, i.e. political stability.

There is nothing unusual in altering a constitution, and when a constitution such as ours is out of tune with the people of the country and in fact is out of tune with the times in which we are living, then we would be falling in our duty unless we make a move to correct the situation. "
(See A History of Swaziland by Dr. J.S.M. Matsebula.)

Although there were harsh measures taken between the years 1973 and 1978 to control political activists Dr. Matsebula op.cit. states:-

"Immediately after the attorney general finished reading the decree the politicians shed their political identities and the political hot dust that was blinding the Swazi people began to settle down. The Swazis who had hitherto been slinging political mud against one another began to bury their political hatchets, and began to communicate amicably. "

This perhaps paints too rosy a picture of this country after the coup. Many draconian measures were introduced, among them the notorious

"detention without trial" Order. Political debate appears to have been stifled, and those opposed to the usurpation of power by the King virtually silenced, either actively or by threat.

Mr. Maziya has referred us to some of the more repressive measures taken against would-be opponents of the new regime. He has submitted that although the King's Proclamation was "effective" it was certainly not supported by the whole nation. One can only hope that the new Constitution will cater for the desires and aspirations of the vast majority of citizens of this country. We must accept, however, (and no suggestion to the contrary appears from the papers before us or emanated from Counsel) that the coup d'etat was a successful one and the majority of the people of this country behaved, by and large, in conformity with the Government as constituted by the King's Proclamation. What is the effect of that?

In his judgment in Mangope v van der Walt and Another NNO
1994(3) SA 850(BGD) Comrie J has a useful reference to many cases and legal writings pertaining to the question in casu. I refer particularly to the following :-

In Madzimbamuto's case (supra) Lord Reid (at p 574) said:-

"A recent example occurs in Uganda v Comr of Prisons, Ex p Matovu (1966) EA 514. On Feb. 22, 1966, the Prime Minister of Uganda issued a statement declaring that in the interests of national stability and public security and tranquillity he had taken over all powers of the government of Uganda. He was completely successful, and the High Court had to consider the legal effect. In an elaborate judgment Sir Udo Udoma CJ said ((1966) EA at 535):

".....we hold, that the series of events, which took place in Uganda from February 22 to April 1966 when the 1962 Constitution was abolished in the National Assembly and the 1966 Constitution adopted in its place, as a result of which the then Prime Minister was installed as Executive President with power to appoint a Vice-President could only appropriately be described in law as a revolution. These changes had occurred not in accordance with the principle of legitimacy. But deliberately contrary to it. There were no pretensions on the part of the Prime Minister to follow the procedure prescribed by the 1962 Constitution in particular for the removal of the President and the Vice-President from office. Power was seized by force from both the President and Vice President on the grounds mentioned in the early part of this judgment. "
Later he said ((1966) EA at 539):

".....our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity. "

There are other judgments which deal specifically with a "usurper" of power within his own country and the criteria which must exist before recognition is given to his regime by the courts. Thus in Mitchell and Others v Director of Public Prosecutions and Another (1987) LRC (Const) 127 (Grenada Court of Appeal) Haynes P said "I would hold that for a revolutionary government to achieve de jure status, that is, to become internally a legal and legitimate Government, the following conditions should exist:

(a) the revolution was successful, in that the Government was firmly established administratively, there being no other rival one;

(b) its rule was effective, in that the people by and large were behaving in conformity with and obeying its mandates; and

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(c) such conformity and obedience was due to popular acceptance and support and was not mere tacit submission to coercion or fear of force; and

(d) it must not appear that the regime was oppressive and undemocratic.

Liverpool JA in the same case said at 115:

In my view when a government in power has effective control with the support of a majority of people and is able to govern efficiently, that government should be recognised as legal. "

After referring to De Smith Constitutional and Administrative Law and to Bryce Studies in History and Jurisprudence, the learned Judge of Appeal continued:

"I am of the view that sovereignty, or revolutionary legality, or de jure status, by whatever name it is called, ultimately depends on consent or acceptance by the people in the particular country under consideration which is manifested by the obedience to the precepts of those claiming to exercise authority over them. Once this is firmly established, it is trite law that in the case of a successful revolution the validity of the new government's laws date back to the day when the revolution first broke out. "

The events in this country, to which I have referred, demonstrate in my view that Swaziland did experience a successful "revolution" in that the Government was firmly established administratively; the rule by the Government was effective in that the people, by and large, were behaving in conformity with it; such conformity was due to acceptance by the majority and was not only submission to coercion or fear of force - in this regard one must assume that the army and police did not remain posted in "strategic places" or in charge of public services for years and that comparative peace prevailed despite their later dispersion. Finally, the indications before us are that the Government was not opposed, at least ostensibly, to a democratic dispensation. I say this despite a strong

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feeling amongst some that thus far this ostensible attitude has been mere lip-service.

In regard to this latter aspect, it appears from the King's Proclamation that the King himself, and his Council, regarded the revolutionary Government as a temporary measure, since the King, in regard to the powers he assumed, declared "for the meantime" he would exercise them in collaboration with his Ministers. He also referred in the Proclamation to "our own peaceful and constructive and essentially democratic methods of political activity". A promising sign of the King's regard for a democratic dispensation in this country is that in 1978 he expressed his intention of issuing decrees only after the introduction of the new Constitution. And of course many of the provisions of the 1968 Constitution were "saved" in the King's Proclamation including that providing for the unlimited jurisdiction of the High Court in criminal and civil matters. If the King wished to become an absolute despot in 1973 he could have then and there placed a limitation on the court's jurisdiction. His apparent respect for the courts is sufficiently consistent with the criterion of a democratic approach required for the legitimacy of a "usurping" power.

In my judgment, therefore, the submission by Mr. Maziya that the King's Proclamation should be regarded as null and void and of no force or effect cannot be sustained.

In making the abovementioned judicial pronouncements applicable to this country I am nonetheless cognisant of the enormity of the decision not to observe the provisions of the 1968 Constitution. Mr. Maziya referred us to authorities which describe the character of the

Constitution and its sacrosanct position in a country's political life. Counsel referred us, inter alia, to the landmark judgment of Mahomed AJ (as he then was) in S v Acheson 1991(2) SA 805 (Nm H C) which was decided by the Court of Appeal of Namibia. The learned judge said:-

"The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror' reflecting the national soul; the identification of the ideals and the aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial adjudication. "

Leon, AJA (as he then was) (with whom Dumbutshena, AJA. and Mahomed, CJ agreed) expressed similar sentiments in Ex Parte Attorney General, Namibia: in Re: the Constitutional Relationship between the Attorney General and the Prosecutor General 1995(8) BCLR 1070(NmS) at 1078 H -I thus:

In a constitutional state the government is constrained by the Constitution and shall govern only according to its terms, subject to its limitations and only for agreed powers and agreed purposes. But it means much more. It is a wonderfully complex and rich theory of political organisation. It is a composite of different historical practices and philosophical traditions. There are structural limitations and procedural guarantees that limit the exercise of state power. It means in a single phrase immortalised in 1656 by James Harrington in THE COMMONWEALTH OF OCEAN A ' a government of laws and not of men. '

Finally on this note Mahomed C.J. summed up the role of the Constitution in a free society by saying:-

"One of the great and irreversible truths yielded by the ethos of human rights generated after the Second World War is that Parliament is not sovereign - Only the Constitution is. "

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

In my judgment this explains why courts have declared regimes to be valid, even though created unlawfully - it is a question of facing reality rather than causing confusion in the public mind and possibly political mayhem.

Mr. Maziya's other line of attack on the Non-Bailable Offences Order was this. He referred to the fact that in terms of the King's Proclamation the King undertook to exercise his powers in collaboration with his Council of Ministers. Any doubt that may have existed regarding the intention of the King in this regard was laid to rest with the King's Order-in-Council cited as The Establishment of the Parliament of Swaziland Order, 1978. This Order makes provision for such

fundamental matters as the composition of Parliament, the Electoral System, Legislation and Procedure in Parliament, and the Executive. Section 80 of that Order is crucial to the issues in these appeals. The relevant sub-sections read as follows:-
"Repeal and Savings.

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80. (1) Nothing in this Order shall affect the validity of any prior law save as hereby amended or repealed, but all existing laws shall continue to operate with full force and effect but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order as read with any subsequent law amending it.

(2) Save in so far as is hereby expressly repealed or amended the King's Proclamation of the 12th of April 1973 shall continue to be of full force and effect:

Provided that the King may by Decree published in the Gazette amend or repeal the said Proclamation after a new Constitution for the Kingdom of Swaziland has been accepted by the King and the people of Swaziland and brought into force and effect. "

Mr. Maziya has submitted that the Section makes the following clear, namely:-

(i) In 1978 the High Court's jurisdiction as defined in the 1968 Constitution and saved in the King's Proclamation was of full force and effect, i.e. it was unlimited.

(ii) The King's Proclamation, save for the respects in which it was expressly repealed or amended by the 1978 Order, (which are irrelevant to the present enquiry) could only be amended or repealed after 1978 by a King's Decree issued after a new Constitution for the Kingdom of Swaziland has been accepted by the King and the people of Swaziland and brought into force and effect.

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As this has not happened, counsel submitted, the High Court's jurisdiction is inviolable and no measure can take place which detracts from the unlimited nature of that jurisdiction. I agree with that submission which, in my judgment, is the only logical deduction from the legislative enactments with which we have been called upon to deal.

I should here point out that although there is a clear distinction to be drawn between a King's Decree and a King's Order-in-Council, in this Kingdom's legislation there appears to be some confusion regarding these two entities. For example, in the King's Proclamation, the King declared that the decision to repeal the 1968 Constitution was arrived at in collaboration with his Cabinet Ministers with the support of the whole nation. There then follows "The King in collaboration with his Council decrees that.....". Whether that means a decree has been issued or whether it is an Order-in-Council is not clear. Another random example is that reflected in the supplement to the Swaziland Government Gazette Extraordinary Vol XVIII No. 23 dated March 28, 1980. It contained what was termed the King's Decree to amend the Establishment of the Parliament of Swaziland Order, 1978. This decree is referred to under Part B - Orders and is described as being a King's Order-in-Council. In these appeals we have been called upon to adjudicate upon the validity of Decree No. 3 only. What follows must not therefore be construed as applying in any way to other legislative enactments which have been promulgated after 1978. Whether such enactments were "decrees" properly so called, or King's Orders-in-Council is peculiarly within the knowledge of His Majesty the King. I do not, therefore, intend anything I say to refer to them.

Decree No. 3 appears to have been a decree properly so called. In his judgment a quo Masuku J said the following:-

"It will be remembered that the Court of Appeal, in Professor Dlamini v The King (Appeal Case No. 41/2000) had declared the Non-Bailable Offences Order No. 14 of 1993 unconstitutional. The executive reacted to this by swiftly procuring the promulgation of Decree No. 2 of 2001 which purported not only to validate or reenact the order but to make other far reaching constitutional changes."

I return to this "swift" reaction and its significance below.

In referring to the judgment in Professor Dlamini, Sapire C.J. correctly observed that the "Court of Appeal having found that the Non-Bailable Offences Order, as an Order-in-Council, was unconstitutional, may not have had to go further, and to indicate how the changes to the constitution could validly be effected. " The learned Chief Justice stated that the sentence in the Professor Dlamini judgment which reads "where the Constitution is amended by the King that must he done by decree published in the Gazette" was therefore an obiter dictum which, of course, is not a binding statement of the law. It is not inappropriate, therefore, to explain the precise conclusions arrived at by this Court in that case.

The Non-Bailable Offences Order 14/1993 made no reference whatsoever to sec. 104(1) of Part 1 of Chapter IX of the 1968 Constitution, which was saved by the King's Proclamation. It did not purport to be an amendment of the Constitution, nor was it intended by the Legislature to be an amendment to the Constitution. When its validity was attacked on the ground that it was inconsistent with sec. 104(1) of the Constitution,

the Crown's contention was that there was no inconsistency because - so it was submitted - the Order did not oust the court's jurisdiction, it only limited the court's discretion, and the Order was therefore not inconsistent with sec. 104(1) of the Constitution.

The court in its judgment found that submission untenable and held that the Order did indeed oust the court's jurisdiction to entertain bail applications by persons charged with any of the offences specified. By reason of such ouster of jurisdiction it was held that the Order was inconsistent with sec. 104(1) of the Constitution and was therefore unconstitutional and invalid. That was the ratio decidendi of the judgment which could have ended there.

However, when confronted with the difficulty that the Order ousted the court's jurisdiction so as to be inconsistent with sec. 104(1), the Director of Public Prosecutions on behalf of the Crown advanced an alternative submission, which was that if the Order "in effect amended the Constitution" it could validly do so because the King had assented to the Order.

In addressing that submission this Court did not hold that the Order purported to amend the Constitution "in effect", or at all, but only that it could not validly do so because of the manner in which it was enacted. The Order, I repeat, was not struck down because it was an amendment of the Constitution that was enacted in an impermissible manner; it was struck down because it was inconsistent with the unamended sec. 104(1) of the Constitution. What this Court did say in relation to the Crown's alternative submission was that any amendment of the Constitution, to be valid, would have to be done by way of a Decree published in the Gazette

and not by way of an "inferior law", such as an Act of Parliament or an Order-in-Council. I agree with Sapire, CJ that in saying this the court was speaking obiter - it was not part of the ratio decidendi.

This is not to say that the obiter portion of the Dlamini judgment is incorrect. So far as it goes it is correct that the Constitution can only be amended by Royal Decree published in the Gazette, but, as Mr. Maziya correctly submitted, such a Decree, to be valid, must be promulgated on the advice of the King's Council, and must await the putting in place of a new Constitution. The Dlamini judgment is incomplete with regard to these last-mentioned two requirements, to which no argument was addressed and to which the Court's attention was never drawn.

It may be thought that there is no longer a requirement that a King's Decree can only be made after a new Constitution is in place. This is because the proviso to Section 80(2) of the Establishment of the Parliament Order, 1978, containing that requirement, was purportedly repealed by King's Decree No. 1 of 1980. However, the latter Decree is itself invalid as it was made prior to the new Constitution being in place. That a King's Decree can, as the legislation presently stands, only be made once the new Constitution is in place therefore remains an essential requirement.

Before us the constitutionality of Decree No. 3 has been fully argued. Having regard to the fact that it was obviously "a swift" reaction to the point raised in the obiter dictum in the Professor Dlamini judgment, Decree No. 3 was intended to be, and was, "a decree published in the Gazette." It must be assumed therefore that this was a decree properly so-called and this was not contested by the Attorney General. The new

Constitution has not yet been put in place, and, therefore, counsel's submission that Decree No. 3 is invalid and that it does not affect the High Court's unlimited jurisdiction as defined in the King's Proclamation, in my judgment is sound and must be sustained.

In the result the appeals are upheld. Decree No. 3 of 2001 is declared to be invalid and the cases of the two appellants are remitted to the High Court to decide whether or not to admit them to bail.

BROWDE, JA

I agree

LEON, JP

I agree

STEYN, JA

I agree

TEBBUTT, JA

I agree

BECK, JA

GIVEN THIS.....day of November, 2002

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