

# **SUPREME COURT OF SWAZILAND**

**APPEAL CASE NO.26/2007**

**In the matter between:**

**JAN SITHOLE N.O. (TRUSTEE OF THE NATIONAL CONSTITUTIONAL  
ASSEMBLY-TRUST)**

1st APPELLANT

**MARIO MASUKU**

2<sup>nd</sup> APPELLANT

**PEOPLE'S UNITED DEMOCRATIC MOVEMENT (PUDEMO)**

3<sup>rd</sup> APPELLANT

**DOMINIC TEMBE**

4<sup>th</sup> APPELLANT

**NGWANE NATIONAL LIBERATORY CONGRESS (NNLC)**

5<sup>th</sup> APPELLANT

**SWAZILAND FEDERATION OF TRADE UNIONS (SFTU)**

6<sup>th</sup> APPELLANT

**SWAZILAND FEDERATION OF LABOUR (SFL)**

7<sup>th</sup> APPELLANT

**SWAZILAND NATIONAL ASSOCIATION TEACHERS (SNAT)**

8<sup>th</sup> APPELLANT

**AND**

**THE PRIME MINISTER**

1<sup>st</sup> RESPONDENT

**SWAZILAND GOVERNMENT**

2<sup>nd</sup> RESPONDENT

**MINISTER OF JUSTICE & CONSTITUTIONAL AFFAIRS**

3<sup>rd</sup> RESPONDENT

**ATTORNEY GENERAL**

4<sup>th</sup> RESPONDENT

**CHAIRMAN: CONSTITUTION DRAFTING COMMITTEE**

5<sup>th</sup> RESPONDENT

**SPEAKER OF THE HOUSE OF ASSEMBLY**

6<sup>th</sup> RESPONDENT

**PRESIDENT OF SENATE**

7<sup>th</sup> RESPONDENT

**MINISTER FOR LOCAL GOVERNMENT AND URBAN DEVELOPMENT**

8<sup>th</sup> RESPONDENT

**IN RE:**

**JAN STTHOLE N.O. (TRUSTEE OF THE NATIONAL CONSTITUTIONAL  
ASSEMBLY-TRUST**

1<sup>ST</sup> APPELLANT

**MARIO MASUKU**

2<sup>ND</sup> APPELLANT

**PEOPLE'S UNITED DEMOCRATIC MOVEMENT (PUDEMO)**

3<sup>RD</sup> APPELLANT

**DOMINIC TEMBE**

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**NGWANE NATIONAL LIBERATORY CONGRESS (NNLC)**

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**SWAZILAND FEDERATION OF TRADE UNIONS (SFTU)**

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**CHAIRMAN: CONSTITUTIONAL DRAFTING COMMITTEE**

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**SPEAKER OF THE HOUSE OF ASSEMBLY**

6<sup>TH</sup> RESPONDENT

**PRESIDENT OF SENATE**

7<sup>TH</sup> RESPONDENT

**CORAM**

**BROWDEJA**

**STEYNJA**

**TEBBUTTJA**

**ZIETSMANJA**

**RAMODIBEDIJA**

**FOR THE APPELLANTS      MR T.R. MASEKO**

**FOR THE RESPONDENTS    MR.J.M. DLAMINI**

## **RULING BY THE COURT**

This appeal is the sequel to one of two applications which were launched in the High Court by the eight above-named appellants (hereinafter referred to as "the appellants") against the above-named seven respondents (hereinafter referred to as "the respondents").

The application which gave rise to this appeal was sub-titled in the documents before the High Court as "Interlocutory Application No.2" and the case number was 2792/2006.

What was sought in that application was an order that the then forthcoming municipal elections be stayed pending the determination of what was referred to as "*the main application*". The main application has as its object an order by the High Court declaring that the Constitution of Swaziland is, for various reasons, invalid and should be set aside; or at least that Section 25 of the Constitution be interpreted so as to endow the 3<sup>rd</sup> and 5<sup>th</sup> appellants with standing to enable them to participate as legal organizations in municipal and national elections.

The so-called Interlocutory Application Case No.2792/2006 was heard, as what was alleged by the appellants to be a matter of urgency, by Maphalala J who sat alone, as it was not possible for him to assemble a full court. The "*urgency*" relied on by the appellants was that if the municipal elections took place before the determination of the interlocutory application the matter would become academic - this, of course, because any order for the stay of the elections would be a ***brutum fulmen*** once those elections had taken place. The respondents raised as preliminary points that the 3<sup>rd</sup> and 5<sup>th</sup> appellants had no ***locus standi*** to bring the application and that, in any event, the matter was not urgent.

Maphalala J, holding that he was bound by a previous judgment of the full bench of the High Court, namely the unreported judgment in the case of **SWAZILAND FEDERATION OF TRADE UNIONS AND OTHERS VS THE CHAIRMAN OF THE CONSTITUTIONAL REVIEW COMMISSION AND OTHERS (CIVIL CASE NO.3367/2004)** upheld the submission by the respondents that the appellants had no *locus standi* and also said that he did not consider the matter to be one of urgency and "*on that ground alone the application ought to be dismissed*".

The respondents raised the question before us whether in the circumstances the judgment of Maphalala J was appealable, as it was delivered in respect of what the appellants themselves termed "*an interlocutory application*".

Had the foregoing been all the relevant facts to this appeal it would, perhaps, have been possible for us to deal with it.

There are, however, other facts which complicate the situation which presently exists between the parties. Not content with the application 2792/2006 the appellants brought another application before the High Court seeking an order for the delivery of documents to them by the same respondents as in the present matter, in order, so we understand, to enable them to pursue the main application, which is the same application as is the target in the matter before us. That second application aptly described by counsel for the respondents as "*overlapping*" and "*interlocking*" with Case No.2792/2006 was argued before a full bench of the High Court presided over by the learned Chief Justice. By the time this appeal was due to be heard by us the following had happened:

- (i) The municipal elections had taken place and



(ii) It had been reported in the press, just two days before this appeal

was called, that the High Court had dismissed the appellants' application before it, and had come to the conclusion that the appellants had no ***locus standi*** to bring the application. The press also reported that the appellants were to appeal against the High Court decision.

Mr. Maseko, who appeared for the appellants before us, confirmed that the High Court Full Bench had, as reported, given its judgment and had pronounced the finding concerning the standing of the appellants. Mr. Maseko also stated that the appellants were considering appealing to this court against that judgment. This court has not had the benefit of seeing the judgment and could therefore rely only on what appeared in the press as confirmed by the attorney for the appellants.

The position therefore is the following:-

(i) We are called upon to decide the question of ***locus standi*** of the appellants without knowing what the basis was for the decision by

the High Court full bench that they had no ***locus standi***. In effect we might be placed in the invidious position of upholding an appeal against that High Court decision without us considering the ***ratio decidendi*** of the full court.

(ii) We are asked to decide a matter in which the relief, on the appellants own averments, is now academic since the elections which we are asked to stay are a thing of the past.

The result of the two applications having been brought, if not simultaneously, at least at times which render them overlapping and intricately intertwined, is that the position is extremely confused. We therefore suggested to the representatives of the parties that because we cannot now hear this appeal, the matter should be postponed to the next session of this Court and, if possible, the two legal teams should attempt to arrive at a joint statement setting out the facts which are common cause and a clear enunciation of the issues between the parties. That, and the fact that this court would have had a proper opportunity of studying the Full Bench judgment referred to, would be of material assistance in enabling this court to deal with this appeal and perhaps the appeal, if it is brought, against the judgment of the High Court Full Bench, simultaneously.

That suggestion was readily accepted by Attorney General Mr. M. Dlamini who appeared for the respondents and, wisely in our view, if somewhat reluctantly, by Mr. Maseko.

As I have already said this appeal appears to have emanated from "Interlocutory Application No.2". What the nature is of Interlocutory Application No. 1 we do not know, nor do we know whether or not it was decided upon in the judgment of the Full Bench of the High Court before Banda CJ.

It is quite impossible to unravel it all and to hear this appeal without having the full picture before us.

The appeal in Case No. 26/2007 is, therefore, postponed to the next session of the Supreme Court.

J, BROWDE

Judge of Appeal

I agree

J.H. STEYN

Judge of Appeal

I agree

P.H. TEBBUTT

Judge of Appeal

I agree

N.W. ZIETSMAN

Judge of Appeal

I agree

M.M. RAMODIBEDI

Judge of Appeal

DELIVERED IN OPEN COURT ON THIS DAY OF 16 NOVEMBER 2007