IN THE SUPREME COURT OF SWAZILAND
HELD AT MBABANE

APPEAL CASE NO. 35/2007

In the matter between:

JAN SITHOLE N.O. (IN HIS CAPACITY AS A TRUSTEE OF THE NATIONAL CONSTITUTIONAL ASSEMBLY-TRUST)	**First Appellant**
MARIO MASUKU	**Second Appellant**
PEOPLE'S UNITED DEMOCRATIC MOVEMENT (PUDEMO)	**Third Appellant**
DOMINIC TEMBE	**Fourth Appellant**
NGWANE NATIONAL LIBERATORY CONGRESS (NNLC)	**Fifth Appellant**
SWAZILAND FEDERATION OF TRADE UNIONS (SFTU)	**Sixth Appellant**
SWAZILAND FEDERATION OF LABOUR (SFL)	**Seventh Appellant**
SWAZILAND NATIONAL ASSOCIATION OF TEACHERS (SNAT)	**Eight Appellant**
And	
THE PRIME MINISTER	**First respondent**
SWAZILAND GOVERNMENT	**Second respondent**
MINSTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS	**Third respondent**
ATTORNEY GENERAL	**Fourth respondent**
CHAIRMAN: CONSTITUTION DRAFTING COMMITTEE	**Fifth respondent**
SPEAKER OF THE HOUSE OF ASSEMBLY	**Sixth respondent**
PRESIDENT OF SENATE	**Seventh respondent**

CORAM: TEBBUTT, JA
ZIETSMAN, JA
RAMODIBEDI, JA
FOXCROFT, JA
EBRAHIM, JA

FOR APPELLANTS: Mr. T.R. MASEKO with Mr. P.M. SHILUBANE

FOR RESPONDENTS: Mr. J.M. DLAMINI with Mr. M.M. VILAKATI

JUDGMENT

TEBBUTT JA

[1] What the appellants in this appeal want this Court to do is to strike down and declare null and void the entire Constitution of the Kingdom of Swaziland which came into existence with the enactment on 26th July 2005 of the Constitution of the Kingdom of Swaziland Act No. 1 of 2005. They had previously asked the High Court to do so but it refused their application, hence this appeal.

[2] As an alternative the appellants seek an order directing the Swaziland Government to convene a constitutional assembly, national convention or other democratic institution, broadly representative of Swaziland society to discuss the constitution and to consider oral and written representations in regard to it in order to "facilitate the adoption of a legitimate final constitution by His Majesty the King and all the people of Swaziland". To this end the appellants seek an order suspending and setting aside the present Constitution for a period of two years.

[3] The basis for the appellants wishing to strike down the Constitution or seeking the alternative orders is a complaint by them that in the process involved in bringing the present Constitution into being - to which I shall refer as "the constitution making process" - they were excluded from participating in it and from making oral and written representations on behalf of their members and of the persons they represent.

[4] The eight appellants represent a variety of interests. The first appellant is Mr. Jan Sithole, who, as a trustee of the organization, represents the National Constitutional Assembly (NCA) Trust, whose principal objects it would appear are to promote, protect, foster, strengthen and deepen the concepts of and protection of

democracy, transparency, good governance, social justice, tolerance and constitutionalism in Swaziland.

[5] The third and second appellants are the Peoples United Democratic Movement (PUDEMO), a political organization, and Mr. Mario Masuku, who is the President of Pudemo. He is also an appellant as a taxpayer and private citizen of Swaziland.

[6] Akin to Mr. Masuku's capacities are those of Mr. Dominic Tembe who is also the Secretary General of the Ngwane National Liberatory Congress (NNLC) a political organization. Mr. Tembe and the NNLC are the fourth and fifth appellants.

[7] The sixth, seventh and eighth appellants are the Swaziland Federation of Trade Unions (SFTU), the Swaziland Federation of Labour (SFL) and the Swaziland National Association of Teachers (SNAT) respectively.

[8] Prior to the coming into being of the present Constitution, which is now, in terms of Section 2 (1) of Act 1 of 2005, declared to be the Supreme Law of Swaziland, the supreme law of Swaziland was the King's Proclamation of 1973: Made before the nation on 12 April 1973 by His Majesty King Sobhuza II, it repealed the previous Constitution which had commenced when Swaziland achieved its independence from Britain on 6 September 1968.

[9] In the Preamble to the King's Proclamation of 1973, King Sobhuza stated that he had come to certain conclusions. These included that the 1968 Constitution had failed to provide the machinery for good government and for the maintenance of peace and order and that it had permitted the importation into

Swaziland of highly undesirable political practices "alien to and incompatible with the way of life in our society ".

[10] Section 2 (e) of the Preamble then follows and reads thus:

> "*That I and all my people heartily desire at long last, after a long constitutional struggle, to achieve full freedom and independence under a constitution created by ourselves for ourselves in complete liberty without outside pressures; as a nation we desire to march forward progressively under our own constitution guaranteeing peace, order and good government and the happiness and welfare of all our people*".

[11] Section 14 (2) of the King's Proclamation, finally, provided that :-

> "*The King may by Decree published in the Gazette, amend or repeal this Proclamation*
> *and he may ....., by Degree make,*
> *amend or repeal any laws*".

]12] On 9 October 1978 a King's Order-in-Council, known as the Establishment of the Parliament of Swaziland Order, 1978 was enacted. It provided for the establishment of a Parliament for Swaziland. Section 80 (2) of that Order-in-Council states the following:

> "*Save in so far as is hereby expressly repealed or amended the King's Proclamation of the 12th April 1973 shall continue to be of full force and effect*". *It went on to contain the following proviso:*
>
> "*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*".

[13] Any doubt as what the effect of Section 80 (2) of the 1978 Order—in-Council was, received clarification from this Court in the case of *The King v Mandla Ablon Dlamini* Criminal Appeal No. 5/2005, when it was emphasized that it was only a King's Decree *which purports to amend or repeal the King's Proclamation of 1973* (emphasis added) that may be made once the new Constitution is in place but that this did not, in any way, limit or prohibit the King from making other Decrees or Orders-in-Council.

[14] Acting pursuant to his powers vested in him by the King's Proclamation of 1973, the King on 22 August 1996, issued Decree No. 2 of 1996 which is the Constitutional Review Commission Decree whereby there was established a Constitutional Review Commission, consisting of 30 members, appointed in terms of the Decree, whose function was "with the assistance of the Attorney General and other constitutional experts" to draft a new Constitution for the Kingdom of Swaziland. Its terms of reference included *inter alia* that it shall:

> "*(f) Receive oral submissions, representations and information from members of the general public on the matters covered in its terms of reference and for this purpose to visit all Tinkhundla Centres to access such members; and;*
>
> *(g) Receive written submissions, representations and information from members of the general public on the*

matters covered in the terms of reference through its address, the secretariat or at Tinkhundla Centres".

[15] There are two aspects of the 1996 Decree that are of importance to this case. The first of these is that the Decree provided (in Section 4 thereof] that -

"*any member of the general public who desires to make a submission to the Commission may do so in person or in writing and may not represent anyone or be represented in any capacity whilst making such submission to the Commission*". The Commission adhered strictly to this requirement. The second is that the Decree provided that, except for purposes of facilitating its work, the Commission shall not, "*make available any of its records or documents to any person other than a member of the Commission, the Attorney General, experts assisting the Commission and members of the Secretariat*" nor shall it permit any person other than those just mentioned to have access to any of its records or documents.

[16] The 1996 Decree was amended on 5 June 2000 to allow that Commission to submit its Final Report to the King on or before 31 October 2000. Such report had to comprise (i) details of the work undertaken by it, including all records of submissions, representations and opinions heard and received by the Commission and (ii) a draft of the Constitution.

The Commission, to which I shall hereinafter refer as "the CRC", duly reported to the King attaching to this a Section, captioned "Section on Submissions based on Topics prepared by the Commission". In it the views, representations and submissions

of the individuals who made such representations and submissions are gathered together in regard to the various topics with which the CRC dealt and then conveyed to His Majesty the King. I shall mention certain of these later in the course of this judgment.

Once again acting pursuant to the powers vested in him by the King's Proclamation of 1973, the King on 19 February 2002 issued Decree No. 1 of 2002 whereby he established a Committee to be known as the Constitution Drafting Committee (hereinafter referred to as "the CDC"). The CDC consisted of 16 members, two of whom were officers of the Attorney General's office, under the Chairmanship of His Royal Highness Prince David. The Attorney General was ex-officio a member of the CDC.

The terms of reference of the CDC were, in consultation with the Attorney General and other experts, to draft a new Constitution for the Kingdom of Swaziland and, in so doing, had *inter alia* to go through the reports of the CRC "with a view to understand the aspirations of the Swazi Nation as far as the contents of the new Constitution were concerned". It also had to "review any legislation, Decree or Proclamation which has a bearing on constitutional and human rights matters" and to consider the constitutions of other countries which the CDC may consider appropriate for obtaining any information, guidelines or principles which may be included in the new Constitution.

The CDC also, in terms of the 2002 Decree, had to consider and provide for appropriate provisions or entrenchments of the Monarchy, other Swazi traditional institutions, the three arms of Government "among other matters" and had to "examine and provide for fundamental human rights and freedoms of the

individual and other rights in the new Constitution and for this purpose examine any legal instruments or documents that may contain them".

The Committee was entitled to invite experts to assist it in its work including experts on Swazi Law and Custom, especially on issues relating to the Monarchy and Swazi Traditional institutions.

As in the case of the CRC, the CDC was also not to make available any of its records or documents to any person other than its members, the Attorney General, experts assisting it and members of the Secretariat or permit any person, other than those just mentioned, to have access to any of its records or documents.

The present litigation started in 2006 in an application in the High Court sub-titled "Interlocutory Application No. 2" (Case No. 2792/2006). This was for an order staying the then forthcoming local government or municipal elections, pending the determination of what was referred to as "the main application". The "main application" was apparently the one with which this Court is presentiy seized *viz* for an order declaring the entire Constitution of Swaziland invalid.

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. It was opposed by the respondents who took as points in limine (i) that the matter was not urgent and (ii) that the appellants, and certainly appellants three and five i.e. Pudemo and NNLC, had no *locus standi* to bring the application.

It will be recalled that in the Preamble to the King's Proclamation of 1973 the King stated in the conclusions he had come to that the 1968 Constitution had permitted the importation into Swaziland of "highly undesirable political practices alien to and incompatible with the way
of life in our society……". It was obviously because of those strictures that the King in paragraphs 11,12, and 13 of his Proclamation of 1973 decreed that:

> "*11. All political parties and similar bodies that cultivate and bring about disturbances and ill-feelings with the Nations are hereby dissolved and prohibited.*
>
> *12. No meetings of a political nature ……shall be held or take place in any public place unless with the prior consent of the Commissioner of Police; and consent shall not be given if the Commissioner of Police has reason to believe that such meeting
> ..... is directly or indirectly related to political movements……*
>
> *13. Any person who forms or attempts or conspires to form a political party or who organizes or participates in any way in any meeting, procession or demonstration in contravention of this decree shall be guilty of an offence and liable on conviction to imprisonment not exceeding six months*".

In other words political parties were banned in the harshest of

terms by the King's Proclamation of 1973.

Based upon this a Full Court of three judges of the High Court held that the applicants - or certainly at least appellants three and five - were illegal organizations which could enjoy no *locus standi* (see **Swaziland Federation of Trade Unions and Others v The Chairman of the Constitutional Review Commission and others** (Civil Case No. 3367/2004). Maphalala J expressed the view that on the principle of *stare decisis* he was bound by the ruling of the Full Court and accordingly upheld the respondents point *in limine* that the appellants lacked *locus standi* to bring their urgent application. He also found that the application was not urgent. Maphalala J did not deal with the substantive arguments raised by the appellants that Section 25 of the Constitution entitled the applicants to participate in the Local Government elections.

The appellants noted an appeal against the judgment of Maphalala J.

The appellants then launched another application before the High Court for an order compelling the respondents and, in particular, the Minister of Justice, the Attorney General and the Chairman of the CDC, to "dispatch the records of all oral and written representatives made to and received by CRC and CDC in the discharge of their functions in terms of Decree No. 2 of 1966 and Decree No. 1 of 2002". That application was described by counsel for the respondents as "overlapping" or "interlocking" with Case No. 2792/2006.

All these matters finally came before this Court in November 2007. By that time the following had happened and here I quote from a ruling made by this Court in November 2007:

"*(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...*"

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 the 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 the 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."

The matter was then postponed from the November session of this Court to the present one.

The parties acceded to the suggestions of the Court as set out above and duly furnished the Court with an agreed Stated Case for determination by the Court. The relevant portion of that Stated Case reads as follows:

"7. *CASE FOR ADJUDICATION BY THIS COURT AD THE FULL BENCH JUDGMENT*

The Honourable Supreme Court of Appeal is requested to determine the following issues:

71 *Whether or not the Full Bench erred in law and in fact in holding the appellants had no* ***locus standi*** *to challenge the Constitution of Swaziland.*

72 *Whether or not the Honourable Court* ***a quo*** *erred in law and in fact in holding that it was bound by the judgment of this Court in* ***LAWYERS FOR HUMAN RIGHTS (SWD) & ANOTHER V ATTORNEY GENERAL CIVIL APPEAL NO.34 of2001.***

73*Whether or not the Honourable Court **a quo** erred in law and in fact in holding that it had no jurisdiction to set aside the Constitution of Swaziland Act 001 of 2005.*

*7.4 Whether or not the Honourable Court **a quo** erred in law and in fact in holding that Constitutional Review Commission (CRC) and the Constitution Drafting Committee (CDC) are not reviewable as they exercised political functions.*"

The parties could not agree on one aspect of the matter. It related to the judgment of Maphalala J. The appellants wished this Court to deal with the matter, together with the appeal against the judgment of the Full Bench of the High Court; the respondents resisted this. The issues raised by the appellants were the following:

"*9.1. Whether or not Mr. Justice Maphalala's judgment is appealable in law.*

92.*Whether or not Mr. Justice Maphalala erred in law and in fact in holding that the **third** and **fifth** appellants were illegal organizations and therefore had no **locus standi.***

93.*Whether or not Mr. Justice Maphalala erred in law and in fact in holding that he was hound by the common law principle of **stare decisis** to follow the judgment of the Full Bench in Case No. 3367/2004.*"

I shall revert to the latter aspect later in this judgment.

The first matter for consideration then is whether the appellants have the necessary *locus standi* to bring the present

proceedings. The Full Bench of the High Court held they did not. The appellants say that in coming to this conclusion the High Court erred.

After reviewing certain authorities both in South Africa and in this country, the court *a quo* stated that a litigant has *locus standi* only if he or she can show a direct and substantial interest in the subject matter, (see *Lawyers for Human Rights (Swaziland) and Another v Attorney General* unreported Civil Appeal 1822 of 2001 -a decision of a five judge bench of this Court). It added

> "*That decision represents for now, the law of this country on the matter of standing*"

The Court *a quo* referred too to the well-known South African case of *Roodepoort - Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 and especially to what was said by *Wessels CJ* in that case at 101 *viz:*

> "*The actio popularis is undoubtedly obsolete, and no one can bring an action and allege that he is bringing it in the interest of the public, but by our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers damages or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have*".

The Court *a quo* also referred to a decision of the South African Appellate Division in *Cabinet of the Transitional Government for the Territory of South West African v Eins* 1988

(3) SA 369 AD, where in a detailed and exhaustive survey of the law in South Africa in relation to *locus standi,* Rabie A.C.J, (as he then was) also considered the law in Canada and in the United States of America.

He started from the premise that a person who claims relief from a Court in respect of any matters must as a general rule, establish that he has a direct interest in that matter in order to acquire the necessary *locus standi.* He referred to *Dalnymple and Others v Colonial Treasurer* 1910 TS 372 where at 392 Wessels CJ said:

> "*Courts of law have required the applicant to show some direct interest in the subject matter of the litigation or some grievance special to himself, (see also* ***Geldenhuys and Ncethling v Beuthin*** *1918 AD 426; Ex* ***Parte Mouton and Another*** *1955 (4) SA 460 (AD)).* ***Rabie A.C.J,*** *then also cited the passage from the* ***Roodepoort - Maraisburg Town Council*** *case quoted above.*

Turning to the law in Canada, he referred to three decisions of the Supreme Court of Canada including the one in *Thorson v Attorney General of Canada* et al (No.2) (1974) 43 DLR 1, which is referred to in the judgment of the court *a quo.* There the Canadian Supreme Court said:

> *an individual has no status to challenge the constitutional validity of an Act of Parliament unless he is specially affected or exceptionally prejudiced by it. The plaintiff in this action had only the same interest as any other taxpayer in Canada.*"

The Court added:

> "*.. to accede to the applicant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain action: and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any of the legislation directly affecting along with other citizens in a similar way, in his business or his personal life*".

Rabie AC J then turned to the United States. Quoting from a work entitled American Constitutional Law by Shapiro and Tresolini, Rabie A.C.J, set out what the authors said was the law of *locus standi* in America. It reads:

> "*An individual has standing to challenge the constitutionality of a law only if his or her personal rights are directly affected by the operation of the statute. To have standing, one must show 'not only that the statute is invalid', but that he (party invoking judicial power) has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally*".
>
> "*The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its opinion*".

The above quotes come from the opinions of the US Supreme Court in *Frothingham v Mellon,* Secretary of the Treasury *et al* 262

US 447 and 488 and *Ashwander et al* v *Tennessee Valley Authority et all* 297 US 288 (1935) at 347. The plaintiffs, said the courts, must show-some thing more than a "generalized grievance"; they must show "injury in fact" to themselves.

The appellants have submitted that the High Court erred in following the decision of the Court in the *Lawyers for Human Rights* case supra. In that case this Court also considered the South African authorities cited above to the effect that there must be a direct interest and one which is more than the sort of interest which all citizens might have in the subject matter of the litigation and concluded that this also represented the law in relation to *locus standi* in Swaziland. Nothing that has been advanced by the appellants has persuaded me that this Court was incorrect in its decision in that case and I can find no reason why this Court should not follow it in the present case.

The appellants however, submit that this Court should, in approaching a constitutional matter, adopt a "generous and liberal approach" to standing and not nonsuit them on the basis of a lack of *locus standi.* They contend that they represent groups of citizens whose rights have been affected by the failure to permit them to participate in the constitution - making process and that on this ground alone they possess the necessary legal standing to bring these proceedings on those persons behalf.

The appellants also base their claim to have *locus standi* on the doctrine of legitimate expectation.

As to the need for this Court to adopt a generous and liberal approach to the question of *locus standi,* in constitutional matters, the appellants have referred to certain cases in other

Commonwealth countries and notably Canada where, by way of exception to the general rule of a need of a direct and substantial interest in the subject matter of the litigation in order to enjoy *locus standi,* the courts have entertained suits brought by litigants whose interest was no greater than that of other members of the public to protect the right in issue.

Some of the Canadian cases are those referred to by Rabie A.C.J, in the *Eins* case supra who opined that he doubted whether the South African law recognized a similar exception. I have similar reservations in so far as our law in this country is concerned. I would add a further observation: although it is permissible - and in many instances may be advisable - to have reference to legal systems and the approach of their courts to problems similar to those which may arise in our courts as an aid to interpretation of similar legislation (see e.g. **Oozeleni v Minister of Law and Another 1994 (2) SA 340; Attorney General v Dow** 1992 BLR 119 (CA)) caution must be exercised in seeking to incorporate the legal standards of other countries into our own. The way of life of the people of this country may, and often does, differ *toto caelo* from those in other countries and considerations of public policy may render such incorporation wholly inappropriate. (see **Oozeleni, supra; Sv Makwanyane & Another** (1995) 3 SA 391 (CC).

Counsel for the appellants has referred to an article by *Loots: Standing to Enforce Fundamental Rights* (South

African Journal on Human Rights (1994) at p 52) where the author said;

> "*The Appellate Division itself missed a golden opportunity to liberalize the law of standing for the*

> *purpose of constitutional litigation when* ***Cabinet of the Transitional Government for the Territory of South West Africa v Eins*** *was brought before it on appeal*"*.*

Be that as it may, our law is still that as set out in the **Lawyers for Human Rights** case supra.

[46] In the *court a quo* the appellants also sought to draw a distinction between what has been described as the enforcement of "bill of rights" provisions and the enforcement of constitutional rights generally. This argument was fully dealt with by Banda CJ in the judgment of the *court a quo.* The appellants did not persist with it before this Court and save to say that I agree, with respect, completely with the views of Banda CJ that the relief being sought by the appellants is of a general constitutional nature and that the direct and substantial interest test must apply to it, I need say no more about this argument.

The appellants have also, as I have said, relied upon the doctrine of legitimate expectation. The phrase "legitimate expectation" was evidently first used as far back as 1969 by Lord Denning MR in **Schmidt and Another v Secretary of State for Home Affairs** (1969) 1 All ER 904 (CA) at 909 C and was thereafter elaborated upon and became part of modern English administrative law in a series of cases including a number in the House of Lords (see e.g. **Findlay v Secretary of State for the Home Department and Other** Appeals (1984 3 All ER 801 (HL): **Council of Civil Service Unions and Others** v Minister for the Civil Service (1984) 3 All ER (HL); ***Leech v Parkhurst Prison Deputy Governor*** (1988) (1) All ER 485 (HL) and ***Attorney General of Hong Kong*** **v Ng Yueh Shin** (1983) 2 All ER 346

(PC).)

The doctrine came to be incorporated into the South African law by the judgment of Corbett CJ in the watershed case of ***Administrator, Transvaal and Others v Traub and Others*** 1989 (4) SA 731 (AD). At 756 G-H, Corbett CJ said:

> "*It is clear from these cases that in this context '**legitimate expectations**' are capable of including expectations which go beyond*

*enforceable legal rights, provided they have some reasonable basis **(Attorney-General of Hong Kong case supra** at 350c). The nature of such a legitimate expectation and the circumstances under which it may arise were discussed at length in the **Council of Civil Service** case **supra.** The following extracts from the speeches of Lord Fraser and Lord Roskill are of particular relevance.*

'But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the Courts will protect his expectation by judicial review as a matter of public law... Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue...'

'The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had "a reasonable expectation" of some occurrence or action preceding the decision complained of and that "reasonable expectation" was not in the event fulfilled.'"

What are the facts in this case?

Following the King's Proclamation of 1973 in which in Section 2 (e) King Sobhuza II spoke of his desire and that "of all my people" to achieve full freedom and independence "under a constitution created by ourselves for ourselves in complete liberty without outside pressures" and "to march forward progressively under our own constitution guaranteeing peace, order and good government and the happiness and welfare of all our people", his successor, King Mswati III set in motion the process to achieve that constitution.

The first step in that process was the establishment of the Constitutional Review Commission (CRC). I have already set out the terms of reference of the CRC and the fact that oral and written submissions and representation were called for from the Swazi people. The appellants contend, however as I understood their argument, that they had a legitimate expectation arising from the promise of the King in Section 26 (e) of the 1973 King's Proclamation of a constitution "created by ourselves for ourselves" that they would participate in the constitution making process. Two factors in my view militate against this. In the first place when Decree No. 2 of 1996 establishing the CRC was proclaimed, the King's

Proclamation of 1973 was still the supreme law of Swaziland. It was the "grundnorm"; the supreme law of the country. As far as two of the appellants are concerned viz Pudemo and NNLC, they were political parties which were banned by the 1973 King's Proclamation. They could, therefore, not have had any legitimate expectation that they would participate in the constitution-making process. And as far as all the appellants were concerned, the 1996 Decree in clear and unambiguous terms set out that any person desiring to make a submission or representations to the

CRC could not be represented by any one else or any body or represent such person in making his or her submissions. They could thus not have had any legitimate expectations that they would be heard by the Commission.

The appellants say the King exceeded his powers in regard to the latter aspect and that the Court should declare the CRC and its work invalid. I think not. Firstly the 1996 Decree and its legitimacy was until now never challenged and, secondly, it has submitted its report and is now *functus officio.*

The appellants also contend that the CRC did not properly carry out its mandate and, in particular, by failing to permit the appellants to make representations to it and to participate in its processes. I cannot agree.

A perusal of the CRC's report shows that not only did it invite representations and submissions from individuals, as it was enjoined to do, but that it (or delegated members of the CRC) in fact travelled the country and visited remote areas in order to facilitate those wishing to make oral or written representations to it, who might otherwise not have been able to travel to Mbabane to do so.

To assist it in its deliberations and in the compilation of its final report the CRC drew up a list of Constitutional Topics for the collection of submissions. I need not detail them here. Some 17 plus in number, they ranged from the Head of State, Citizenship, the Three Arms of Government and a Bill of Rights and Freedoms to matters regulated by Swazi Law and Custom, Political Parties and any other topic of the choice of the person making submissions. The CRC stated that "The Final Report is therefore a

summary of the submissions of the nation. The submissions are the views of the individual citizens who came or wrote to the Commission to make the same submissions".

Once again I need not deal with each and every topic canvassed by the CRC. However, selectively, one learns from its report, for example, that "almost the entire members of the nation……. recommend that the Monarchy continues as it is constituted currently……..there is a (small minority) which recommends that the powers of the Monarchy must be limited". Again, that the overwhelming majority "recommends that Parliament must work in pursuance of the Tinkhundla System of Government, whose objective is to develop the regions of the Kingdom equally and at the same pace".

The appellants have criticized the findings of the CRC as having but scant validity in that recommendations "by the nation" or "the overwhelming majority" do not include the views of their members due to their inability to participate in the process.

It is on this basis that they have claimed that this Court should review and set aside the findings of the CRC. They maintain that the CRC should have interpreted the 1996 Decree in such a manner as to have allowed the appellants, other representative bodies and organs of civil society in Swaziland to have made submissions to it and to have provided for meaningful participation by the broad general public of Swaziland. Having not done so, the appellants contend, the decisions of the CRC fall to be reviewed and set aside.

[58] I have already expressed the view that the wording of the 1996 Decree is clear and unambiguous and I can find

no basis for holding that the CRC, in not permitting what I might describe as group representation, misinterpreted its function or failed properly to perform it.

[59] Although the CRC was a body established by law under the 1996 Decree, its function was not a judicial, quasi - judicial or a legal or quasi - legal one. Its task was to solicit and collate the views of the public on the political issues which were to form the foundation of the draft constitution. As stated by **Ringera J in Njoya and Others v Attorney General and Others (2004)** Human Rights Law Reports 157:

> "*The generation of views by the people is not an act of constitution - making. It is their expression of opinion*".

This Court is possessed of the same powers as the High Court. Rule 53 of the High Court Rules lays down the procedure to be followed to have heard by the High Court.

> "*Proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi - judicial or administrative junctions*".

I have already held that the CRC was not performing judicial or quasi - judicial functions. It was also not performing administrative functions. No review would therefore lie in regard to the functions it did carry out.

In the landmark case in the South African Constitutional Court in which that Court was called upon to - and did - certify the

new South African Constitution of 1996, (see *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa,* 1996; 1996 (4) SA 774 (CC) the Court had this to say about its function in relation to the work done by the Constitutional Assembly (CA), the body which did the spadework in the preparations of the new text (NT) of the Constitution in South Africa - much like that of the CRC and CDC in this country.

> "*Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT...*
>
> *Nor do we have any power to comment upon the methodology adopted by the CA.... objections being confined to complaints that submissions to it were ignored by the CA, that its deliberations sometimes lacked transparency and the like. Even if such complaints were to be well-founded, which we are manifestly neither legally empowered nor practically able to determine, they would remain irrelevant to our task.*"

Those remarks are completely apposite in relation to the function this Court is now being asked to perform.

The appellants have also relied on a passage from the judgment of Innes CJ in **JOHANNESBURG CONSOLIDATED INVESTMENT CO. V JOHANNESBURG TOWN COUNCIL 1903 TS 111** where at 115 the following appears :-

"*But there is a second species of review analogous to the one with which I have dealt, but differing from it in certain well-defined respects. Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court.*"

That expression of the power of a court to review a decision of a public body has been applied in South Africa for over a century and has also been applied in the courts of this country but, as was held by the Court ***a quo*** (and I respectfully agree with it) there is no suggestion of any gross irregularity or clear illegality on the part of either the CRC or the CDC or that they disregarded any part of the Decrees creating them. No basis for any review, therefore, exists in this respect either.

It follows that I am of the view, and so hold, that the appellants have not shown any sound basis for this Court to disturb the findings and reports of either the CRC or CDC and that their arguments on these aspects must fail.

As to the appellants' claim that they must be furnished with all the oral and written submissions and other documents made or supplied to the CRC or CDC, the provisions of the 1996 and 2002 Decrees are once again clear and unambiguous. They are not entitled to them. This Court has no reason not to follow those provisions. The appellants' claims are dismissed.

Should this Court, despite its above findings, neverthess

strike down the 2005 Constitution of Swaziland in its entirety?

The appellants' challenge to its validity is as set out early in this judgment, founded upon their not having been permitted to participate in the constitution -making process. I have analysed their contentions in what has gone before in this judgment and have found, if I may summarise those findings, that the 1996 Decree in clear and specific terms disentitled them from so participating. I have found that neither of those Decrees was invalid or ***ultra vires.*** The Decrees afforded every one of the members of appellant organizations or bodies the complete right to make whatever submissions or representations they wanted to, whether oral or written, to the CRC in their individual capacities. They were only barred from representing others, or being represented by others, in making such submissions or representations. Two of the appellants were not able to represent their members' views because they were, in terms of the King's Proclamation of 1973, prohibited political parties. They, and the other appellants were not entitled, as organizations or bodies, to make submissions and representatives in those capacities, to the CRC and CDC by virtue of the provisions of the two Decrees in question.

[67] The very foundation of the appellant's challenge to the validity of the Constitution having crumbled to nought, what reason then is there why the Court should strike down the Constitution? Indeed, one must pose the question: should this Court do so?

[68] In the case of **Lucky Nhlanhla Bhembe and Ray Gwebu v Rex,** as yet unreported, a judgment of the Full Bench of this Court delivered on 22 November 2002, this Court surveyed the

constitutional history of this Kingdom from the Westminster-style Constitution of 1968 to the King's Proclamation of 1973. Following that Proclamation, which, as pointed out above, was the supreme law of Swaziland, it was by at least a tacit acceptance by the population, the new "grundnorm" of the Kingdom. 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 and it would appear that the government was not opposed to a democratic dispensation. A submission, therefore, that the King's Proclamation should be regarded as null and void and of no force and effect, could not, so this Court held, be sustained. The King's Proclamation had operated and been effective by then (2002) for some 29 years and this court held that:

> " *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 impractical but may well result in sinking this Kingdom into an abyss of disorder if not anarchy*".

[69] Similar considerations, to my mind, prevail today. It is common knowledge - and this Court can take cognizance of it through a perusal of the activities of the CRC and CDC - that the constitution-making process has been a long one. The people of Swaziland, despite the protestations of the appellants to the contrary, took part in that process. Views were expressed, submissions and representatives made and the reports collating and analyzing those views were put before the King. It is also common knowledge that the road to final acceptance of the Constitution was sometimes a somewhat rocky one. It has been said that a constitution embodies what is in substance an

agreement reached by various shades of public opinion as to how the sovereign power of the state is to be exercised in the future. It is usually evolutionary, not revolutionary. That is what occurred in South Africa. It is also what happened in this country.

[70] The Preamble to the present Constitution sums it all up very admirably. It repeats the desire of the peoples of Swaziland as a nation to achieve full freedom and independence under a constitution created "by ourselves for ourselves in complete liberty"; "the necessity to review the various constitutional documents, decrees, laws and customs and practices to promote good governance and the rule of law"; the need to "protect the fundamental rights and freedoms of all in our Kingdom...." And the desire to march forward "under our own constitution, guaranteeing peace, order and good government and the happiness and welfare of all our people". It then goes on to say that:

> "*Whereas the Constitution in draft form was circulated to the nation in both official languages and vetted by the people at Tinkhundla and Sibaya meetings.*
>
> *Now, Therefore, we the Ngwenyama in Council acting together with and on the approval of the Swazi Nation, meeting as the Swazi National Council…….hereby accept the following Constitution as the Supreme Law of the Land*".

[71] Once again, despite the protestations of the appellants to the contrary, nothing was been put before this Court to suggest that the factual situation set out in the Preamble is incorrect.

[72] Were this Court to strike down the Constitution, the 1973 King's Proclamation would again become the supreme law of the land. The people of Swaziland, as set out above, have accepted their new Constitution, created by themselves for themselves, as the supreme law of the land. As the Court said in the **Bhembe and Gwebu** cases supra, to attempt now to restore the 1973 King's Proclamation would not only fly in the face of the tremendous effort expended by all those charged with bringing the new Constitution into being, but of the wishes of the people themselves, and may well result in sinking this Kingdom into an abyss of disorder and perhaps even anarchy. This Court, therefore, declines to strike down the Constitution.

[73] For similar reasons there would, in the view of this Court, be scant purpose in suspending the Constitution for two years in order to bring about a national convention or similar body. The people have already spoken. To create the body suggested would be solely to pander to the whims of the appellants, which this Court declines to do.

[74] One aspect remains *viz* a consideration of the judgment of Maphalala J. The appellants have also urged this Court to decide the substantive matter which

Maphalala J did not decide *viz* should the appellants be allowed to participate - and participate fully - in the forthcoming national elections. This Court cannot now embark on that exercise. It is a court of appeal, not one of first instance. There is no judgment on appeal before it on the issue raised. Moreover, the Court was informed that there is pending before the High Court an application dealing with the very issue now raised. This Court cannot, therefore, entertain any appeal on it before the decision of the High Court has been pronounced.

[75] In the result the appeal fails and must be dismissed.

]76] There remains only the question of costs. Costs were ordered against the appellants in the court **a quo.** This Court can find no justification for interfering with or varying that order. In regard to the costs of appeal, however, the appellants' counsel, Mr. Maseko, has submitted that the issues raised by the appellants were of much moment to them and their members; were of interest to the public; and were complex and fraught with legal difficulty. Mr. Vilakati, who appeared with Mr. Dlamini for the Crown, in the best traditions of the Bar, very properly drew the Court's attention to the fact that in similar matters the Courts have expressed reluctance to make costs orders against the losing party. Having regard to this, and to the factors advanced by Mr. Maseko, the Court feels that it would not be unfair to either party if each party were to pay its own costs.

[77] The following order is therefore made:

1. The appeal is dismissed.
2. As to the costs of appeal, each party is ordered to pay its own costs.

P.H. TEBBUTT

Judge of Appeal

I agree

N.W. ZIETSMAN

Judge of Appeal

I agree

M.M. RAMODIBEDI

Judge of Appeal

I agree

J. G. FOXCROFT

Judge of Appeal

I agree

A.M. EBRAHIM

Judge of Appeal

Delivered in open court at Mbabane on this 23rd day of May 2008