

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE
26/08

CIV.APPEAL CASE NO:

In the matter between:

Swaziland Coalition of Concerned

Civic

Organizations

Trust

1stAppellant

Comfort Mduduzi Mabuza

(In his official capacity as a trustee of

The Swaziland Coalition of Concerned Civic

Organizations Trust) **Henry Tum Du Pont**
Appellant

2nd

(In his official capacity as a trustee of

The Swaziland Coalition of Concerned Civic

Organizations Trust) **Mandla Innocent Hlatshwayo**
Appellant

3rd

(In his official capacity as a trustee of

The Swaziland Coalition of Concerned Civic

Organizations Trust)

Jan Jabulani Sithole
Appellant

4th

(In his official capacity as a trustee of

The Swaziland Coalition of Concerned Civic
Organizations Trust

Musa Petros Dlamini)
Appellant

5th

(In his official capacity as a trustee of

The Swaziland Coalition of Concerned Civic
Organizations Trust)

Appellant

6th

AND

Elections and Boundaries Commission
Respondent

1st

Chief Gija Dlamini
Respondent

2nd

Mzwandile Fakudze
Respondent

3rd

Mkosingumenzi
4th Respondent

Dlamini

Gloria
5th Respondent

Mamba

**Ncumbi
6th Respondent**

Maziya

**Judicial
7th Respondent**

Service

Commission

Attorney General of the Kingdom of

**Swaziland
8th Respondent**

Government of the Kingdom of

**Swaziland
9th Respondent**

Minister of Justice and Constitutional

**Affairs
10th Respondent**

CORAM: FOXCROFT, JA

EBRAHIM, JA

MOORE, JA

DR. TWUM, JA

FARLAM, JA

FOR THE APPELLANT

K. MOTSA

FOR THE RESPONDENT

ATTORNEY GENERAL

JUDGMENT

DR. S. TWUM J.A.

[1] This is an appeal from the judgment of the High Court delivered in open court on 26th March 2009. It was a split decision. The majority decision was written by Judge M. Agyemang and concurred in by Maphalala, J (Principal Judge). Judge Q.M. Mabuza dissented and wrote a minority judgment.

The Trust

On or about 16th March 2003 the Swaziland Coalition of Concerned Civic Organisations Trust was founded by five (5) Swazi Organisations; namely:

1. The Federation of Swaziland Employers and Chamber of Commerce.
2. The Swaziland Council of Churches.
3. The Association of Swazi Business Community.
4. The Swaziland Federation of Trade Unions.
5. The Law Society of Swaziland.

[2] Their Deed of Trust was duly notarised by Lindiwe Khumalo-Matse, Notary Public. In the Deed of Trust the Founders expressed the desire to form a charitable trust upon the terms and conditions and for the purposes set out in the Deed of Trust.

[3] The first Trustees of the Trust were appointed by the Founders in the Deed of Trust. They were:

1. MANDLA INNOCENT HLATSHWAYO who was nominated in his capacity as the President of the Federation of Employers and Chamber of Commerce.
1. LOUIS NCAMISO NDLOVU also nominated in his capacity as a representative of the Swaziland Council of Churches.
1. HENRY TUM DU PONT, in his capacity as a director of the Association of Swazi Community.
1. JAN JABULANI SITHOLE, in his capacity as Secretary of the Swaziland Federation of Trade Unions.
1. PAUL MHLABA SHILUBANE, in his capacity as the President of the Law Society of Swaziland.

[4] The Deed of Trust was subsequently amended, and on or about the 8th July 2008 the amended Deed of Trust was duly notarised. It amended the original Deed of Trust thus:

PAUL MHLABA SHILUBANE

and LOUIS NCAMISO NDLOVU

resigned as Trustees and in their places

COMFORT MDUDUZI MABUZA

and MUSA PETROS DLAMINI, were appointed.

[5] Application to the High Court:

On or about the 23rd of July 2008, the Trust and the Trustees of the Trust, by Motion on Notice applied to the High Court, Mbabane, for the following reliefs:

“1. Declaring that the purported appointment of the

second, third, fourth, fifth, and sixth respondents as members of the Elections and Boundaries Commission (the first respondent) is unlawful and invalid.

1. Declaring that the Elections and Boundaries Commission is currently not constituted lawfully.

1. Declaring that the second, third, fourth, fifth and sixth respondents are not eligible for appointment as members of the Elections and Boundaries Commission.

1. Declaring that all actions and decisions purportedly taken by the first respondent as purportedly composed of the second, third, fourth, fifth and sixth respondents are unlawful and invalid purported appointments of such respondents.

1. Declaring that the first respondent and its members have no legal right or power to exclude or preclude persons or groups such as the Swaziland Coalition of Concerned Civic Organizations from providing voter education to member of the public and that the first respondent’s lawful function in relation to voter education is to facilitate the provision thereof and not to provide such voter education on an exclusive basis.

1. Ordering such respondents as may oppose this application to pay the costs hereof, jointly and severally, the one paying the other to be absolved including certified costs of Counsel as per High Court Rule 68 (2).

1. Granting further or alternative relief.”

[6] The applicants cited as Respondents:

1. The Elections and Boundaries Commission
2. Chief Gija Dlamini
3. Mzwandile Fakudze
4. Nkosingumenzi Dlamini
5. Gloria Mamba
6. Ncumbi Maziya
7. Judicial Service Commission
8. Attorney General
9. Government of the Kingdom of Swaziland
10. Minister of Justice and Constitutional Affairs

[7] The application in essence challenged the validity of the appointments of the second to sixth respondents as members of the first respondent (EBC) in terms of Legal Notice No. 32 of 2008. It also challenged the “attempt of the EBC to preclude other persons or entities, such as the Trust and its affiliates, from providing voter education.”

[8] No relief was sought against the seventh respondent. It was cited because of its possible interest in the issues raised in the proceedings.

[9] The eighth respondent, the Attorney General, was cited in his official capacity as such and on behalf of the Government of the Kingdom of Swaziland. By virtue of section 77 (5) (c) of the Constitution of Swaziland the Attorney General has the function *inter alia*, to represent the Government in courts or in any legal proceedings to which the Government is a party.

[10] The ninth respondent, the Government of the Kingdom of Swaziland, was cited by virtue of its possible interest in the reliefs sought in this matter.

[11] The tenth respondent is the Minister of Justice and Constitutional Affairs. It appears no relief was sought against him.

[12] The Founding Affidavit in support of the application was sworn to by the Second Applicant, Comfort Mduduzi Mabuza. Paragraph 18 of the said affidavit stated:

“Particularly because the Trust has as one of its primary objects and functions the provision of voter education and the promotion of and protection of democratic and other civil and human rights, the Trust has a direct and material interest in the lawfulness of the operations and actions of the EBC, particularly where this is prejudicing or has the potential to prejudice the voter education activities of the Trust and its affiliates. It therefore has an interest in the lawfulness of the appointment of the members of the EBC who undertake such operations and actions.”

[13] Other paragraphs elaborated the facts the applicants would rely on in support of their application as well as provisions of the Constitution they were going to cite. It also cited legal authorities, both local and foreign. In particular, the Founding Affidavit set out the reasons why the applicants considered the appointments of certain members of the EBC to be illegal or unlawful or invalid.

[14] In response the respondents gave Notice to Raise Points of Law as follows:

“1. That the (charitable) Trust is not valid-

1. For lack of separate or independent trustees;
2. For lack of identifiable beneficiary capable of enforcing performance;
3. For lack of a charitable object;
4. For vagueness.

1. That Applicants have no *locus standi* to bring this application in that:
 1. They lack the appropriate interest
 2. They have suffered no prejudice.

1. That the matter of the appointment of 1st to 6th Respondents is not justiciable-
 1. As a matter of public policy; or
 2. By operation of section 11 of the Constitution.

1. In addition to paragraph 2 above, that Applicants' prayer 5 raises no cause or controversy for determination.

1. That citation of 8th Respondent suffices. 9th and 10th Respondents should not have been cited or joined."

[15] The Deputy Chairman of EBC, Mzwandile R. Fakudze, swore to an affidavit which the respondents intended to use wherever relevant in support of the points of law raised.

[16] On behalf of the applicants, Comfort Mduduzi Mabuza swore to a Replying Affidavit.

[17] The record shows that during the hearing of the application, learned counsel for the applicants abandoned relief 4 i.e., "declaring that all actions and decisions purportedly taken by the first respondent as purportedly composed of the second, third, fourth, fifth and sixth respondents, are unlawful and invalid in consequences of the unlawful and invalid purported appointment of such respondents."

[18] In due course the court considered the legal points raised *in limine* by the respondents, as well as the reply thereto by learned counsel for the applicants and the majority of the court held that the application must fail in relation to prayers 1-3 aforesaid. The majority further held that prayer 5 which seeks a declaration that

the first respondent is not entitled to bar other entities from carrying out voter education must however succeed.

[19] The minority judgment, however, held that the applicants succeeded in respect of prayers 1, 2 and 3 as well as prayer 5 which the majority judgment had also upheld in favour of the applicants. Since prayer 4 had been abandoned by the applicants the minority judgment made no order in respect of it.

[20] In sum, the respondents succeeded in their objections *in limine* that the applicants lacked capacity to bring the action. The respondents therefore successfully resisted the applicants' prayers 1, 2 and 3 which failed and were dismissed.

[21] **The Appeal**

The applicants, being aggrieved and dissatisfied with the majority judgment appealed against it to this court. The Notice of Appeal was filed on 4th May 2009.

The parts of the majority judgment and its orders against which the appeal was noted are:

- The order dismissing prayers 1, 2 and 3 of the application;
- The order declining to make a costs order in favour of the appellants;
- The parts of the judgment which set out the reason for upholding the objection to the *locus standi* of the appellants (albeit on a point not raised by the respondents or by the court during oral argument), namely that the second to sixth appellants, while being citizens of the Kingdom of Swaziland, brought the application in their representative capacities as trustees of the first appellant and

because they had not brought the application in their personal capacities as citizens;

- The parts of the judgment which set out findings or observations in relation to the merits in respect of prayers 1 to 3, to the extent that such parts rejected the submissions made on behalf of the appellants.

[22] The grounds of appeal on which the appeal was noted are:

“1. The learned Judges who comprised of

The majority (Agyemang J, with Maphalala J

concurring) erred in finding that the second to sixth appellants, who are Swazi citizens, were not bringing the application in their capacity as citizens of the Kingdom, but merely in a representative capacity as trustees of the first appellant (which is a trust), and that on that ground they lacked *locus standi*.

1. The learned Judges in the majority erred in failing to find that, in terms of the relevant provisions of the Constitution of the Kingdom of Swaziland and the common law, a trust with a legitimate public purpose and interest in the upholding of the Constitution, such as the first appellant, is legally entitled to challenge what it contends to be violations of the Constitution (such as alleged in the present matter) and that it has the legal and constitutional entitlement to bring such proceedings in its own name and represented by its duly authorised trustees.
2. The learned Judges in the majority erred in failing to find that all the appellants had the necessary *locus standi*.

4. The learned judges in the majority erred in finding that the task of ensuring that the Constitution is upheld has

been given only to natural persons who qualify under the provisions on citizenship contained in Chapter IV of the Constitution, and that artificial persons such as a trust have no legal entitlement, even though their citizen trustees, to bring legal proceedings in order to ensure the vigilant upholding of the Constitution.

5. To the extent that the learned judges in the

majority made findings or observations in relation to the merits of the matter in respect of prayers 1, 2 and 3 adverse to the appellants, the learned Judges in the majority erred therein, and in failing to adopt and uphold the findings made in favour of the appellants on the merits in the minority judgment of Mabuza J.

6. The learned judges in the majority erred in

failing to order the respondents to pay the costs of the application.”

[23] The quintessential issue for determination in this appeal is whether the majority judgment in the court *a quo* erred by holding that section 2 (2) of the Constitution restricts the right to challenge, uphold and defend the Constitution, to the King and citizens of this Kingdom. Put differently, are the appellants right in their view that the majority judgment erred by upholding the respondents’ objection *in limine* that the appellants, suing as Trustees, lacked capacity to mount the proceedings in so far as they sued not in their personal capacities as citizens of the Kingdom, but as Trustees of the Trust.

[24] It is common cause that the upholding of the objection *in limine* resulted in the dismissal of the appellants’ reliefs 1, 2 and 3 by the

majority of the court *a quo*. The appellants' other issue with the majority is that the respondents gave three reasons in support of their objection *in limine* to their capacity, all of which were rejected by the majority judgment. Nonetheless, the objection itself was upheld. They pointed out that, first the respondents argued that the Trust itself, not being a legal persona, could not sue and be sued in its name. That much the appellants appeared to have conceded. Next, they pointed out that the respondents argued that the Trust was illegal or unenforceable because its objects were for political purposes or that those objects were vague and uncertain. This was also dismissed by the majority, holding that the objects or purposes were not vague or uncertain, nor were they political in nature. The third reason given by the respondents, so the appellants argued, was that the trustees themselves lacked capacity because they did not demonstrate that they had suffered any injury as a result of the appointment of the second to sixth respondents, thereby showing that they had a direct and substantial interest in the order they sought. This reason was also rejected by the majority. Rather, the appellants submitted that the majority judgment relied on "the matter of capacity canvassed by the applicants themselves in their arguments." It was further argued by the appellants that the finding of the majority based on the purported citizenship requirement in section 2 (2) of the Constitution had not been pleaded by the respondents. Consequently they had no opportunity to deal with such a challenge.

[25] In my view, the majority were right in rejecting the Attorney General's submission that the Trustees lacked capacity because the purposes of the Trust were illegal or unenforceable or that they were political in nature. This submission was due to a lack of appreciation of the issues that were joined between the appellants and the respondents, and this was caused essentially by the Attorney-General's problems with the law on charitable trusts. I

believe it was as a result of that fundamental problem that the Attorney-General “pleaded” in paragraph 10 of the Respondents’ Heads of Argument as follows:

“Unfortunately both opinions of the court a quo leave one who is aware of the legal morass in this area (in this country) with many unanswered questions. Respondents feel that whatever may be the shortcomings in these proceedings on appeal, the opportunity to clarify the law relating to charities should not be lost by default.”

[26] The law of charity in many commonwealth countries takes its origin from the definition of a charity by **Lord McNaughten** in the English case of **Commissioner of Income Tax v. Pemsel** (1891) A.C. 531 (H.L.). He defined “charity” in its legal sense as comprising four principal divisions:

1. Trusts for the relief of poverty;
2. Trusts for the advancement of education;
3. Trusts for the advancement of religion;
4. Trusts for other purposes beneficial to the community not falling under any of the preceding heads.

Generally, whether or not a trust is valid or enforceable it must satisfy the three certainties test: i.e., of words subject-matter and objects. It is a matter of private law. Indeed, it is a conveyancing problem. Except in the few cases where the trust’s objects or purposes are illegal or subversive and so the trust is banned as being contrary to public policy or is in contravention of some provision in the Criminal Law, once the three certainties are present the trust will be valid and enforceable. In *casu*, it is clear that this is not what the Attorney-General had in mind when he submitted that the purposes of the Trust were vague and uncertain. Admittedly in the case of the **Bonar Law Memorial Trust**, 49 L.T.R. 220 the

English High Court indeed held that the trust was not one for charitable purposes only and that on the evidence, the main purpose of that Trust was for the advancement of the fortunes of a political party by means of an educational system. But that dispute was a public law issue as explained below.

[27] It must be emphasized that in all these cases where the court had to deal with the objects or purposes of a charitable trust the tussle was between the Trustees and the Income Tax Authorities. Under many national laws, charities properly constituted, may obtain and claim exemptions from payment of income tax. This is a concession. The purpose of offering certain tax benefits to charitable organisations is to promote activities which are seen as being of special benefit to the community or advancing a common good. Two main advantages are obtained by achieving status as a registered charity under the Income Tax Acts. The first is to provide receipts to donors, who, if they are individuals are entitled to claim a tax credit for their trust gifts, and if corporations, deductions from their taxable income for all charitable gifts. Registered charities pay no tax on their income. Hence, the attraction of status as a registered charity, is obvious. The ability of a charitable organization to carry out activities in pursuit of its goals often depends on its ability to attract donations from the public. Hence the decision to offer tax benefits to prospective donors can be a major determinant of the success of the organization.

[28] In *casu*, the Attorney General argued at some length that the Trust had political purposes and so it was illegal and unenforceable. With all deference to him, that argument was flawed. In the first place, the issue at stake was not about the enforceability of the Trust. It was rather whether the Trust had locus to enforce certain provisions of the Constitution of the Kingdom of Swaziland. Secondly, as I have demonstrated above, the maintenance of a

charitable status is beneficial in terms of maximizing its funds for its objects or purposes. There was no evidence that the Trust enjoyed any tax exemption at all, but considering the paltry sum of One Thousand Emalangi (E1, 000.00) Founding Donation, settled upon the Trustees by the Founders the need for exemption might soon have to be addressed by the Trustees. That is no index of unlawfulness.

[29] The drawback to exemption is, of course, that generally as the activities of registered charities are, in effect, subsidized out of the public purse, in that donations are deductible for income tax purposes, Parliament has a duty to provide a legal framework to regulate charities and their activities. That legal framework is to ensure that charities use funds provided them for charitable purposes and pursue those purposes in an efficient manner. This monitoring is delegated to the Income Tax Authorities. It remains for me to mention that it is as a result of this monitoring that purposes aimed at promoting or advocating a change in the law or in its administration, or a change in public policy are not regarded as charitable. The underlying reason for refusing to treat a political object as charitable was articulated by **Lord Parker of Waddington** in **Bowman v. Secular Society** (1917) AC 406 (HL) at 442 thus:

“...A trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit...”

[30] In *casu*, therefore, when the Attorney General submitted that the Trust was illegal, there was no basis for it. Of course, if a

situation arises where a proscribed organization, (e.g. a banned society), masquerades as a trust, espousing seditious or other similar political ideologies then it would be illegal because it was banned, and not because it was a trust set up for political purposes. Of course, a banned trust cannot even invoke the jurisdiction of the courts. **Swaziland Federation of Trade Unions and Organizations v. the Chairman of the Constitutional Review Commission and organizations** Civil case No. 3367/2004.

[31] **Appellants' capacity**

The Pleadings.

Paragraph 8.15 of the Deed of Trust empowered the Trustees to “engage in any legal proceedings on behalf of or against the Trust in the name of the Trust.” Further, the Trustees were themselves, individually nominees of the constituent founders of the Trust. The Founding Affidavit of Comfort Mduduzi Mabuza, clearly states in paragraph 3.5 as follows:

“I have been duly authorised to bring the present application on behalf of all the applicants, as appears from a resolution adopted by the Trustees and dated 17th July 2008 attached as Annexure “B1” thereto as well as confirmatory affidavits deposed to by the third to seventh applicants (Annexures “B2” to “B6” hereto).”

[32] In paragraph 4 of the Founding Affidavit the appellants explained that the “Trustees bring these proceedings on behalf of the Trust and in their official capacities as Trustees.” The Resolution, Annexure B1 stated that “we the undersigned, acting in our capacities as Trustees of the Swaziland Coalition of Concerned Civic Organizations Trust and having been so authorised to do, resolve to launch motion proceedings in the High Court against the Elections

and Boundary Commission, the Commissioners, the Judicial Service Commission and other parties.” Finally, Rule 17 (4) of the High Court Rules requires that every summons shall set forth the full names of the Plaintiff and where he sues in a representative capacity, such capacity. None of the Trustees alleged anywhere in their affidavits or anywhere else that they were suing in their personal capacities as citizens of Swaziland.

I have always understood the law to be that a party is bound by his/her pleadings and cannot at the hearing set up a case completely different from his/her pleadings.

See per (i) **Farwell J.** in **Young v. Star Omnibus Co. Ltd** (1902) 86 L.T. 41 at 43. (ii) **Dam v. Addo** (1962) 2 Ghana Law Reports 200 (S.C.)

[33] **The appellants' complaints**

The appellants complained that in dismissing their claim for reliefs 1, 2 and 3, the majority judgment had relied on their own pleadings particularly paragraph 18 of their Founding Affidavit and not on the reasons given by the Respondents in support of their objection *in limine*. At first blush there is some merit in that complaint, but it cannot be seriously suggested by the appellants that if their paragraph 18 aforesaid established their locus, the majority judgment could have ignored it without any complaint from them. It must be emphasized that every plaintiff has a duty in any court action to plead sufficient facts which clearly establish his/her locus. I believe, it was in recognition of this that appellants anchored their capacity on “a direct and material interest in the lawfulness of the operations and actions of the EBC, particularly where this is prejudicing or has the potential to prejudice the voter education activities of the Trust and its affiliates. It therefore has an interest in

the lawfulness of the appointment of the members of the EBC who undertake such operations.”

[34] The appellants also stated in paragraph 17 of the Founding Affidavit that their “application in essence challenges the validity of the purported appointment of the second to sixth respondents as members of the EBC in terms of Legal Notice 32 of 2008 (Annexure C referred to above.) It also challenges the attempt of the EBC to preclude other persons or entities, such as the Trust and its affiliates, from providing voter education.” Now, Section 2 (2) of the Constitution of the Kingdom of Swaziland provides that “the King and iNgwenyama and all citizens of Swaziland have the right and duty at all times to uphold and defend this Constitution.” The majority judgment held that: the Trust itself, not being a legal person has no *locus standi* and the suit brought in its name must fail for lack of legal personality to maintain same. I agree with that holding.

[35] The more contentious issue in the appeal between the appellants and the respondents is whether or not the suit apparently brought by the Trustees, qua trustees, is maintainable? After giving the matter my most anxious consideration, I am convinced that the majority judgment on that issue was correct.

[36] The majority judgment held that the only persons with locus to uphold and defend the Constitution are His Majesty the King and all citizens of the Kingdom of Swaziland. That comes from a fair reading of section 2 (2) of the Constitution. The majority judgment distinguished those cases where a party complained of infractions of his fundamental rights and freedoms, for which special provision had been made in section 35 (1). The majority pointed out that in contradistinction to section 2 (2), section 35 (1) says any person is entitled to sue to protect these freedoms and rights.

[37] It was submitted to us by counsel for the appellants that in constitutional adjudication, access to the courts should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. (See para 31 of p.16- AHA). With all deference to counsel for the appellants this argument does not avail the appellants. The majority judgment was not based on any rule that only those with vested interests would be afforded standing in constitutional challenges. The majority judgment indeed accepted that where a party sued to enforce his/her fundamental rights and freedoms, flexibility and a generous approach to standing was desirable. But the present suit was of a different nature. It dealt with the right to uphold and defend the Constitution. As this Court pointed out in the consolidated cases of **Khanyakwezwe Alpheus Mhlanga and One other and The Commissioner of Police and 3 others**, etc, case No. 12/2008 and **Swaziland Correctional Services Union and The Commissioner of Correctional Services and 5 others** (unreported) “What is important is the wording of our Constitution. A proper interpretation must be given to the language as it appears in that document. A broad, generous and liberal interpretation must be given to the sections pronouncing human rights and freedoms, and any section that limits such rights and freedoms must be given a strict and narrow interpretation. What the courts cannot do is to re-write the Constitution.” Section 2 (2) of the Constitution specifically uses the word “CITIZEN”. There can be no ambiguity. The Court referred to the case of **S. v. Zuma & Others** 1995 (2) S.A., 642 (CC) where **Kentridge A.J.A.** delivering the judgment of the South African Constitutional Court stated as follows: at page 653 A - B:

“We must heed **Lord Wilberforce’s** reminder that even a constitution is a legal document, the language of which must be respected. If the language used by the lawgiver is ignored

in favour of a general resort to “values” the result is not interpretation but divination.”

[38] The history of the making of the 2005 Constitution of the Kingdom of Swaziland is succinctly chronicled in the judgment of **Tebbutt J.A.** in the Appeal case No. 35/2007 - **JAN SITHOLE N.O. (in his capacity as a Trustee of the National Constitutional Assembly Trust and 7 others** and **THE PRIME MINISTER and 6 others** in which the appellants in the appeal sought among others, an order to strike down and declare null and void the entire Constitution of the Kingdom of Swaziland. Prior to the said Constitution, the supreme law of the Kingdom was then the King’s Proclamation of 1973. This Proclamation repealed the previous Constitution which had commenced when Swaziland achieved its independence from Britain on 6th September, 1968. The processes for promulgating the present Constitution were arduous, painstaking and sometime acrimonious. The preamble to the King’s Proclamation of 1973 stated that he had come to certain conclusions. These included the fact that the 1968 Constitution had failed to provide machinery for good government and for the maintenance of peace and order 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....”

[39] The King’s Proclamation envisioned, (after a long constitutional struggle), the achievement of 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 progressively under our own constitution guaranteeing peace, order and good government and the happiness and welfare of all our people”. The various steps set in train to achieve the present Constitution may be read in that judgment referred to above.

[40] It is in the light of the Kingdom's experiences that the people of this nation enacted for themselves the new Constitution.

[41] In my opinion it was not due to any idle or fanciful boast that the defence and protection of that nascent Constitution was bestowed on the King and citizens of this Kingdom. Of course, the King is a citizen – the first citizen. So the citizens of this nation have its destiny in their hands. The defence of the Constitution may mean more than mere litigation. It may mean, for example, putting men and women in arms to repel aggression from outside. Those with the greatest interest to do this are the citizens. It is not enough for people to press for fundamental rights and freedoms. There is a concomitant duty owed to the nation to defend and protect it.

[42] I am persuaded that the choices made in the Constitution manifest the right balance; fundamental rights and freedoms for all present in the nation, but its defence and protection, primarily rest with its citizens.

[43] Citizenship embodies a bundle of rights and freedoms which other persons cannot have. For example, a citizen may not be deported from the Kingdom. A citizen may have the right to own a national passport. He may be able to live in any part of the Kingdom and he has a right to register and vote in elections. Citizenship must therefore belong to natural beings; not artificial entities like companies and corporations and Trusts. Citizens experience emotions and evince loyalty.

[44] During the hearing of the appeal counsel for the appellants bemoaned the fact that by interpreting section 2 (2) in the way the majority judgment did, it was restricting standing to go to court to enforce the Constitution to human beings to the exclusion of artificial persons like companies. I am persuaded (from what I have said above) that the Constitution makes the right choice. Non-

citizens will come to no harm. Their rights and freedoms are protected adequately by section 35 (1) of the Constitution. But the indelible line of demarcation is that the nation belongs to its citizens. Section 2 (2) is addressed to them. When a Constitution has been so meticulously fashioned and political power in the nation has been carefully shared among various organs and institutions of state, it is imperative that the language used in the Constitution should be given effect to. In my opinion the language of section 2 (2) clearly articulates the view that only the King and all citizens of Swaziland have the right and duty to defend and protect the Constitution. In my opinion this arrangement accords with the vision of the King when he made his proclamation of 1973.

[45] It was submitted to us that the appellants are all citizens of Swaziland and so should be able to sue to challenge the Executive Branch of Government, even if they sued in their official capacities as Trustees of the Swaziland Coalition of Concerned Civic Organizations Trust. The short answer is that any citizen who invokes the jurisdiction of this court “wearing two hats” as Counsel for the appellants put it, to defend and protect the Constitution, has not shown sufficient commitment. When that need arises all concerned citizens must stand up and be counted.

I agree entirely with the majority judgment of the court *a quo* that the appellants in so far as their application to that court was in their capacities as Trustees who were in fact representing a non-juristic association of concerned groups, they were not acting as citizens as required by sections 2 (2) of the Constitution. If indeed they were minded to sue as citizens but chose to wear the hat of Trustees in the first instance then they have themselves to blame for their disappointment!

In the result I will dismiss the appeal with costs to the respondents.

Delivered in open court on 28th May 2010.

DR. SETH TWUM

JUSTICE OF APPEAL

I agree: J.G. FOXCROFT

JUSTICE OF APPEAL

I agree: A.M. EBRAHIM

JUSTICE OF APPEAL

I agree: S.A. MOORE

JUSTICE OF APPEAL

I agree: I.G. FARLAM

JUSTICE OF APPEAL