

THE HIGH COURT OF SWAZILAND

CIV. TR. 1822/01

LAWYERS FOR HUMAN RIGHTS (SWD)

1<sup>st</sup> Applicant

HUMAN RIGHTS ASSOCIATION OF SWAZILAND

2<sup>nd</sup> Applicant

And

THE ATTORNEY-GENERAL

1<sup>st</sup> Respondent

THE MINISTER FOR JUSTICE AND

CONSTITUTIONAL AFFAIRS

2<sup>nd</sup> Respondent

CORAM: MAPHALALA J.; MASUKU J.; ANNANDALE J.

For the Applicants: Mr M. Dlamini For the Respondents: Mr.

L.R. Mamba

JUDGEMENT

30/08/01

Masuku J.

This is an application brought under a Certificate of Urgency for relief in the following terms:

A

1. Waiving the time limits and the forms of service prescribed by the Rules of Court and hearing the matter urgently.

2. Declaring that:-

(a) the retiring (sic) age of Judges of the High Court of Swaziland is seventy-five (75) years, and

(b) those judges who are now over the age of 65 remain in office until they reach the age of 75 years.

3. Costs of this application.

The Founding Affidavit is deposed to by one Mr. Manene Thwala on behalf of the 1<sup>st</sup> Applicant, whilst Dr. Joshua B. Mzizi filed a Supporting affidavit on behalf of the 2<sup>nd</sup> Respondent. As will appear from the Notice of Motion above, the Applicants seek a declaratory Order regarding the retirement age for Judges of the High Court. It is apparent that the question to be determined relates to the retirement age of Judges, of which the Judges sitting to hear this matter form part, although the latter i.e. the members forming the Full Bench panel have not reached the retiring age, whether 65 or 75. We secured the agreement of Counsel on both sides that we could preside over this matter, notwithstanding any interest that we may perceivably have in the lis before Court.

Facts giving rise to application

The facts which give rise to these proceedings may briefly be summarised as follows: In 1968, the Independence Constitution (hereinafter referred to as "the Constitution") was promulgated and it thus became the Grundnorm of Swaziland.

Section 99 (1) of the

Constitution provided inter alia, regarding the retirement of Judges:

A

"Subject to the provisions of this Chapter, a person holding

the office of a judge of the High Court shall vacate that office on attaining the retiring age. "

Section 99(5), on the other hand, provides as follows:

"For the purposes of subsection (1), the retiring judge shall be the age of sixty-two

years or such other age as may be prescribed Act of Parliament:

Provided that-

- (a) a provision of an Act of Parliament, to the extent that it alters the age at which judges shall vacate their offices, shall not have the effect in relation to a judge after his appointment unless he consents to its having effect;
- (b) the King, acting in accordance with the advice of the Judicial Service Commission, may permit a judge who attains the age prescribed by or under this subsection to continue in office for such fixed period as may be agreed between the King and that judge, and in relation to that person the provisions of this Constitution shall have effect as if he would attain the retiring age on the expiration of the fixed term so agreed. "

Parliament, in exercise of the powers conferred upon it by the provisions of Section 99) of the Constitution stipulated the retiring age to be sixty-five. This was contained in Act No. 36 of 1970, which was an amendment of the provisions of Section 3 of the High Court Act, No. 20 1954. The heading of this Section is 'Retiring age of Judges". By Act No.9 of 1973, promulgated on the 24<sup>th</sup> January 1973, Parliament again amended Section of The High Court Act by increasing the retiring age from sixty-five to seventy-five.

On the 12<sup>th</sup> April 1973, the King issued the Proclamation to the Nation (hereinafter referred to "as the Proclamation") and in which he assumed all executive, legislative and judicial powers. This Proclamation repealed the Constitution with certain savings.

Among the provisions saved was Chapter IX of the Constitution, which made provisions relating to the Judicature and to which the Sections cited above, regarding the retiring age. If Judges are contained. On the 2<sup>nd</sup> June, 2001, the King issued Decree No. 2 of 2001 And Section 14, headed " Retirement of judges", provides as follows:

"Section 99 of the Constitution as reinstated by King's Proclamation to the Nation is amended in sub-section (5) by replacing the words 'sixty two ' with the words 'sixty five' ".

From the provisions of Decree No.2, it is clear that there is

a conflict in the retiring age as described by Parliament, namely seventy-five and that provided for in Decree No. 2, which is sixty-five. It is in this connection that the Applicants herein sought a declaratory Order, in terms of which the Court would pronounce on the correct retiring age for purposes of certainty. It is worth mentioning that Decree No.2 was short lived as it was repealed some thirty-two days later by Decree No. 3 of 2001. Amongst the Sections repealed by Decree No. 3 was Section 14 cited immediately above. The question for the Court to determine therefor was which of the two ages above is the retiring age for Judges of the High Court.

### Applicants' Case

In their papers, the Applicants allege that they are associations which in terms of the provisions of their respective constitutions assist in the maintenance of the highest Judicial standards by ensuring that there is an independent Judiciary and further promote human rights, including the question of security of tenure and the independence of Judges. They contend in their papers that the age of retirement for High Court Judges is 75 in terms of the provisions of Act No. 9/1973. They further allege that the provisions of Decree No. 2 of 2001, cited above, which stated the retirement age to be 65, did not affect alter the position stipulated by Act No. 9/1973.

In support of the urgency alleged, the Applicants aver that the prevailing uncertainty regarding the retirement age is generally disruptive and not conducive to the proper functioning of the Court. They allege further that the Judges who have reached the age of 65 have a penumbra of doubt regarding their right to continue occupying their positions on the bench. It is further alleged that from newspaper reports, (copies of which are not annexed) the Respondents, who contend that the retirement age is 65, have evinced a clear intention to have the Judges who are 65 or above retired, or to arrange for having their stay on the Bench extended, presumably in terms of the provisions of Section 99 (5) (b) of the Constitution.

### Respondents' Case

The Respondents, who opposed the application, filed a Notice to raise points in limine, which because no affidavits were filed falls to be regarded as a Notice in terms of the provisions of Rule 6 (12) (c), i.e. a Notice to raise points of law only. The points of law raised by the Respondents are the following:

1. The Applicants do not have locus standi to claim the relief, which they seek.
2. The matter is not urgent.
3. There is no case for the citation and joinder of the First Respondent.

#### Arguments by Counsel

At the commencement of the matter, the Applicants' counsel advised the Court that he was withdrawing the application for relief under Prayer 2 (b) of the Notice of Motion.

This is a wise and laudable step. I say this because it is doubtful whether this Court would have had the power to grant the relief in the terms sought, and if so, whether the Court would have been in position to enforce that Order, if the same would for some reason not be adhered to. It is important for Counsel to always keep the doctrine of effectiveness in the forefront of their minds when drafting papers on the basis of which the Court will be moved to grant relief.

Mr. Mamba for the Respondents argued that the Applicants do not have the *loci standi* in *judicio* for the following reasons:

- (a) each one of the Applicants does not qualify to be regarded as a *universitas* and therefore, neither can sue or be sued in its own name, notwithstanding the provisions of Rule 14 of the Rules of Court. This, Mr. Mamba argued, was apparent from the Applicants' respective constitutions. Reference to the relevant provisions of the constitutions shall be made later in this judgement.
- (b) each one of the Applicants is not empowered by its constitution to institute proceedings of the nature that they have brought before Court i.e. they both acted *ultra vires* their constitutions in launching the application before Court.

It was further submitted on the Respondents' behalf that neither of the Applicants has a "direct and substantial" or "peculiar" interest in the relief sought and which interest could be prejudicially affected by any decision of the Court on the merits. Put differently, the Applicants cannot show on their papers or at all, that they can be inhibited in accomplishing the objects set out in their respective constitutions unless the Court grants the relief that they have prayed for. Mr. Mamba, in this connection, argued that the Applicants are busybodies in affairs that do not concern them and should for that reason be discouraged by the Court from this conduct by dismissing the application with costs on the punitive scale.

In support of the point relating to urgency, the Court drew to

Mr. Mamba's attention that in view of the fact that when the matter was to be heard for the very first time, the

Applicants mero motu applied for the matter to be postponed sine die and the Respondents did not attend Court, if they so wished, as required by the Notice of Motion.

The matter was then set down some two weeks later. In view of the foregoing, the Court was of the view that the matter had progressed beyond the stage where the Respondents would be allowed to raise the question of urgency as any difficulty that they may have had with filing the papers was ameliorated by the postponement of the matter sine die. It does however behove me to mention even at this stage that the application is fatally deficient regarding allegations in support of urgency, as required by the mandatory provisions of Rule 6 (25) (a) and (b).

In this regard, this Court has issued a plethora of instructive judgements including *Humphrey H. Henwood v Maloma Colliery and Another* Case No. 1623/94; *Ben M. Zwane v The Deputy Prime Minister and Another* Case No. 624/2000; *H.P. Enterprises (Pty) Limited v Nedbank Swaziland Limited*. Mr. Mamba then directed his attack on the question of urgency solely for purposes of deciding the question of costs. He argued that by their actions in bringing the matter to Court in the manner and form in which they did, the Applicants were guilty of abuse of the Court process, necessitating the Court to mark its disapproval of their conduct by mulcting them with punitive costs.

The last argument for the Respondents was that the Attorney-General had not been properly cited in the papers in that he had been cited in his capacity as the Legal Advisor both to the King and the Government. No legal Advisor can be cited in Court papers in such capacity, so the argument ran. On the merits, the Respondents argued that the Proclamation, in saving Chapter IX of the Constitution, did not take into account the amendments effected to the High Court Act and that for purposes of properly construing the question before Court, Section 99 (5) must be examined in its pure form i.e. before the amendments were effected to it by Parliament in 1970 and 1973, respectively. The Applicants argued otherwise both regarding the points in limine and on the merits.

I now find it apposite to consider the issues before Court and announcing thereon, commencing with the issue of locus standi. It is my view and that of the Court that should the Applicants fail in establishing their loci standi in judicio, then that will mark the end of the matter and will obviate the need to pronounce upon the other issues arising, including the merits

of the application.

### The Applicants' Loci standi in judicio

Huber, in his writings describes locus standi in judicio in the following language:

"In the case of both plaintiff and defendant it is necessary that they should have a locus standi in judicio, that is, a capacity appear before the law, such as is not possessed by all those who are not their own men, like children under seven years, and insane persons, who cannot appear anyway, even when supported by their tutors. "

Andrew Beck, in his article entitled, "Locus standi in judicio or Ibi Ius Ibi Redium ", 1983 Vol. 100, SALJ, page 278, argues that the concept of locus standi in judicio can be viewed in two different senses and it is in both senses that the concept will be considered in this matter, as will appear below.

(a) Does each of the Applicants qualify to be regarded as a universitas with power to sue and to be sued in its own name?

In MORRISON V STANDARD BUILDING SOCIETY 1932 AD 229 at 238, Wessels J.A. propounded the applicable principles in the following languages:-

"In order to determine whether an association of individuals is a corporate body which can sue in its own name, the Court has to consider the nature and objects of the association as well as its constitution and if these show that it possesses the characteristics of a corporation or a universitas then it can sue in its own name.... A building society is not a partnership in any shape or form. One member of a building society is not the agent of the others and his acts cannot bind his fellow members. Nor can a member of such a society be held liable for the debts of the society. The society exists as such quite apart from the individuals who compose it, for these may change from day to day. It has perpetual succession and it is capable of owning property apart from its members. "

In order to come to a conclusion on whether the Applicants have loci standi in this matter, it is clear from the authority cited immediately above that we have to have regard to the constitutions of the Applicants.

In MOLETLEGI AND ANOTHER v PRESIDENT OF BOPHUTHATSWANA AND OTHERS 1989 (3) SA 119 B, the principles governing this issue were adumbrated with absolute clarity by Friedman J. as the following:-

- (a) For a voluntary association of persons to have locus standi in judicio, it must be a corporate body of the nature of a universitas personarum.
  - (b) That the two chief characteristics of a universitas upon which its locus standi depends are:-
    - (i) perpetual succession in the sense that the organization has a continued existence or identity despite changes in its membership.
    - (ii) the capacity of acquiring rights and incurring obligations independently of its members, most importantly, the capacity to own property i.e. landed property.
- © That in order to determine whether a voluntary association is a universitas it is necessary to look in the first instance at its constitution.
- d) If it is not possible to so determine by reference to the constitution either from its express terms or by way of implication, regard must be had to the nature of and objects of the association.

I will, in view of the foregoing instructive decisions refer to the Applicants' constitutions in order to determine whether they have locus standi. I must however state that from a cursory glance at the Applicants' constitutions, it is abundantly clear that both possess perpetual succession and Mr Mamba did not argue otherwise. For that reason, no more needs be said regarding perpetual succession. It is clear that both Applicants have a continued existence in that the constitutions make provision for election of office bearers.

Regarding the issue of acquiring landed property apart from its members, I propose to deal with the 1<sup>st</sup> Applicant first. Article 2 of the 1<sup>st</sup> Applicant's constitution provides as follows:-

" Lawyers for Human Rights (Swaziland) (LHR(S)) shall be a juristic person having perpetual succession and being capable of acquiring and disposing of rights (including the right to movable and immovable property) and to borrow money and to encumber movable and immovable property for the purpose of fulfilling the aims and objectives of LHR (S), of incurring obligations and of entering into legal transactions and of suing and being sued in its own name. "

From the provisions of this article, it is clear that the Association has capacity to acquire movable and immovable property. The question which begs an answer but which answer is not provided in the above clause is this: can LHR (S) acquire and dispose rights in relation to both movable and immovable property separately from its members?

Article 9.2 of the constitution appears to provide the answer. It provides as follows:-

"Trustees shall have vested in them all funds and real personal estate whatsoever belonging to LHR (S) for the use and benefit of LHR (S). Upon the death, or removal of such trustee from office, the funds and real personal estate so vested in him shall vest in the succeeding trustee without any conveyance or assignment being necessary. "

'real estate', which occurs in the above article has been defined by William C Burton. 'Legal Thesaurus', Regular Edition, 1980, in the following language;-

" acreage, lock, chattels real, domain, estate fee, freehold, ground, hereditament, land, landed estate, lot, parcel, plot, property, real property, realty. "

From the foregoing definition, it is clear that real estate relates to landed property. From the provisions of clause 9.2, it is therefore clear that funds and landed property of LHR(S) vest, not in LHR(S) as an association, but in its trustees, who upon death or removal from office relinquish that property so vested in them, not to LHR(S) but to the succeeding trustees. In this sense, it is clear that LHR(S) is not capable of acquiring and alienating property independently of its members but it is the trustees that are capable of doing so.

Article 12.1.2, deals with dissolution of LHR(S) and provides the following:-

"If a resolution is duly passed, or if for any reason the organization ceases to exist, its assets, after payment of its debts, shall devolve upon such charitable, or educational or ecclesiastical institutions of a public character in Swaziland as themselves have similar aims, or if there is no such institution then to an institution whose aims are not inconsistent with those of the organization, and which are exempt from donation tax, as the NEC may decide, and if no such decision has been made then such body or bodies falling within the foregoing provisions as may be agreed to by a majority of the members of the Law Society of Swaziland. "

Whilst conceding the unequivocal effects of article 9.2, M Dlamini argued that article 12.1.2 suggest that as the property does not belong to the Trustees as at dissolution, the said property can be distributed to other like organizations. I do not agree with the interpretation contended for by Mr Dlamini. The wording of article 9.2 is clear and unambiguous, namely; it vests funds and property of LHR (S) in the trust s. Article



12.1.2 is a generic one dealing with dissolution and in consonance with the maxim "generalia specialibus non derogant", the provisions of article 9.2 supersede those of article 12.1.2 regarding the identity of the person in whom the property vests during the life of LHR (S). At its dissolution, it may be that the trustees, who would then have no successors, would be called upon to relinquish the property and have the same assigned to the body or association to whom by resolution, the property would be appointed to devolve. I am constrained, in view of the above conclusion to hold that the Applicant does not qualify to be regarded as a universitas personarum. It accordingly does not have locus standi in that sense.

Turning to the 2<sup>nd</sup> Applicant's constitution, it makes no clear provision for acquisition and alienation of property. No provision is made regarding the identity of the person in whom such property shall vest. It cannot be said in view of such glaring deficiencies in its constitution that the 2<sup>nd</sup> Applicant is capable of acquiring and disposing of its property independently of the members who form it. All that provision is made for relating to property acquired is in article XIX (3) which records that the income and property of HUMARAS, wherever derived shall be applied solely towards the promotion of the aims and objectives of the association. This does not address the issue and I am again constrained to hold that the 2<sup>nd</sup> Applicant fails to meet the rigours of universitas personarum recorded above. I find for this reason that it does not have locus standi in judicio.

In BANTU CALLIES FOOTBALL CLUB v MOTLHUMME AND OTHERS 1978 (4) SA 486 (T) at 489 C, King J. stated as follows:-  
"The rights and powers of a voluntary association are limited by the terms of its charter or constitution. The constitution defines whether an association is or is not a universitas and confines its activities to what is expressly or impliedly contained therein. "

Having considered relevant provisions of the respective constitutions of the Applicants, I come to the view that both Applicants do not qualify to be regarded as universitas personarum.

Should I have erred in my conclusions above appertaining to HUMARAS, I am constrained by the dictum in the MOLETLEGI case (supra) to have regard to the nature and objects of the association as enshrined in its constitution. Article IV provides the aims and objectives of HUMARAS as follows:-  
"(1) to promote and protect human rights through out Swaziland and support similar efforts elsewhere;  
(2) to walk alongside and co-operate with those organizations

which seek to bring about an end to racial segregation and other forms of discrimination, be it in Swaziland or elsewhere.

- (3) to give attention to the protection and welfare of under-privileged members of society such as women, children, the handicapped etc.
- (4) to promote public awareness of human rights through research; documentation; dissemination of information through the media, workshop, seminar, newsletter etc.
- (5) to co-operate and affiliate with national, regional, and international organizations with similar objectives."

A constitution spells out the powers of any association. Any action falling outside the powers set out in the constitution falls to be declared ultra vires. From HUMARAS' aims and objectives, it is clear to my mind that the authors of the constitution never envisaged HUMARAS moving on application of this nature, no matter how well-meaning and noble the motivation was. For this reason, it does appear to me that in moving this application, HUMARAS acted ultra vires its constitution. I may as well add that this observation applies within equal force to LHR(S), as its constitution also does not give it power to move proceedings of the nature presently being adjudicated upon.

Reverting to HUMARAS, there is a further difficulty in that it is not apparent that the moving of this application was sanctioned by the Executive Committee. I say this because no resolution has been annexed by the Deponent and whereby he was authorized to take the action that he did. I find, in view of the foregoing, that HUMARAS acted ultra vires its constitution in moving this application and its application falls to be dismissed therefor.

(b) Do the Applicants have a direct legal interest in the relief sought?

The general rule is that a person who claims relief from a Court in respect of any matter must establish that he has direct interest in the matter in order to acquire the necessary locus standi to seek relief. This statement of law has received comment generously as will appear below.

In DALRYMPLE AND OTHERS v COLONIAL TREASURER 1910 TS 372 at 390, Wessels J. stated thus: -

"The person who sues must have an interest in the subject-matter of the suit and that interest must be a direct interest... Courts of law ...are not constituted for the discussion of academic questions and they require the litigant to have not only an interest, but also an interest that is

not too remote. "

With the disappearance of the actio popularis, it is now incumbent on an applicant to show some direct interest in the subject matter of the litigation or some special grievance to himself.

In GELDENHUYS AND NEETHLING v BEUTHIN 1918 AD 426, Innes C.J. stated as follows

"After all, courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. "

A 'direct and substantial interest' was defined by Corbett C.J. with absolute clarity and devastating candour in UNITED WATCH & DIAMOND CO. (PTY) LTD AND OTHERS vs DISA HOTELS 1972 (4) (SA) quoting with approval the view expressed in HENRI VILJOEN (PTY) LTD v AWERBUCH BROS 1953(2) SA 151 (O). It was defined as: -

"...An interest in the right which is the subject matter of the litigation and...not merely a financial interest which is only an indirect interest in such litigation... This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions ...and it is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgement of the Court. "

In similar vein, Wessels C.J. stated as follows in ROODEPOORT - MARAISBURG TOWN COUNCIL v EASTERN PROPERTIES (PROP) LTD 1933 AD 87 at 101: -

" ...any person can bring an action to vindicate a right which he possesses... whatever that right may be and whether he suffers special damage or not, provided that he can show that he has a direct interest in the matter not merely the interest which all citizens have. "

The raison d'être for this special test was expressed in the following language by Lord Scarman in INLAND REVENUE COMMISSIONERS v NATIONAL FEDERATION OF SELF-EMPLOYED AND SMALL BUSINESSES LTD (1981) 2 WLR 722 AT 749 B:-

"It enables the Court to prevent abuse by busybodies, cranks and other mischief makers. "

The question for determination at this juncture is the class

to which the Applicants belong, namely, whether they are persons with a direct and substantial interest in the order sought or starry eyed busy bodies, cranks or mischief makers.

In the drafting of their papers, the Applicants did not give much thought to the question of locus standi although it was apparent at the outset that any Respondent in such matter would raise it. The only allegation in the LHR(S) affidavit is paragraph 6, which is couched as follows:-

"In terms of the 1<sup>st</sup> Applicant's constitution, the 1<sup>st</sup> Applicant's aims and objects are inter alia, to assist in the maintenance of the highest judicial standards in Swaziland by ensuring that there is an independent judiciary. In this connection the security of tenure of judges to their retiring age is essential. The Applicants in common with all Swazi citizens have a vital interest in opposing the premature removal of judges and maintaining the constitutional guarantees of the judges' security of tenure. "

Regarding HUMARAS, the following appears at paragraph 5 of the Supporting Affidavit:-

"It is verified and confirmed that the second Applicant, in its aims and objectives seek to measure the respect and protection of fundamental rights, freedoms and civil liberties throughout the Kingdom of Swaziland.  
5.1. It is rather confirmed that it is in the best interest of the administration of justice and promotion of human rights that a declaration order be made regarding the retiring age for judges. "

Admittedly the promulgation of any legislation that would seek to have the effect of impinging upon the independence of the Judiciary or destabilizing the security of tenure of Judges the High Court is a matter of concern to every citizen in this country. This is so because then the independence of the Judiciary is not assured where there is no serenity surrounding the tenure of Judges, a legitimate fear may arise that any matter involving the citizens, particularly against the State, some other influential person or body of persons or institution may not be decided impartially. There is also concern, as submitted for the Applicants, that any uncertainty in the retiring age of Judges is "generally disruptive and not conducive to the proper functioning of the Court". All the above are, as I have said, legitimate concerns but that is not the issue. The issue is, have the Applicants been able to demonstrate an interest that is not only in order but that which also ranks above the interests of all citizens in so far as the proper administration of justice and the security of tenure of members of the Judiciary is concerned?

Mr Dlamini referred us to the case of VERIAVA AND OTHERS v PRESIDENT, S.A. MEDICAL AND DENTAL COUNCIL AND OTHERS 1985 (2) SA 293 (T). This was a case involving the death of Bantu Steve Biko and in which allegations of professional misconduct could be sustained against members of the respondent who had attended to Mr. Biko before he died. Notwithstanding the legislative power to investigate the allegations further and if necessary, to institute disciplinary proceedings against the erring doctors, the Medical and Dental Council did not do so. The applicants, who were medical doctors and therefore falling under the jurisdiction of the Respondent, brought an application to set aside the Respondents' resolution not to take further action against the doctors concerned. The question of the Applicants' locus standi arose. Boshoff J.P. had this to say at page 15 D-G:-

A

"The question of the locus standi of a person to approach the Court about a grievance, generally speaking depends on the nature of the interest he has in the matter in respect of which he has a grievance. In legal terms, it depends on the nature of the right he has which he wishes to have enforced by the Court. If he wished to found this right on a breach of statute, the right which he seeks to enforce, or the inquiry in respect of which he claims damages or against which he desires protection, will depend upon the nature of the litigation. The right must above all be available to him personally and the injury must be sustained or apprehended by himself. Where it appears from the reading of an enactment itself or from that plus a regard to surrounding circumstances that the legislature has prohibited the doing of an act in the interest of any person or class of persons, the intervention of the Court can be sought by any such person to enforce the prohibition without proof of special damage. "

The Court found that the Applicants had established their locus standi because the Respondent was the custos morum of the medical profession and was expected to attend to all matters which may have the effect of impacting negatively on the profession.

Because of complaints of improper or disgraceful conduct against the practitioners concerned, the legislation was for the benefit of all members of the profession, including the applicants. They therefore had a direct interest in requiring the Respondent to exercise its power in terms of the relevant legislation.

In CABINET OF THE TRANSITIONAL GOVERNMENT FOR THE TERRITORY OF S.W.A, v EINS 1988 (3) SA 369 (A) at 390, Rabie C.J. was of the view that in the VERIAVA case (supra), that the Applicants

had locus standi on grounds inapplicable to the latter before him.

The closing words of Boshoff J.P. quoted above, should not be construed out of context. They should be read in appreciation of the facts of that case and are not in my view of general and across the board application. In the circumstances of that case, the Applicants did not have themselves, to show any special damage sustained as a result of the Respondents refusing to exercise their statutory powers. Because of the refusal to exercise those powers, clearly the entire medical profession, including the Applicants stood to be discredited, hence the choice of words by the learned Judge President.

My view in this case is that both Applicants, noble, laudable, praiseworthy and ideal as their intentions may have been, have failed to show that they have a special interest over and above that which all citizens in this country have at stake. Testimony to this fact is to be found in paragraph 6 of the Founding Affidavit (quoted above), particularly where the Deponent stated that "...The Applicants in common with all Swazi citizens have a vital interest in opposing the premature removal of judges..."

The strict criteria set out earlier in this judgement have not been met. The Applicants have failed to show that they have "not only an interest but also an interest that is not too remote". - DALRYMPLE CASE (supra). They have also not shown that they have " a legal interest in the subject matter of the action which could be prejudicially affected by the judgement of the Court". - UNITED WATCH & DIAMOND COMPANY (supra).

In this regard, I wish to quote with approval the comments of Laskin C.J. in a Canadian case, quoted by Rabie C.J. in EINS' case above at page 392 E-G. The applicable principles could not be put better:-

"I start with the proposition that, as a general rule, it is not open to a person simply because he is a citizen and a tax payer or is either the one or the other, to invoke the jurisdiction of a competent Court to obtain a riding on the interpretation or application of legislation, or on its validity, when that person is not either directly affected by the legislation or is not threatened by sanctions for an alleged violation of the legislation. Mere distaste has never been a ground upon which to seek the assistance of a Court.

Unless the legislation itself provides for a challenge to its meaning or application or validity by any citizen or taxpayer the prevailing policy is that a challenge must show some special interest in the operation of the legislation beyond

the general interest that is common to all members of a relevant society. "

As held above, the Applicants have failed this test. Their concern is understandable but concern alone is not enough. The Applicants have to show that they are directly affected thereby. This matter that could be pursued by a vibrant Law Society or the Judges themselves.

We were referred to a judgement of the Appeal Court of Lesotho in LAW SOCIETY OF LESOTHO v THE PRIME MINISTER. In that case, a Counsel in the Attorney- General's Chambers had been appointed as judge of the High Court and the question was whether the independence of the judiciary as not compromised by the appointment, particularly in view of the provisions of the Human Rights Act, 1983 of that country. It does not appear to me that the question of the locus standi of the Law Society of Lesotho was ever raised or pronounced upon by the Cot. In any event, it does appear to me that the Law Society, in view of its legislated position, stands in a privileged position to challenge issues such as the present compare to both Applicants, particularly having regard to their aims and objects as recorded in their respective constitutions. For the above reason, the Lesotho case is clearly distinguishable.

In view of the conclusions I have reached the question of locus standi, I find it unnecessary to pronounce on the other legal issues raised by the Respondents. I would propose that the application be dismissed.

#### Costs

The general rule is that the unsuccessful party should bear the costs and this rule will be observed in casu. The Respondents have however applied for costs on the punitive scale on the grounds that the Applicants brought a helpless case, as it were, before Court.

In PAGE v ABSA BANK LTD t/a VOLKSKAS BANK AND ANOTHER 2000 (2) SA 661 (ELD) at 667 B-D, Leach J. considered the circumstances in which costs ought to be granted on the punitive scale. He stated as follows: -

"In the ordinary course of events, a party litigates at the risk of being called upon to pay the costs of the opponent which generally are granted on the scale between party and party. However, should a claim or defence be found to be vexatious, frivolous, totally without sustenance or hopeless from the onset (this list is not exhaustive) the Court is called upon to make a value judgement on whether the unsuccessful litigant should bear the burden of costs on the

scale as between attorney and client. " Harms J.A. in AA ALLOY FOUNDRY (PTY) LTD v TITACO PROJECTS (PTY) LTD 2001 (1) SA 639 (SCA) at 648, warned against the Court using hindsight in assessing the conduct of a party in considering an order for punitive costs. This word of caution has been adhered to.

I am of the view that there is nothing in the Applicants' conduct that tends to suggest elements of frivolity, vexatiousness or the items listed in the PAGE case above. For that reason, to grant an Order for costs on the punitive scale is unwarranted. I also do not find it proper to grant the costs de bonis proprii as requested by Mr Mamba. Costs be and are hereby granted against the Applicants jointly and severally, the one paying the other to be absolved and it is so ordered.

In sum the application is dismissed with costs on the ordinary scale.

T.S. MASUKU  
JUDGE

I agree  
S.B. MAPHALALA  
JUDGE

I agree  
J.P. ANNANDALE  
JUDGE