

## **On amorphous terms, terrorism and a feeble judiciary: Analysing the dissenting judgment in *Maseko v Prime Minister of Swaziland and Others* (2016)**

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### **Abstract**

On 16 September 2016, the Swaziland High Court delivered judgment in the matter between *Maseko and others v Prime Minister of Swaziland and others* [2016] SZHC 180, in which it declared certain provisions of the Suppression of terrorism Act (2008); and the Sedition and Subversive Activities Act (1938) as unconstitutional. The Declaration followed a constitutional challenge, based on the applicants' freedom of expression, assembly and association. The judgment was unprecedented in the Swaziland context, given that of the four applicants, three were political activists and one was a Human Rights lawyer. All four have been in frequent collision with the government over their political opinions. Two judges ruled in favour of the applicants, whilst the third one ruled against them. The judgment was a sharp departure from past decisions, where the courts often ruled in favour of the state, leaving many litigants without a remedy. The ruling marked the first time a Swazi court had declared the Swaziland Constitution a living document. However commendable the main judgment, the dissenting opinion raises several constitutional questions that need to be addressed. This article therefore, critically analyses the dissenting opinion of Justice Hlophe, and seeks to demonstrate that his approach is antithetical to constitutionalism, and is irreconcilable with accepted notions of Bill of Rights litigation.

### **Introduction**

In the later part of 2016, the High Court sitting in Mbabane, Swaziland, handed down judgment in a landmark case, in which it declared as unconstitutional certain provisions that form the backbone of Swaziland's so-called anti-terrorism legislation. These were various sections of the Suppression of Terrorism Act 3 of 2008, and the Sedition and Subversive Activities Act 46 of 1938. The matter arose after several individuals were charged under these two Acts, after they had made certain utterances, and displayed certain writings on their own t-shirts. It was alleged that they had uttered words such as *Phansi ngeTinkhundla Phansi* ("Down with the Tinkhundla System of Government Down") and *Viva PUDEMO Viva*. If convicted, all four would each face up to 20 years in prison without the option of a fine. The applicants were Thulani Maseko (a human rights lawyer), Maxwell Dlamini (a political student activist), Mario Masuku (a political activist and leader of a banned

opposition party styled as People's United Democratic Movement [PUDEMO]), and Mlungisi Makhanya (a political activist). All except Maseko, were members of PUDEMO. All of them have been routinely arrested and charged over the years for some or other offences relating to freely expressing their views, or for associating and assembling with like-minded individuals. Their political activities often put them on a collision course with the state, which regards political parties as banned under a royal decree that survived the new Constitution, the King's Proclamation to the Nation on 12 April 1973. Through this royal decree, the then King, Sobhuza II unilaterally abrogated the Independence Constitution, which did not have any clauses regulating its repeal, save for provisions regulating its amendment. He announced the repeal and at the same time proclaimed that

I further declare that, to ensure the continued maintenance of peace, order and good government, my Armed Forces in conjunction with the Swaziland Royal Police have been posted to all strategic places and have taken charge of all government places and all public services.

In paragraph 11 of the Proclamation, the King decreed that, "All political parties and similar bodies that cultivate and bring about disturbances and ill-feelings within the Nation are hereby dissolved and prohibited."

It would seem that political activity runs counter to the concept of "monarchical democracy", which the King of Swaziland propounded before the United Nations in 2013 (General Assembly of the UN 2013). In terms of this form of democracy, there is a "marriage between the monarchy and the ballot box". The ballot box is regarded as the will of the people, which provides advice and counsel to the King and serves to ensure transparency and accountability. This is a form of democracy that the applicants were opposing, when they were charged with terrorism and sedition.

### **A brief treatment of the main judgment**

The main judgment, written by Mamba J, with Annandale J concurring, was a progressive one. It regarded the Constitution as a Living Document (para 41). The main judgment provides a step by step analysis of how the Bill of Rights litigation in the Swaziland context plays itself out. In that regard, it starts with a discussion of *locus standi*, before considering the two rights under discussion, namely freedom of expression and freedom of association. It proceeds to deal with the issue of limitation of rights, in which it relies on comparative jurisprudence from other jurisdictions, including South Africa.

### **Section 35 on Standing**

Judges Mamba and Annandale took judicial notice of the fact that the applicants were charged with various crimes under the two impugned Acts, and that they were now challenging the constitutionality of those provisions. Based on this, they agreed with the applicants' contention that they had standing before court. Section 35(1) of the Swaziland Constitution governs the issue of *locus standi*. It provides that where a person alleges that any of the rights in the Bill of Rights:

*has been, is being, or is likely to be*, contravened in relation to that person or a group of which that person is a member (or in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, ... **that person (or that other person) may apply to the High Court for redress** (emphasis added).

By virtue of section 35(2) (a) of the Constitution, the High Court has original jurisdiction to hear a matter brought in terms of subsection (1); in other words, a constitutional challenge. This position, taken by the majority judgment differs from that of the dissenting judge, as will be shown below.

### **Section 24 on expression**

Section 24 governs freedom of expression and opinion. In subsection (2), it stipulates that a person shall not be deprived of this right without his free consent. This provision denotes that the individual can waive his right, but such waiver must be freely given. The individual must not be coerced, neither must he be deceived into giving up his freedom of expression. The Constitution recognises that this right includes freedom of the press and other media, and the freedom to hold opinions without interference; to receive and impart ideas and information without interference, as well as protection against interference with one's correspondence. Interestingly, and especially for this politically charged case, the freedom to impart and receive information includes all forms of communication, whether the communication be to the public generally or to any person or class of persons (section 24(2) (c)). This provision was informed by the need to protect dissenting voices in the Swaziland context, which had been systematically silenced by draconian pieces of Legislation under the colonial regime, as well as in the post-independence era, where the King ruled by a supreme royal decree.

Section 24(3) contains the internal limitation of the right to freedom of expression. It provides that

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision— (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health.

The provision goes on to stipulate that the limiting measure or law must be reasonably required for any of the four purposes that are listed below. The operative word here is the “reasonableness” of the limiting measure. This means that a law which is required for any of the listed purposes will fail the constitutionality test, where it is proved to be unreasonable. The four purposes that a limiting measure must be aimed at serving are:

1. protection of the reputations, rights and freedoms of others or the private lives of persons concerned in legal proceedings;

2. preventing the disclosure of information received in confidence;
3. maintaining the authority and independence of the courts;
4. regulating the technical administration of operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication.

Also protected are laws that impose reasonable restrictions on public officers (section 24(3) (c)). This provision seems to have been influenced by the desire to protect state secrets, preventing public officers from divulging certain information that they come into contact with as part of their work. Again, here the emphasis is on the term “reasonable”. The same section proceeds to give guidance on how to determine if a limiting measure is justifiable or not. The *proviso* to section 24(3) reads thus:

except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society.

In terms of the Swaziland limitation analysis, the court ought to embark on a two- stage enquiry. (i) The first leg involves the determination of whether a right in the Bill of Rights has been infringed. Once that is found to be the case, the next question is whether such infringement came by way of a law (section 24(3)).

After the offending law is identified, the court can then move on to the second leg of the enquiry. Where the infringement did not occur under the authority of any law, the enquiry ends there;

The limitation cannot pass the constitutionality test. (ii) The second leg comes into play once the law is identified, under which the violation occurred. At the commencement of this stage of the enquiry the court must answer the following question: *What was the Purpose of the Limitation for which the Law was Passed?* This could be any of the five purposes listed in section 24(3) (b) and (c), as well as section 25(3) (b) and (c). If the law is found to be unsuited to that purpose, the enquiry stops there, because a purposeless law cannot be constitutionally justified. If it is established that the law serves any of the four listed purposes, the court must then determine if, even in light of its stated purpose, that law can be justified in a democratic society. In other words, the law must introduce a reasonable limitation of the right that would be found to be reasonable in a democratic society.

In the final analysis, three things are required in the Bill of Rights litigation in Swaziland:

1. The limitation must be provided for by law;
2. The limitation must pursue one of the specific purposes set out in sections 23 and 24;
3. The limitation must be reasonably justifiable in a democratic society.

The reasoning in the main judgment followed this approach, and came to the conclusion that the limitation was not justifiable. This limitation clause is the source of the divergence

of opinion on who bears the onus of proving that the limiting measure is not reasonable and therefore, not justifiable in a democratic society.

### **Section 25 on Assembly and Association**

Section 25(1) and (2) provides that a person has the right to freedom of peaceful assembly and association; and that this right cannot be taken away from the person enjoying it without that person's free consent. In subsection (3), the internal limitation is introduced, in similar wording to the section 24(3) text. Subsection (4) goes further to provide for yet another limitation clause, which largely targeted juristic persons such as trade unions, and by extension, political parties. It provides that a limiting measure shall not be in conflict with the Constitution to the extent that it makes provision:

for the registration of trade unions, employers' organisations, companies, partnerships ... and other associations including provision relating to the procedure for registration, prescribing qualifications for registration and authoring refusal of registration on the grounds that the prescribed qualifications are not fulfilled; or for prohibiting or restricting the performance of any function or the carrying on of any business by any such association as is mentioned in paragraph (a) which is not registered.

### **Limitation analysis**

Unlike the South African Constitution's section 36, the Swaziland Constitution does not have a general limitation clause. Instead, it relies solely on internal limitations contained within the particular provision sanctioning each right. As seen above, the two rights under discussion also have internal limitations. The South African provision reads thus:

1. The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Notably, the limitation of the two freedoms in the Swaziland context subject the enjoyment of these rights to interests of defence, public safety, public order, public morality or public health. Whilst these instances accord with Article 19(3) of the International Covenant on Civil and Political Rights, which Swaziland acceded to in 2004, they were not meant to give the state carte blanche for human rights violations. In General Comment 34, the Human Rights Committee stated that

when a [s]tate party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself...the relation between right and restriction and between norm and exception must not be reversed.

### **Putting the Dissent Judgment in Perspective**

Hlophe J's dissenting opinion differs from the approach taken in the main judgment. To begin with, the Judge did not engage in a sequential analysis of the various steps that need to be satisfied in a case where the constitutionality of any law is challenged. Instead, he conflated issues, created new principles *in vacuo*, and totally misread previous decisions of the Swaziland High Court. Hlophe J's opinion failed to take into consideration the spirit of the Bill of Rights and the context within which it operates. The Judge's opinion seems to be heavily steeped in or influenced by mixed notions of absolutism and parliamentary sovereignty.

In addition, Hlophe J avoided dealing with the issue of standing at all. It is safe to assume that he agreed with the main judgment's approach to the issue of standing, and simply proceeded to lay out the reasons why the application should fail. It is worth noting that in his treatment of the application, the Bill of Rights was not central at all. He simply proceeded with the matter as if it was heard in the pre-constitutional era. Quite ironically, the criminal trials of the applicants had been scheduled to be heard at the High Court by Hlophe J, before the applicants decided to attack the constitutionality of the sections under which they were charged, thereby halting the criminal proceedings.

Hlophe J described the remedy sought by the applicants, using emotive language, referring to it as an "extreme remedy" (para 5). From the outset, it was clear that the Judge did not believe that the case ought to have come before his court. In paras 16–20, Judge Hlophe detailed why he believed the matter was a criminal one, and ought to have been dealt with by the criminal court and not the constitutional court. He invoked what he termed "a long established principle that a matter capable of a decision or determination on any other ground than a constitutional one" ought to be resolved using the former. For this, he relied on the South African case of *Qwelane v Minister of Justice and Constitutional Affairs* 2015 (2) SA 493(GJ) at para 10.

The major problem with this approach is that the *Qwelane* case involved an Equality court matter, not a criminal matter. In fact, the *Qwelane* court had to deal with a novel question of law. The court had to determine whether it is competent for a judge of the High Court to hear Equality Court proceedings and High Court proceedings simultaneously, based on a constitutional challenge in one consolidated case. In other words, whether the Judge could serve a dual role, in his capacity as High Court judge and Equality Court judge. In the final analysis, the *Qwelane* court issued an order to the effect that the Equality Court proceedings and the constitutional challenge proceedings should be consolidated for hearing before a single judge sitting as Equality Court and High Court.

The Equality Court is not a Criminal court. It has been described as “a special animal”, “a special purpose vehicle” (*Manong and Associates (Pty) Ltd v Department of Roads and Transport, EC and Others (No2)* 2009 (6) SA 589 (SCA) para 57). On the one hand, it is a specialist court with exclusive jurisdiction on equality matters, such as the relief sought in that case. The constitutional challenge, on the other hand, could not be brought before the Equality Court, since only the High Court and the courts above it have constitutional jurisdiction.

Consolidation in the Swaziland context would not work for the following reason: the minimum number of judges required to hear a constitutional challenge at the Swaziland High Court is three. This is not the case in South Africa. The purpose of consolidation of actions before the High Court is to provide for a single hearing of substantially similar issues in order to avoid a multiplicity of trials. The prospects of Hlophe J, as trial judge, raising these constitutional matters *mero motu* were also very slim, given his demonstrated aversion to constitutional claims.

In para 20 of his dissenting judgment, Hlophe J seems to jettison the applicants’ case simply because he does not believe the trial court would have come to the conclusion that the applicants uttered terrorist slogans in violation of the impugned legislation. Even though Judge Hlophe was scheduled to be the trial judge, absent any evidence in the criminal trial itself, it can be argued that his conclusion is based on conjecture. The court was not called upon to decide the guilt or otherwise of the applicants. His reasoning seems to suggest that the applicants should have allowed the criminal trial to first run its course, and if they were acquitted, there would be no need to challenge the two Acts (para 36). Only if they were found guilty would they, in the judge’s opinion, be in a position to challenge the constitutionality of the two pieces of legislation (para 37). To make a determination on the constitutionality or otherwise of the impugned provisions before the conclusion of the criminal trial would, in the words of the judge, “have been unnecessary and premature.” This line of reasoning is flawed in many respects.

First, the Bill of Rights in the Swaziland Constitution does not only offer *ex post facto* protection of fundamental rights. Hence the wording of the clause on standing, section 35(1), is alive to that fact. The section entitles the beneficiary of a right whose right *has been, is being, or is likely to be* contravened, to approach the High Court for redress. The applicants’ rights to freedom of expression and assembly and association were already threatened by the criminal charges preferred against them. To expect them to first go through the criminal trial before approaching court indicates a failure to appreciate the reach and ambit of section 35 on standing. Secondly, the authority upon which the judge relied uses the words “where possible.” This effectively means there is no *carte blanche* rule that matters capable of being determined on any other ground than a constitutional one should be settled on that other ground. The operative words here are “where possible.” This denotes that the court must engage in a weighing up of the issues before it, to determine what impact its decision will have on the applicant if it decides that the matter should be determined on the other ground than the constitutional one. This is what is known as the

balance of convenience. In other words, the court must be alive to the prejudice which the applicant will likely suffer if the matter is not decided on constitutional grounds.

### **Conflating Ripeness and Mootness?**

Judge Hlophe concluded that the application was abstract (para 21), without demonstrating exactly how abstract it was. It is our contention that the applicants' case was not abstract at all. Furthermore, it is our argument that even if the matter was an abstract one, it is of such public importance, taking into account the history of repression and alleged human rights violations in the Swaziland context that the interests of justice favoured proceeding with the hearing. However, it is imperative to demonstrate what an abstract or moot case is.

It seems trite that the law frowns upon the institution of abstract cases. It was stated in *Ainsbury v Millington* [1987] 1 All ER 929 (HL) at 930g that, "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law where there is no dispute to be resolved." This is because courts do not want to give legal advice gratuitously, and thereby waste limited resources and time.

A matter will, generally speaking, be considered abstract if the order of the court will not have any practical effect on any of the parties. Such a matter is considered academic or hypothetical, a mere legal or advisory opinion. This could be the case where no right has been infringed or threatened to be infringed, but the entire litigation is based on the apprehension that sometime in the indeterminate future there might be an infringement of a particular right. This could, for example, flow from the conduct of the state or a particular law that exists within the statute books, even though it is hardly used.

Closely related to this are matters that are considered moot. In *National Coalition for Gay and Lesbian Equality and Others v Minister for Home Affairs and Others* 2000 (2) SA 1 (CC), the Constitutional Court of South Africa gave guidance on when a matter can be considered as moot. It was said that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy, which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Although the terms "moot", "abstract" and "academic" are often used interchangeably by the courts, it seems that for a matter to be moot, there must first exist a legal controversy which, owing to some intervening circumstance, has ceased to exist by the time the matter is heard before court. Notably, a matter cannot be regarded as moot where the issues have not been resolved or become non-existent (*Ramuhovhi and Another v The President of the Republic of South Africa and Others* [2016] ZALMPHC 18 para 39). A matter may be abstract without it being moot, but a moot matter will always be abstract.

In his dissent, Hlophe J chose to frame his opinion, based on the perceived "abstract nature" of the application. However, further reading of his judgment reveals that he also invoked principles of the doctrine of ripeness (para 37). In terms of this doctrine, a court will not



entertain a matter if it is premature in the sense that rights have not been infringed or threatened (du Plessis, Penfold and Brickhill 2013, 8). In effect, ripeness usually forms part of the court's enquiry, when the litigant has not yet been affected by the unlawfulness which grounds his application. At the heart of Hlophe J's findings was his assertion that the question of whether the sections that the applicants sought to have struck down were ripe for constitutional consideration. In this regard, he opined in para 37 that "only where one has been convicted, can [it] be claim[ed] that the section in question infringes his right depending on how the Constitutional Court will decide the matter."

The concept of ripeness was elucidated by Justice Laurie Ackerman of the South Africa Constitutional Court, who said "while the concept of ripeness is not precisely

defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed" (*National Coalition for Gay & Lesbian Equality & Others v Minister of Home Affairs & Others 2000 (2) SA 1 (CC)* para 21). However, the inquiry does not end there. Currie and de Waal (2013, 85) assert that:

Ripeness entails consideration of the timing of a constitutional challenge. The fitness of the constitutional issue in a case for judicial decision must be weighed alongside the hardship to the parties of withholding the court's consideration.

In other words, the court must ask itself if the applicants would suffer any prejudice by waiting for their trial and conviction before making the constitutional challenge. According to Hlophe J, he would have preferred that the applicants launch their challenge after conviction or acquittal, rather than doing so as free men.

Judge Hlophe's inverted approach to determining the matter is unfortunate in that ripeness correlates with standing, which the Judge did not address in his judgment, save to import it covertly through his opinion on ripeness. His reliance on ripeness simply sought to demonstrate that the applicants were before the court prematurely. Effectively, this meant that they did not satisfy the requirements of section 35 on *locus standi*. We have already exhaustively dealt with the issue of standing above, and given that the main judgment accepted, albeit fleetingly, that indeed the applicants had standing, we need not repeat the argument here. The challenge brought against the impugned provisions were in no way premature, notwithstanding the fact that the prejudice and harm that the applicants would suffer appears to have completely escaped the learned Judge. They would be faced with a 20-year sentence each, with no option of a fine in the event of their conviction. Furthermore, their freedom of movement had already been affected since they were out on bail when the matter was heard by the court. Currie and de Waal (2013, 86) assert that in a case where "the applicant would suffer serious and irreparable harm by being required to exhaust the remedy (the criminal trial in this case), it would be unreasonable to delay the constitutional challenge." There is much to be said about Hlophe J's assertion that the act of

laying charges against the applicants, citing the two laws, did not render those laws unconstitutional. He put it thus in his dissenting opinion (para 38):

It follows therefore, that it would be stretching things too far to say that simply because one has been charged with having uttered vacuous statements, which do not prove a seditious intention as contemplated in law and (as) interpreted in numerous judgments of this court, and the courts from foreign jurisdictions, he can have a statute declared unconstitutionally when it did not infringe on any of his rights.

It is an established principle that where a law threatens constitutional rights, it is not necessary to wait until the law has been implemented before approaching the court for a remedy (*Abahlali baseMjondolo Movement of South Africa v Premier of KwaZulu-Natal* [2009] ZACC 31, para 14). Hlophe J's reasoning suggests that until the applicants were found guilty of the crimes alleged, the law had not come into operation and as such, no rights could be said to have been violated.

The deleterious effects of the criminal proceedings on the applicants' fundamental freedoms were not imagined, neither were the concerns raised by the applicants a remote possibility somewhere in the indeterminate future. Their fears were by no means fanciful. Criminal charges had already been preferred against the applicants, based on those provisions. There was therefore, no need to wait until the conclusion of the criminal trial before rights could be said to have been violated. Hlophe's apparent misunderstanding of how a Bill of Rights operates led to his second incorrect conclusion, that owing to the "prematurity of the constitutional matter", it was therefore, abstract (para 21). He seemed to entertain a flawed idea that abstract always equals waste of time. However, that is not entirely true. Abstract challenges (or so called moot challenges) are sometimes allowed by the courts if they deal with matters of public importance. In *MEC for Education, KZN and Others v Pillay* [2007] ZACC 21 in para 32, the Constitutional Court held that it may be in the interests of justice to hear a matter even if it is moot if any order which the court may make will have some practical effect either on the parties or on others.

In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12, Yacoob J was emphatic that not all abstract applications are self-defeating. He opined that the principle was not an invariable one, and that there might be circumstances in which it would be in the public interest to litigate in the absence of a live case (para 18). This was reiterated in *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5 (para 20). The court went on to lay down the following factors as prerequisites to the question whether the court should consider an abstract matter: (i) whether there is another reasonable and effective manner in which the challenge may be brought; (ii) the nature of the relief sought and the extent to which it is of general and prospective application; (iii) the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court; (iv) the

degree of vulnerability of the people affected; (v) the nature of the rights said to be infringed; as well as (vi) the consequences of the infringement. This is not a closed list.

Had Judge Hlophe applied the above requirements to the case, he would most likely have come to a different conclusion. If one looks at the nature of the relief sought, it becomes immediately clear that the applicants wanted to protect their fundamental rights from unlawful interference by the state. The freedoms of expression and assembly are very important for individual self-fulfilment, and for the democratic process, as they assure stability and the contestation of ideas. This is much more so in the Swaziland context, where these freedoms were heavily curtailed during the years of colonial rule, and were further rendered non-existent for over three decades between independence and the adoption of the current Constitution. The relief sought was indeed of general application, as the entire population was affected by the restraint imposed by the impugned provisions. Further, the order was likely to be applied to similar cases in future. The applicants, being individuals who are vocal about their political beliefs were indeed vulnerable in a state where repression of political opposition has formed the bedrock of governance and judicial processes. The consequences of the infringement included loss of livelihoods, loss of liberty, and a violation of a broad range of rights, owing to the incarceration related to the criminal trial, for simply expressing their dissatisfaction with the system of government. At the time the constitutional challenge was initiated, the applicants were out on bail.

A ground for serious criticism is that the learned Judge, in coming to this conclusion, relied on a pre-constitutional era case decided by the Swaziland High Court in 1987. This was the case of *R v Shongwe, Mphandlana and Others* 1987–1995 (4) SLR 184, in which the accused were acquitted after it could not be proved that the words they had published, “away with the king, “referendum or we bomb” evinced an intention to incite violence. With reference to this, Justice Hlophe stated that “where a person charged under this Act was acquitted, he obviously cannot talk of his aforesaid right having been infringed” (para 37). This often repeated statement from the judgment in different ways totally misses the point on constitutionalism and the law. Elsewhere, the judge said: “I do not think that a serious Act made to curb terrorism can justifiably be struck down simply because it happened to be wrongly applied in a situation where it should not” (para 54)

The Judge’s approach runs counter to accepted notions of constitutional supremacy and the invalidity of offending laws. When a law is declared invalid it means it was never valid. The invalidation is not prompted by the application that came before the judge or any other court action. It is not the charges against the applicants that made the law invalid but, rather, its standing next to the supremacy of the constitution from the day either of them were enacted. Currie and De Waal (2014) maintain that “In principle therefore, the declaration invalidates the legislation and any actions taken under the legislation from the moment the legislation or the Constitution came into effect and not from the moment of the court order.”

## **Onus of proof in constitutional matters**

In South African law, the approach of the courts to onus splits the enquiry into two stages—the first being proof of the existence of an infringement, and the second stage aimed at establishing the propriety of that infringement in an open and democratic society. Hence, from the seminal case of *S v Makwanyane* [1995] ZACC 3, and throughout many cases decided later by the South African courts, the burden of proving that a limiting measure is justifiable lies with the party seeking to rely on that measure. It was stated in *Makwanyane* (para 102) that “It is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified.”

This formula for establishing onus was set out further by Ackermann J in the following extract from *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13 (para 44):

The task of determining whether the provisions of [an] Act are invalid because they are inconsistent with the guaranteed rights here under discussion involves two stages, first, an enquiry as to whether there has been an infringement of the [...] guaranteed right; if so, a further enquiry as to whether such infringement is justified under [...] the limitation clause. The task of interpreting the [...] fundamental rights rests, of course, with the Courts, but it is for the applicants to prove the facts upon which they rely for the claim of infringement of the particular right in question. Concerning the second stage, [it] is for the legislature or the party relying on the legislation to establish this justification [in terms of the limitation clause], and not for the party challenging it, to show that it was not justified.

In *Moise v Greater Germiston Transitional Council* [2001] ZACC 21 (para 18), it was stated that although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.

Further, in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] ZACC 10 (para 36) it was stated that

Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends...a failure to place such information before the court, or to spell out the reasons for the limitation, may be fatal to the justification claim.

In the case of *Maseko and Others v Prime Minister of Swaziland and Others* [2016] SZHC 180, the onus was on the state, which ought to have advanced proof that the limitation placed on freedom of expression was justifiable in an open and democratic society. The state did not do that.

To support the finding that the applicant bore the onus of proof, Judge Hlophe did not rely on any case law, save to state that he agreed with the arguments raised by the respondent (para 47). The respondent's argument was simply that in Swaziland, unlike in other jurisdictions, the onus of proving that offending legislation is justifiable lies with the applicant. This approach raises serious concerns and is steeped very heavily in pre-constitutional era judicial reasoning. It seeks to paint Swaziland as a unique legal system, totally divorced from legal developments in the broader global context. This is not the case, and the adherence to the past ignores the point raised by Mamba J in the main judgment, that the Constitution is a living document, and that it affirmed the universality of human rights (para 41). What compounds Judge Hlophe's approach is that it overlooks the fact that the Constitution contains, in material respects, a new and fundamental commitment to human rights, and is not merely a contemporising and incremental articulation of previously accepted and entrenched values shared in our society (*Shabalala v The Attorney General of Transvaal* [1995] ZACC 12 para 28). To that end, it is a document that ought to enforce a sharp departure with the past of boasting about a "unique way" of doing things in the Swaziland context; where democratic norms and values are deemed foreign to the "Swazi way of life." It ought to jettison the repression, inequality and authoritarianism that characterised the colonial period and period of the rule by royal decree. The constitutional text is premised on the aspirations of a future based on democracy and popular participation, which ought to create a legal culture of accountability and transparency. Judge Hlophe's assertions negate all those constitutional objectives.

In para 46 of his dissenting judgment, Judge Hlophe incorrectly relied on *The King v Swaziland Independent Publishers* [2013] SZHC 88 para 91—however, that judgment simply affirms the position that rights are not absolute, and it does not support the argument that the onus to prove that the violation is unjustifiable is on the applicant. A reading of the judgment in *The King v Swaziland Independent Publishers* case reveals that Judge Hlophe did not read the entire judgment, but merely cut out a paragraph that would support his assumed legal position and disregarded legal precedent. The judge seems to have merely come to the conclusion he wanted, without any case law or legal principle supporting his finding. In para 91, the judgment he relied on deals with the fact that rights are not absolute, whilst in para 92, it underscores the position that the duty to prove that a limitation is justifiable in the Swaziland context lies with the respondent, as in most advanced legal systems, and not the applicant as the judge held. In para 94, it clearly states that "[t]he onus of proving that the limitation is reasonably justifiable in a democratic society lies with the party seeking to uphold the limitation." It is a matter of concern that the judge did not give any weight to the multitude of case law from persuasive jurisdictions indicating that the onus to prove that a limitation is justifiable lies with the party alleging such justification. Further, Swaziland courts have long embraced this legal position as well. This does not bode well for the development of jurisprudence on the limitation of rights in the Swaziland jurisdiction. It is noteworthy though, that Justice Yacoob, in *Phillips and Another v Director of Public Prosecutions and Others* [2003] ZACC 1 (para 20) stated that "the absence of evidence and argument from the state does not exempt the court from the obligation to conduct the justification analysis and apply the limitation clause." Whilst this may seem to

indirectly support Judge Hlophe's approach, sight must not be lost of the fact that what is unacceptable here is the fact that a new legal principle was created *in vacuo*, and in total disregard of a litany of cases, both from with n and without Swaziland, favouring the position that the state bears the onus of proof.

### **Failure to Apply the Rules of Constitutional Interpretation**

In his judgment, Hlophe J stated that he did not see any relations between the charges against the applicants and the constitutionality of the sections they sought to impugn. The learned Judge pointed out that had he heard the criminal case (as he was scheduled to since it had been allocated to him), he would likely have acquitted them, because there was no correlation between the charges laid against them, and the sections in the Sedition Act and the Suppression of Terrorism Act cited by the prosecution. In paragraph 15 of his dissent, he stated:

[t]hat one has for instance been charged with a ridiculous charge does not make the Act supposedly relied upon unconstitutional, particularly where the court could possibly find that the conduct in question does not even violate the section concerned ...

Justice Hlophe devoted a large portion of his judgment to dealing with the question whether it was necessary for the applicants to challenge the constitutionality of the sections under which they were charged before their trial. His line of reasoning was that the prosecuting authority may have misdirected itself in using the wrong law to prosecute the accused and that, in and of itself, did not render the law unconstitutional. However, this line of reasoning does not seem to be supported by any evidence, neither did the state advance such an argument in its submissions.

The applicants had complained of the words used in the impugned provisions as being vague and overbroad. These include words such as disaffection, discontent and "exciting of ill-feelings." In other words, their expressions were said to have caused ill- feelings and disaffection amongst the Swazi populace. It is of concern that these words could be the basis for restricting freedom of expression in a constitutional and democratic state that Swaziland claims to be in its Constitution. Discontent and disaffection are endemic to the political arena. People holding opposing views will always entertain one or more of these emotions, and it would seem that by today's standards, these emotions are actually political currency. A political group and its members will seek to persuade prospective voters by creating disaffection with the manner in which their opponent handles certain policy and governance issues. That is what the applicants were doing, merely voicing their disaffection towards the "monarchical democracy system of government".

Constitutional interpretation differs slightly from ordinary interpretation of statutes. It takes into account various factors, all of which are aimed at assisting the court to protect fundamental rights and uphold the rule of law. Indeed, in *Shabalala v The Attorney General of Transvaal* [1995] ZACC 12 para 27, it was held that a supreme constitution must be given a generous and purposive interpretation. National constitutions and Bills of Rights in

particular, are interpreted purposively to avoid the “austerity of tabulated legalism.” Such an approach is necessary since it enables the court to take into account more than legal rules (*Nyamakazi v President of Bophuthatswana* (1994) 1 BCLR 92 (B) at 566G). During the interpretation of the Constitution, its spirit and tenor must be adhered to, because the Constitution is a “mirror reflecting the national soul” (*S v Acheson* 1991 (2) SA 805 (NmHC) at 813 A-B). In other words, the values and moral standards that underpin this document must be taken into account throughout the interpretation process.

In the Swaziland Constitution, such values are to be found in the preamble. The preamble provides, amongst other things, that

Whereas it is necessary to protect and promote the fundamental rights and freedoms of ALL in our Kingdom in terms of a constitution which binds the Legislature, the Executive, the Judiciary and the other Organs and Agencies of the Government.

Further, section 1(1) provides that “Swaziland is a unitary, sovereign, democratic Kingdom.” In a democratic state, dissenting political opinions would not be suppressed through vague and overbroad prohibitions such as those contained in the impugned provisions.

Various interpretive aids are useful in this exercise. One such aid is the history of human rights violations. The historical context is critical in assessing the intention of the drafters of the Constitution. Yet this did not feature in Judge Hlophe’s analysis of the meaning of amorphous words such as “disaffection”, “discontent” and “exciting ill- feelings.” There is no shortage of illustrations of human rights violations, particularly political rights such as expression, association and assembly in the Swaziland context. Context is fundamental to constitutional interpretation. A provision of the constitution cannot be interpreted in isolation, but must be read in the context as a whole. The context includes the historical factors that led to the adoption of the constitution in general, and the fundamental rights in particular (*S v Makwanyane*, para 10). In the Swaziland context, where for decades, royal decrees meant that activities of opposition parties were criminalised under the King’s Proclamation to the Nation of 12 April 1973, courts ought to interpret freedom of expression broadly, in line with the aspirations of an open and democratic society (Dube and Nhlabatsi 2016, 267). After all, the motivation for adopting a new constitution, as contained in the preamble included the protection and promotion of fundamental rights as well as desire to start afresh, and to achieve full freedom and independence. We argue that had the learned Judge applied the now established principles of constitutional interpretation, the offending provisions would not have passed the constitutional muster; for they perpetuated the repressions that existed under the colonial era, as well as under the era of rule by royal decree between 1973 and 2006.

### **Judicial endorsement of abuse of prosecutorial discretion?**

Hlophe J chastised the applicants for bringing the application, but did not condemn the Director of Public Prosecutions (DPP), who laid the charges against the accused (applicants

in the case at hand). In paragraph 35 of his dissenting judgment, the learned Judge opined that

[n]o material whatsoever, is placed before this court to enable it to determine whether in fact there would in law be any basis for the criminal charges they are faced with. In other words, whether the offences they are charged with are sustainable or not. They want to say simply because they were charged with the alleged offences, it was the pieces of [l]egislation complained of that provided they be charged with the specific offences or put differently, that simply because they were so charged...

But the Judge apparently ignored the fact that prosecutorial authority in Swaziland vests with the DPP in terms of section 162(4) (a) of the Constitution. This is not a function of the court as Judge Hlophe implies. Courts are enjoined by the law to acquit an accused person if ridiculous charges have been brought against them. Further, he seemed to be suggesting that apart from establishing that the law in question violates a fundamental right, the applicants should have proceeded to convince the court on whether the case against them was “sustainable or not.” This suggests a new requirement in constitutional litigation, one which has no basis, neither in case law nor in the Constitution. After all, this court was not called upon to pronounce on the guilt or otherwise of the applicants.

It is notable that in September 2009, one of the applicants in the current matter, Mario Masuku, was acquitted in a different case on a charge under the Suppression of Terrorism Act, after he was kept in custody for almost 11 months (*R v Masuku* [2009] SZHC 220). When Justice Mamba acquitted Masuku at the close of the crown’s case, not only did he find the indictment was badly worded, but also that the investigating officer had given testimony that was irrelevant to the matter. The Judge also found that some of the witnesses in the case had tried to manufacture evidence in order to get a conviction (*R v Masuku* paras 11 and 12). Therefore, it is our contention that by challenging the law itself in this case the applicants were, *inter alia*, seeking to avoid yet another frivolous trial, as the DPP has made it a habit of taking them to court from time to time.

## **Conclusion**

The Swaziland courts are faced with the mammoth task of applying the Constitution to eliminate deeply entrenched human rights violations, which can be traced back to the colonial era. The fact that the King’s Proclamation to the Nation remains unrepealed, neither by way of a court decision nor by any other legislative means, signifies that political rights will remain in limbo until a progressive court interprets the Constitution to strike down that royal decree. Whilst the reasoning of the main judgment that the Constitution is a living document, the main purpose of which is to usher in transformation and erase past injustices, the various positions taken by the dissenting judgment of Hlophe J are very alarming. These positions cannot be reconciled with an open and democratic society which Swaziland claims to be. The Judge’s opinion also perpetuates dangerous notions associated with the austerity of tabulated legalism; and is not suited to a socio-legal and political context, where individuals require greater protection from a government that



violates fundamental rights with impunity. The Judge's opinion also poses the risk of eroding public confidence in the judiciary.

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