

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO: 180/13

In the matter between:

MAXWELL MANQOBA THANDUKUKHANYA DLAMINI

1st APPLICANT

MFANAWENKHOSI MBHUNU MNTSHALI

2nd APPLICANT

DERRICK DICKSON NKAMBULE

3rd APPLICANT

And

THE PRIME MINISTER OF SWAZILAND

1st RESPONDENT

MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS

2nd RESPONDENT

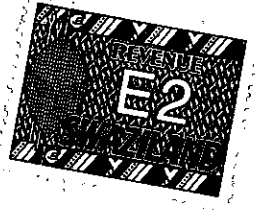
THE DIRECTOR OF PUBLIC PROSECUTIONS

3rd RESPONDENT

THE ATTORNEY GENERAL

4th RESPONDENT

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FOUNDING AFFIDAVIT

I, the undersigned

MAXWELL MANQOBA THANDUKUKHANYA DLAMINI

Do hereby make oath and say as follows:-

1. I am the first applicant in this proceedings.
2. The fact contained herein are to the best of my knowledge true and correct and are, unless otherwise stated or indicated by the context, within my personal knowledge. Where I make legal submissions I do so on the basis of advice that I have received from my legal representatives, which advise I verily believe to be correct.

THE PARTIES TO THESE PROCEEDINGS

3. I am a 23 year old male Swazi citizen from the Mantambe area of Shiselweni district. I live near Mbabane with my parents.
4. I am a student at the University of Swaziland. I have missed several examinations because of my imprisonment pursuant to the charges against and which I describe more fully below. I am hopeful that upon my acquittal I will be able to return to my studies.

MMN

5. The second applicant is Mfanawenkhosi Mbhunu Mntshali. He is a 37 year old male Swazi citizen from the Gobhola area under Chief Mabhedla in the Hhohho Region. He runs a plumbing business. He has a wife and eight children, whom he lives with and supports at their family home near Mbabane.
6. The Third applicant is Derrick Dickson Nkambule. He is a 47 year old male Swazi citizen from the Mgababa area, under chief Mabhedla in the Hhohho region. He runs an upholstery business. He has one child.
7. The confirmatory affidavits of Mfanawenkhosi Mbhunu Mntshali and Derrick Dickson Nkambule are annexed hereto marked 'A' and "B", respectively.
8. I and my co- applicants are charged with contravening the Sedition and Subversive Activities Act, 1938 (Sedition Act). We have an obvious interest in the relief sought in this application, which we bring in our own interest and also in the public interest.
9. The first respondent is the Prime Minister of Swaziland, Mr. Barnabas Sibusiso Dlamini. He is cited in his capacity as the head of government.
10. The second respondent is the Minister of Justice and Constitutional Affairs, Mr. Sibusiso Shongwe. The Minister is cited in his capacity as the Minister responsible for tabling bills in parliament, including bills such as the Sedition Act, which is impugned in this application.
11. The third respondent is the director of Public Prosecutions, Mr. Nkosinathi Maseko. He is cited in his official capacity as the officer responsible for the prosecution of all criminal activities that occurs within the Kingdom of Swaziland.
12. The fourth respondent is the Attorney General, Mr. James Majahenkaba Dlamini. He is cited in his official capacity as the official legal representative of the government of the kingdom of Swaziland, it's officers and agencies.

13. Both the third and fourth respondents are ultimately responsible for the charges brought against the applicants.

BACKGROUND TO THIS APPLICATION

14. On the 23rd September 2013, I was arrested and detained with the second and third applicants at the Mbabane police station.
15. I and the other applicants were subsequently indicted for trial at the High of Swaziland on the 27th September 2013, on two charges of contravening the Sedition Act by participating in an unlawfully rally with a seditious intention and possessing a seditious publication in the form of a banner.
16. Regardless of our plea or what evidence may be presented at our trial, we stress in this application that participation in a rally and possessing a banner are not seditious activities that should be criminally prosecuted. That is because in an open and democratic society, committed to the rule of law and the principles of the constitution, participation in a rally is a healthy feature of democratic life. Indeed, as I now demonstrate, the sedition act is unconstitutional in respect of the charges against me and my co – applicants.

THE CRIMINAL CHARGES WE ARE FACING AS APPLICANTS

17. We are accused of contravening section 4 (a) of the Sedition Act, in that on or about 19th April 2013, and at or near Msunduzi township, Mbabane area on the Hhohho region, while acting jointly and severally in furtherance of a common purpose, we did unlawfully attempt, make preparations and conspired with other people to bring hatred and dissatisfaction against the Swaziland Government and the administration of Justice. I annex a copy of the indictment issued against the applicants marked "C" hereto.
18. According to section 4 (a) of the sedition Act, *"[a]ny person who does or attempts to do, or makes an preparation to do, or conspires with any person to do, any act with a seditious intention"* is guilty of an offence.

19. We are further accused of contravening section 4 (e) of the Sedition Act, in that upon or about 19 April 2013, and at or near Msunduzi Township, Mbabane area in the Hhohho region, while acting jointly and severally in furtherance of a common purpose we did without lawful excuse display a banner inscribed with seditious publication in contravention of the Sedition Act.
20. According to section 4 (e) of the Sedition Act, "[a]ny person who without lawful excuse has in his possession any seditious publication" is guilty of an offence.
21. According to section 2 of the Sedition Act, "seditious publication" means "any publication containing any word, sign or visible presentation expressive of a seditious intention".
22. Section 3 (1) of the Sedition Act defines a "seditious intention" as an intention to —
 - (a) *bring into hatred or contempt or to excite disaffection against the person of His Majesty the King, His Heirs or successors, or the Government of Swaziland as by law established; or*
 - (b) *excite His Majesty's subjects or inhabitants of Swaziland to attempt to procure the alteration, otherwise than by lawful means, of any matter in Swaziland as by law established; or*
 - (c) *bring into hatred or contempt or to excite disaffection against the administration of justice in Swaziland; or*
 - (d) *raise discontent or disaffection amongst His Majesty's subjects or the inhabitants of Swaziland; or*

- (e) *promote feelings of ill-will and hostility between different classes of the population of Swaziland.*"

THE UNCONSTITUTIONALITY OF SECTION 3 (1) OF THE SEDITION ACT

23. I and my co-applicants are seeking an order declaring the provisions of section 3 (1) of the Sedition Act to be inconsistent with the Constitution and therefore, invalid. As a consequence of that unconstitutionality, we furthermore ask that sections 4 (a) and (e) [which are predicated on section 3 (1), and which are the sections that we are charged with contravening], are similarly declared unconstitutional.
24. The definition of "*sedition intention*" in section 3 (1) of the Sedition Act is overbroad and encompasses a wide range of non-seditious conduct.
25. The effect of the definition of "*sedition intention*" is to proscribe free thinking, legitimate expression, freedom of conscience, freedom of thought, freedom of assembly and association protected by sections, 23, 24 and 25 of the Constitution.
26. The Sedition Act criminalises the raising of discontent and disaffection. Its significance and effect is that it does not matter how conflicted the viewpoint of the head of state and government may be with the aspirations, dreams, objectives, needs and desires of the citizens of the country, such viewpoint should be accepted without question, thereby creating a docile citizenry and ensuring suppression of debate and democratic expression.
27. I have been advised that the inclusion of such a wide range of prohibited conduct in the Sedition Act unjustifiably limits the rights to freedom of conscience, freedom of thought, freedom of expression, freedom of assembly and association.
28. Furthermore, the Sedition Act unjustifiably limits those rights through the invocation of intolerably open-ended and vague terms such as "discontent",

"ill-will", "disaffection" and "hostility" arising from the prohibited conduct. The terms are incapable of objective verification, and provide no or insufficient guidance to the subjects of the law or to the officials of the state who must police the law, as to the law's application. I am advised that the doctrine of vagueness is founded on the rule of law, and requires that laws must be written in a clear and accessible manner, and must indicate with reasonable certainty to those who are bound by them what is required of them, so that they may regulate their conduct accordingly. This is of particular importance in criminal law provisions; the statutory text must be clear to potential wrongdoers what conduct is proscribed by the specific legislation as well as to law enforcement agencies and officials.

29. The principle of legality demands that when legislation is construed using the usual canons of construction, it must indicate with reasonable certainty to those who are bound by it the act which is enjoined or prohibited. If it does, it is constitutionally acceptable; if it does not, it is constitutionally offensive.
30. Citizens of the Kingdom of Swaziland such as myself and my co-applicants are prohibited by provisions of the Sedition Act from expressing opinion, beliefs or ideas through publications – on pain of criminal sanction. We are denied the freedom to hold or consider a fact or viewpoint, thought, independent and in conflict with the viewpoints of the head of state or government of the day. What is more, the Sedition Act is policed by the State through the offices of the third and fourth respondents and the police, and on account of their subjective views of whether the conduct in question has given rise to the types of "discontent", "ill-will", "disaffection" and "hostility" prohibited under section 4.
31. We are further prohibited by the Sedition Act from forming and participating in rallies and demonstration, which are aimed at expressing opinions, thoughts and ideas which may be in conflict with the viewpoint of the government of the day. This limitation is neither proportional to its objectives, nor justifiable. The restrictions do not conform to the spirit of the Constitution of promoting good

governance, the rule of law and attaining progressive development of the Swazi society.

32. It is on the basis of the foregoing that I humbly submit that section 3 (1) of the Sedition Act should be struck down as unconstitutional, including sections 4 (a) and 4 (e) which are reliant upon section 3 (1).

33. I and my co-applicants accordingly pray for the relief set out in the Notice of Motion to which this affidavit is annexed.

[Handwritten signature]

DEPONENT

The deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at

12 JUNE on this the 12 day of 2014

[Handwritten signature]

KENNETH NHLENGETHWA

COMMISSIONER OF OATHS

