THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO 1703/2014

In the matter between

MARIO THEMBEKA MASUKU	**1ST APPLICANT**
MAXWELL MANQOBA DLAMINI	**2ND APPLICANT**

and

THE PRIME MINISTER OF SWAZILAND	**1ST RESPONDENT**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS	**2ND RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

APPLICANTS' SUBMISSIONS

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INTRODUCTION

1. The Applicants have been charged with contravening the Suppression of Terrorism Act, 3 of 2008 (the Terrorism Act), and the Sedition and Subversive Activities Act, 46 of 1938 (the Sedition Act). They face four charges,[1] which are all based on substantially the same facts: that on or about 1 May 2014 and at or near Manzini Salesian Sports Ground the accused chanted the following slogans in support of a proscribed entity, the People's United Democratic Movement, "VIVA PUDEMO VIVA, PHANSI NEGTINKHUNDLA PHANSI AND FURTHER CALLING AND/OR DEMANDING FOR THE OVERTHROW OF THE LEADERSHIP AND GOVERNMENT".

2. The First Applicant described the events which took place at the May Day celebrations at the Salesian School sports ground as follows:

> "*11. On 1 May 2014 the second applicant and I attended the May Day celebrations at the Salesian School sports ground in Manzini. The celebrations were attended by thousands of Swazi workers who had gathered to commemorate the International Workers' Day.*
>
> *12. I spoke at the event, and the second applicant participated in the singing of songs and chanting of slogans. In the speeches and songs the second applicant and I sought to draw attention to several issues affecting Swaziland at present. We questioned the legitimacy of the tinkhundla system of governance and of the absolute monarchy. I also called for the government to urgently restore the AGOA agreement with the USA government. I criticized the judiciary and called for those responsible to restore the independence of the judiciary and restoration of the rule of law.*

[1] The first charge is of contravening section 11(1)(a) of the Terrorism Act; the second is of contravening section 11(b) of the Terrorism Act; the third is of contravening section 4(a) (b) (c) and (e) read together with section 3(c) and (e) of the Sedition Act; and the fourth is of contravening section 5(1) read together with section 5(2)(a)(i)(ii) and (iii)(b)(c)(d)(e) and (f) of the Sedition Act. The charges are set out in full in an annexure to the founding affidavit and are not repeated.

13. The speeches and comments were in response to what we perceive as a grave political situation in Swaziland in which citizens' rights are repeatedly infringed. The second applicant and I believe that the Constitution of Swaziland is supreme and must be respected, and that various Swazi officials do not adhere to their constitutional obligations. Our comments aim to explain why Swazi officials and officials' conduct was inconsistent with the Constitution, and why this entailed that their rule was unconstitutional and invalid.

Our speeches were intended, without using force or violence, to protest against actions of officials that we believe were inconsistent with the Constitution of Swaziland and not in the interest of a free and democratic Swazi society."

3. The Deputy Attorney-General in his answering affidavit denies the correctness of the statements made by the First Applicant (for example he denies that the rights of citizens are being infringed by any Swazi official and claims that all the actions of officials are "*in line"* with the Constitution), but does not dispute the First Applicant's evidence concerning what he said at the May Day celebration in paragraph 12 of his affidavit and merely puts him to the proof thereof.[2]

4. The Applicants seek an order declaring that sections 11(1)(a), 11(1)(b), 28, and 29(4) in the Terrorism Act, along with paragraphs 1 and 2(j) of the definition of *"terrorist act"* and paragraph (b) of the definition of *"terrorist group"*, are inconsistent with section 21, 24, 25, and 33 of the Constitution or infringe the principle of legality, and are therefore invalid. The Applicants also seek an order declaring that sections 3(1), 4(a), 4(b), 4(c), 4(e), 5(1) and 5(2) of the Sedition Act are inconsistent with section 24 of the Constitution and infringe the principle of legality and are therefore invalid.[3]

[2] Answering Affidavit, paragraph 7.
[3] These provisions are set out below.

5. The Respondents' case is based on the premise that the applicants' conduct, in chanting slogans and speaking out against the system of governance, the absolute monarchy and calling for the restoration of the rule of law, contravene the statutory prohibitions on terrorism and sedition.

6. The core issue which this Court is required to determine is whether the impugned statutes are unconstitutional and invalid to the extent that they criminalise statements calling for non-violent political change.

7. The structure of these submissions is as follows:

    7.1. The challenge to the definitions of terrorist act and terrorist group and sections 11(1)(a) and 11(1)(b) of the Terrorism Act on the grounds that they infringe the principle of the rule of law and the Applicants' rights to freedom of expression and association ("the first challenge") is set out;

    7.2. The contention that sections 28 and 29(4) of the Terrorism Act conflict with the rights to administrative justice and to a fair trial ("the second challenge") is motivated; and

    7.3. The basis for the relief declaring sections 3(1), 4(a), (b), (c) and (e) and 5(1) and (2) of the Sedition Act constitutionally invalid ("the third challenge") is considered.

8. Before considering the substantive issues outlined above, however, it is necessary to deal with a preliminary point raised in relation to the citation of the Respondents.

CITATION OF THE PARTIES

9. The Respondents in this Application were cited as follows:

    9.1. The First Respondent, the Prime Minister of Swaziland, was cited in his capacity as the head of government;

9.2. The Second Respondent, the Minister of Justice and Constitutional Affairs, was cited in his capacity as Minister responsible for tabling bills in Parliament;

9.3. The Third Respondent, the Director of Public Prosecutions, was cited in his capacity as the officer responsible for the prosecution of criminal activities in Swaziland; and

9.4. The Fourth Respondent, the Attorney General, was cited in his capacity as official legal representative of the government of Swaziland.

10. The Fourth Respondent objected to the citation of the First, Second, and Third Respondents.

11. This application requires this Court to determine the constitutionality of two statutes and the First, Second, and Third Respondents have all been correctly cited for the following reasons:

11.1. The First Respondent has ultimate control of the Royal Swazi Police Service – the officers who enforce and apply the Sedition and Terrorism Acts. He does, therefore, have a direct interest in the outcome of this matter.

11.2. The Second Respondent is the Minister responsible for tabling bills in Parliament, and as the outcome of this application may be that the Terrorism and/or Sedition Acts have to be amended, the Second Respondent has a direct interest in the matter.

11.3. The Third Respondent is the individual ultimately responsibility for initiating all prosecutions in the Kingdom – including prosecutions under the Sedition and Terrorism Acts. He therefore has a direct interest in this application.

12. The relief sought in this Application challenges the constitutionality of legislation for which all four Respondents are responsible or are required to administer. It is accordingly submitted that there is no merit in the point *in limine.*

THE FIRST CHALLENGE

THE RIGHTS OF FREEDOM OF EXPRESSION AND ASSOCIATION

13. The Applicants submit that the definitions of terrorist act and terrorist group, as well as sections 11(1)(a) and 11(1)(b) of the Terrorism Act, violate the principle of legality and sections 24 and 25 of the Constitution.

14. The Supreme Court in *The Prime Minister of Swaziland v MPD Marketing & Supplies*[4] held that the *"Kingdom of Swaziland is a Constitutional State. It has incorporated the doctrine of the rule of law by the enactment of the Constitution."*

15. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[5] the South African Constitutional Court held as follows:

> *"These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada the Supreme Court of Canada held that:*
>
> > *'Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the*

[4] *Prime Minister of Swaziland and Others v MPD Marketing & Supplies (Pty) Ltd* (Appeal Case No. 18/2007) (Appeal Case No. 18/2007) [2007] SZSC 11 (15 November 2007), para 17.1.
[5] 1999 (1) SA 374 (CC) [56].

Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc v The Queen [1985] 1 SCR 441 at 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.'" [footnotes omitted]

16. The implications of the principle of the rule of law have been stated eloquently by this Court in *The King v Swaziland Independent Publishers*:[6]

> *"It is apparent from the preamble to the Constitution of 2005 that this country committed itself to a new era of Constitutional supremacy and the rule of law. The country further committed itself to "start afresh under a new framework of constitutional dispensation", and to protect and promote the fundamental rights and freedoms of All in terms of a Constitution which binds the legislature, the executive, the judiciary and the other organs and agencies of the government.*
>
> *The Preamble further provides that all the branches of government are the guardians of the Constitution, and that it is therefore necessary that the courts be the ultimate Interpreters of the Constitution. Similarly, section 2 (1) of the Constitution provides that the Constitution is the supreme law of this country and that if any law is inconsistent with this Constitution, that other law shall to the extent of the inconsistency be void."*

17. Section 24 of the Constitution protects the right to freedom of expression.[7] The content of this right will be considered in the paragraphs which follow.

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[6] *The King v Swaziland Independent Publishers (Pty) Ltd & Another* (53/2010) [2013] SZHC88 (2013), para 138.

[7] *A person has a right of freedom of expression and opinion.*

1) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say –

Freedom of Expression

18. Freedom of expression is the cornerstone of democracy. It is particularly important in the political sphere and freedom of political debate is at the very core of the concept of a democratic society.[8] Freedom of expression is both intrinsically valuable and instrumentally useful. It is useful because it protects democracy by informing citizens, promoting debate and exposing misgovernance and folly. It is intrinsically valuable in that it advances the search for truth on the part of both individuals and society. The repression of views regarded as unacceptable carries the risk that those views might never be exposed as wrong. Open debate promotes truth-finding and enables citizens to scrutinise political arguments and consider social values.[9]

19. The Supreme Court has held that fundamental human rights, which include the right to freedom of expression, must be interpreted generously:

> *"What is important is the wording of our own Constitution. A proper interpretation must be given to the language as it appears in that document. A broad, generous*

> *a) Freedom to hold opinions without interference;*
> *b) Freedom to receive ideas and information without interference;*
> *c) Freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and*
> *d) Freedom from interference with the correspondence of that person*
>
> *2) 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;*
> *b) That is reasonably required for the purpose of –*
> *i. Protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;*
> *ii. Preventing the disclosure of information received in confidence;*
> *iii. Maintaining the authority and independence of the courts; or*
> *iv. Regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication; or*
> *c) That imposes reasonable restrictions upon public officers,*
> *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.*

[8] *Law Offices of Ghazi Suleiman / Sudan*, ACHPR, 228/99.
[9] *Democratic Alliance v African National Congress and Another* (CCT 76/14) [2015] ZACC 1; 2015 (2) SA 232 (CC) (19 January 2015) [122] (*"Democratic Alliance"*). *The Citizen 1978 (Pty) Ltd and Others v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (*"McBride"*) [82].

and liberal interpretation must be given to the sections pronouncing human rights and freedoms, and any section which limits such rights and freedoms must be given a strict and narrow interpretation."[10]

20. This Court has recognised the importance of the right of freedom of expression for promoting the democratic ideals entrenched in the Constitution:[11]

> *"The right of freedom of expression and opinion is important in our society in advancing the democratic ideals enshrined in the Bill of Rights; the right allows society to form and express varying opinions constructively with a view to achieve open and accountable governance. However, the right has to be exercised and enjoyed within the confines and parameters of the Constitution; the enjoyment of this right like with all other rights should not interfere with the rights of others."*

21. The Supreme Court has also stated that it cannot be overemphasized that the right to freedom of expression advances the need for public information *"through the robust criticism and comments of the media."*[12]

22. In a similar vein, the South African Constitutional Court has noted that the right of freedom of expression, together with mutually supporting rights, including the right to freedom of association, confirm the importance, both for a democracy and for the individuals who make up society, of being able to form and articulate opinions, particularly views that are unpopular or which inconvenience the powerful. The converse of this principle is the need for the public airing of disagreements, the tolerance of opinions of which we disapprove and the refusal to silence unpopular views.[13]

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[10] *Mhlanga and Another v The Commissioner of Police and Others* (12/08) [2008] SZSC 21 (23 May 2008) page 15.
[11] *The King v Swaziland Independent Publishers (Pty) Ltd & Another* (53/2010) [2013] SZHC88 (2013) para 97.
[12] *African Echo (Pty) Ltd t/a Times of Swaziland vs Inkhosatana Gelane Simelane* (77/2013) SZSC 83 (3 December 2014, para 4.
[13] *Democratic Alliance, supra*, [124] – [125]; *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) (*SANDU*) [7] – [8]; *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W); 1996 (6) BCLR 836 (W) at 608G-609A; *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) [43].

23. Robust political debate forms the basis of the democratic process. Political life in South Africa *"has always been loud, rowdy and fractious"*. It is good for democracy, society and individuals for there to be as much vigorous debate of public affairs as possible within the boundaries set by the Constitution.[14] It is submitted that these principles apply with equal force in this country.

Freedom of Association

24. Section 25 similarly protects the right to freedom of assembly and association.[15] In *South African National Defence Union v Minister of Defence and Another,*[16] the Constitutional Court stated:

> *'[Freedom of speech] is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). These rights taken together protect the rights of individuals not only*

[14] *Democratic Alliance, supra,* [133] and 193; *McBride, supra,* [99] – [100].

[15] Section 25 reads as follows:

1) *A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and association, that is to say, the right to assemble peacefully and associate freely with other persons for the promotion or protection of the interests of that person.*
2) *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;*
    b) *That is reasonably required for the purpose of protecting the rights or freedoms of other persons; or*
    c) *That imposes reasonable restrictions upon public officers,*

    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.
3) *Without prejudice to the generality of subsection (2), 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. *For the registration of trade unions, employers organisations, companies, partnerships or co-operative societies and other associations including provision relating to the procedure for registration, prescribing qualifications for registration and authorising refusal of registration on the grounds that the prescribed qualifications are not fulfilled; or*
    b. *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.*
4) *A person shall not be compelled to join or belong to an association.*

[16] 1999 (4) SA 469 (CC) ((1999) 20 ILJ 2265; 1999 (6) BCLR 615; [1999] ZACC 7) [8].

individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.'

25. The rights to freedom of expression and association are accordingly closely related and, while not being absolute, are strongly protected: they both can only be limited by a law which is reasonably required for the purposes set out in subsections 3; and which is reasonably justifiable in a democratic society.

Limitations analysis

26. This Court has found as follows with regard to the limitations on the right to freedom of expression:[17]

"It is apparent from section 24 that the right of freedom of expression and opinion is not absolute; it is subject to various limitations as reflected in section 24 (3).

...

It is apparent from section 24 (3) of the Constitution that the right of freedom of expression and opinion is subject to the limit that it will be sustained unless it is shown not to be reasonably justifiable in a democratic society. Section 24 (3) (b) (iii) specifically limits the right in order to maintain the authority and independence of the courts; this is achieved in terms of the law of contempt of Court. The onus of proving that the limitation is reasonably justifiable in a democratic society lies with the party seeking to uphold the limitation."

[17] *The King v Swaziland Independent Publishers (PTY) Ltd & Another* (53/2010) [2013] SZHC88 (2013) paras 91 and 94.

27. In the present case, a limitations analysis of sections 24 and 25 of the Constitution involves the following questions:

    27.1. Is the limitation contained in law?

    27.2. Is the limitation reasonably required in the interests of defence, public safety, public order, public morality or public health?

    27.3. Is the limitation reasonably justifiable in a democratic society?

28. Underlying such an analysis is the understanding that the limitation should not render the right nugatory.[18]

Is the Limitation contained in Law?

29. Limitations to the rights to freedom of expression and association can only be effected by *"law"*, but the Constitution does not specify what criteria this law must meet. It is therefore necessary to determine what would constitute a *"law"*, and if a limitation does not meet this standard the limitation is automatically impermissible.

30. The principle of legality requires all law to be clear, concise, and certain.

31. The Canadian Supreme Court eloquently explained why the principle of legality is so important in a democracy.

> "*The principles expressed in these two citations are not new to our law. In fact they are based on the ancient Latin maxim nullum crimen sine lege, nulla poena sine lege -- that there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as*

[18] *Chimakure v Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH), 17; UNHCR General Comment 34 at para 21.

is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards … This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law."[19]

32. The South African author, CR Snyman, set out four rules of the principle of legality that apply to the criminal law, including that crimes should not be formulated vaguely and that all definitions of crimes should be interpreted narrowly.[20]

33. In *Constitutional Law of South Africa*, Chaskalson, Woolman and Bishop write:

> *"Laws may not grant officials largely unfettered discretion to use their powers as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extensions."*[21]

34. The Supreme Court in Canada discussed the need for clarity for both citizens and officials.

> "*A law must set an intelligible standard both for the citizens it governs and the officials who must enforce it. The two are interconnected. A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed*."[22]

[19] Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.) [1009] 1 SCR 1123 at p. 25 C.R.R, p 86 C.C.C.
[20] The other two rules are that an accused can only be convicted if his conduct is recognised as a crime, that the crime an accused is convicted of must have been a crime at the time of its commission. Snyman CR *Criminal Law* Part 1, The Principle of Legality. Accessed through LexisNexis Online, 22 February 2015.
[21] Chaskalson, Woolman and Bishop, Constitutional Law of South Africa, Juta Second Edition, 2014, 49. See also *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 47.
[22] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 S.C.R 76, at para 16.

35. This was, the Court held, to prevent "*the evil of leaving 'basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application*."[23]

36. In sum, the principle of legality is necessary to to ensure that societies remain "*governed by the rule of law, not the rule of persons*."[24]

37. The European Court of Human Rights, in *Sunday Times v United Kingdom*, explains:

> *"(A) norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: He must be able to – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail."*[25]

38. In accordance with this principle, courts in the region have emphasized that the doctrine of vagueness requires that laws must be written in a clear and accessible manner[26] and in a manner which specifies clearly to what extent constitutional rights are curtailed by the law.[27]

Does the Limitation Protect an Interest Listed in Sections 24(3) and 25(3) of the Constitution?

39. Sections 24(3) and 25(3) of the Constitution provide a set of listed interests that justify limitation to the rights, and the limitation must therefore have as its objective the protection of one of those interests.

40. The Respondents bear the onus of demonstrating precisely which interests are sought to be protected by the limiting legislation, and if they are unable to do so, then the limitation is

[23] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 S.C.R 76 at para 16
[24] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 S.C.R 76 at para 16.
[25] *Sunday Times v United Kingdom*, ECHR, Application No. 6538/74 at para 49.
[26] *Affordable Medicines Trust v Minister of Health and another* 2006 (3) SA 247 (CC), at para 108.
[27] *Chimakure v Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH) page 26.

unconstitutional.[28] These interests must be pressing, substantial and important to society.[29] The Respondents must further show how the societal need for the limitation of the right outweighs the individual's right to enjoy the right in question.[30]

The Proportionality Analysis: Is there a Rational Connection between the Interest Sought to be Protected and the Limitation?

41. The Respondents are then required to show that there is a rational connection between the interest listed in sections 24(3) and 25(3) of the Constitution, and the limitation of the rights to freedom of expression and association by the Terrorism Act. This stage of the analysis requires an inquiry into the proportionality of the limitation in relation to the harm caused.

42. The Canadian case of *R v Oakes*[31] authoritatively set out the proportionality test, and has been referred to and applied in jurisdictions around the world. In one application of the *Oakes* test the Kenyan High Court explained that the objective of the legislation must be rationally connected to the means chosen to achieve the objective, and must not be arbitrary, unfair or based on irrational considerations. In addition, the means chosen to achieve the objective must limit the right as little as possible and their effect on the limitation of rights must be proportional to the objective sought to be achieved.[32]

43. In determining whether a statute meets constitutional muster, the court must have regard to both its purpose and its effect.[33]

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[28] *National Media Group Limited v Attorney General* [2007] 1 EA 261 (HCK); *R v Oakes* [1986] 1 SCR 103.
[29] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295; *Coalition for Reform and Democracy and Others v Republic of Kenya and Attorney General*, Petition 628 of 2014, High Court of Kenya Full Bench, decision on 23 February 2015 at para 210-1.
[30] *S v Zuma and Others* (1995) 2 SA 642 (CC), *Coalition for Reform and Democracy and Others v Republic of Kenya and Attorney General*, Petition 628 of 2014, High Court of Kenya Full Bench, decision on 23 February 2015 at para 210.
[31] *R v Oakes* [1986] 1 SCR 103.
[32] *Coalition for Reform and Democracy and Others v Republic of Kenya and Attorney General*, Petition 628 of 2014, High Court of Kenya Full Bench, decision on 23 February 2015 at para 212. See also UNHCR General Comment 34 at para 34.
[33] *R v Chaulk* (1990) 3 SCR 1303.

44. The Canadian Supreme Court, in the case of *R v Big M Drug Mart Ltd*, held:

> *"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."*[34]

45. The Courts are also required to acknowledge the importance of the right that is being limited, and to determine its value to the achievement of a functioning democracy.

> "*The questions which fall to be considered are the needs or objectives of a democratic society in relation to the right or freedom concerned. Without a notion of such needs, the limitations essential to support them cannot be evaluated. For example, freedom of expression is based on the need of a democratic society to promote the individual self fulfilment of its members, the attainment of truth, participation in decision making, and the striking of a balance between stability and change. The aim is to have a realistic, open, tolerant society. This necessarily involves a delicate balance between the wishes of the individual and the utilitarian 'greater good of the majority*"[35]

46. The purpose of the proportionality test is to ensure a fair balance between the rights of an individual and the rights of a community,[36] and to ensure that rights are not made illusory through limitations.[37] This aspect of the limitations analysis also requires Courts to ascertain

[34] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, cited with authority in *Coalition for Reform and Democracy and Others v Republic of Kenya and Attorney General*, Petition 628 of 2014, High Court of Kenya Full Bench, decision on 23 February 2015 at para 98. See also
[35] *Handyside v United Kingdom* 1 EHRR 737.
[36] See *Chimakure v Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH), 21.
[37] See *Constitutional Rights Project and others v Nigeria* (2000) AHLHR 227 (ACHPR 1999), at para 42

whether the legislation is narrowly tailored so as to not infringe the right more than is necessary.[38]

47. It is vitally important that Courts recognise that the exercise of individuals' rights may cause some harm to the community's interest and that this alone is not sufficient to justify the limitation of those rights. In *Chimakure* the Zimbabwe Constitutional Court held that only serious harm can lead to a limitation of the right.

> "[*t]he exercise of the right to freedom of expression is not protected because it is harmless. It is protected despite the harm it may cause.*"[39]

48. The Constitutional Court emphasised that only real damage of harm can justify a limitation.

> "'*[t]he Constitution forbids the imposition of a restriction on the exercise of freedom of expression when it poses no danger of direct, obvious, serious and proximate harm to a public interest listed in section 20(2)(a) of the Constitution*."[40]

Is the Limitation Reasonably Justifiable in a Democratic Society?

49. The final requirement is that the law limiting the right must nevertheless be "*reasonably justifiable in a democratic society*". This, in effect, limits the limitation. In this respect, it is useful to look to the case law by the Constitutional Court of Uganda, which has described the requirement that limitation must be reasonably justifiable in a democratic society as a yardstick with which to conduct the limitations analysis.[41]

50. It is important to recognise that when assessing whether a limitation is reasonable in a *"democratic society*" the Court must have regard to all democratic societies. This was noted

[38] See *Canada (Attorney General) v Bedford* 2013 SCC 72, at para 113 and *Chimakure v Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH), 58.
[39] *Chimakure v Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH), 57.
[40] *Chimakure v Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH), 56.
[41] *Obbo v Attorney General* page 295.

by the Ugandan Supreme Court when it acknowledged that Uganda's ideal democracy cannot be a specifically Ugandan construction of the principle.

> "*I have not the slightest doubt that when the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails. They meant democracy as universally known*."[42]

THE TERRORISM ACT

51. The starting point, in assessing the constitutionality of the Terrorism Act, is its purpose. This was stated, in the Memorandum of Objects which accompanied the Suppression of Terrorism Bill (No. 5 of 2008), as being:

> *"to provide a legal regime that would prevent, fight and suppress terrorists activities in compliance with the United Nations Security Council Resolution 1373 and the United Nations Conventions against terrorism."*

52. It is accordingly necessary to assess whether the Act achieves its stated objective of giving effect to the international law principles embodied in the Conventions against Terrorism and Security Council Resolution 1373.

53. Sections 11(1)(a) and (b) of the Terrorism act sets out the offences of soliciting and giving support to terrorist groups:

> *"A person who knowingly, and in any manner, -*
>
> *(a) Solicits support for, or gives support to, any terrorist group, or*
> *(b) Solicits support for, or gives support to, the commission of a terrorist act,*

[42] Obbo v Attorney General page 270.

commits an offence and shall, on conviction, be liable for imprisonment for a term not exceeding fifteen (15) years."

54. Section 2 of the Terrorism Act provides definitions for "terrorist group" and "terrorist act".

"terrorist group' means -

(a) An entity that has one of it's activities and purposes, the committing of, or the facilitation of the commission of, a terrorist act; or
(b) A specified entity;

'terrorist act' means –

1. An act or omission which constitutes an offence under this Act or within the scope of a counter-terrorism convention; or

2. An act or threat of action which –

(a) causes –

(i) the death of a person;

(ii) the overthrow, by force or violence, of the lawful Government; or

(iii) by force or violence, the public of a member of the public to be in fear of death or bodily injury;

(b) involves serious bodily harm to a person;

(c) involves serious damage to property;

(d) endangers the life of a person;

(e) *creates a serious risk to the health or safety of the public or a section of the public;*

(f) *involves the use of firearms or explosives;*

(g) *involves releasing into the environment or any part of the environment or distributing or exposing the public or any part of the public to –*

(i) *any dangerous, hazardous, radioactive or harmful substance;*

(ii) *any toxic chemical;*

(iii) *any microbial or other biological agent or toxin;*

(h) *is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;*

(i) *is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;*

(j) *involves prejudice to national security or public safety;*

and is intended, or by its nature and context, may reasonably be regarded as being intended to –

(k) *intimidate the public or section of the public; or*

(l) compel the Government, a government or an international organisation to do, or refrain from doing, any act.

3. Notwithstanding the provisions of subsection (2), an act which –

(a) Disrupts any services; and

(b) Is committed in pursuance of a protest, demonstration or stoppage of work, shall be deemed not the terrorist act within the meaning of this definition, so long as the act is not intended to result in any harm referred to in paragraphs (a), (b), (c), (d), (e) of subsection (2)" [emphasis added]

The Definition of "Terrorist Act"

55. This Court must be astute to ensure that the Terrorism Act adheres to internationally accepted norms and does not unnecessarily infringe on constitutionally protected rights in the Kingdom.[43] The United Nations Special Rapporteur on the promotion and protection of human rights while countering terrorism, has stressed the need to balance counter-terrorism measures with protection of fundamental human rights:

> "*The Special Rapporteur recognizes States' right and duty to protect individuals, both their citizens and others, from violence, including terrorist attacks. States therefore have an obligation to take effective counter-terrorism measures. At the same time, States must respect their international human rights obligations in all the measures that they take to counter terrorism. The Special Rapporteur would like to stress that these two requirements placed on States are not mutually exclusive. In human rights law, the extreme and difficult situations States may face*

[43] *Coalition for Reform and Democracy and Others v Republic of Kenya and Attorney General*, Petition 628 of 2014, High Court of Kenya Full Bench, decision on 23 February 2015.

are recognized by allowing for certain limitations and derogations in extraordinary circumstances."[44] [emphasis added]

56. In a recent High Court decision in Kenya the Court confirmed that "*protecting national security carries with it the obligation on the State not to derogate from the rights and fundamental freedoms guaranteed in the Constitution*".[45]

57. The Applicants submit that the definition of "*terrorist act*" in the Terrorism Act is overly broad and unjustifiably infringes on the rights to freedom of expression and association.

58. Although United Nations Security Council 1373, to which the Terrorism Act seeks to give effect, did not contain a definition of *"terrorism"*, Security Council Resolution 1566 addressed the lacuna in calling on all States to prevent acts of terrorism, and characterising terrorist acts as:

> "*criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are by no means justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature*."[46]

59. The United Nations High Level Panel on Threats, Challenges, and Change addressed a letter to the Secretary General in 2004 in which they provided their definition of terrorism. This

[44] UN Special Rapporteur Report 2006, UN Doc A/61/267 at para 10.
[45] *Coalition for Reform and Democracy and Others v Republic of Kenya and Attorney General*, Petition 628 of 2014, High Court of Kenya Full Bench, decision on 23 February 2015 at para 1.
[46] UN SC Resolution 1566, para 3. S/RES/1566 (2004)

definition included that the conduct must have been intended to "*cause death or serious bodily harm to civilians or non-combatants."*[47]

60. The South African Protection of Constitutional Democracy against Terrorist and Related Activities, 33 of 2004, in similar fashion, requires serious harm or violence in its definition of terrorism.[48] The United Kingdom's Terrorism Act of 2000 also defines terrorism as requiring "*serious violence against a person*" or "*serious damage to property*".[49]

61. In 2006 the United Nations Special Rapporteur in 2006 defined *"terrorism"* in the following terms:

> "*Therefore, at the national level, the specificity of terrorist crimes is defined by the presence of three cumulative conditions: (i) the means used, which can be described as deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; (ii) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to do or refrain from doing something; and (iii) the aim, which is to further an underlying political or ideological goal. It is only when these three conditions are fulfilled that an act should be criminalized as terrorist; otherwise it loses its distinctive force in relation to ordinary crime*".[50] [emphasis added]

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[47] Transmittal letter dated 1 December 2004 from the Chair of the High-level Panel on Threats, Challenges and Change addressed to the Secretary-General UN DOC A/59/565, para 164.

[48] See, for example, subsection (a)(i): "involves the systematic, repeated or arbitrary use of violence", subsection (a)(iii): "endangers the life, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person, or any number of persons", subsection (a)(iv): "serious risk to the health or safety of the public or any segment of the public"

[49] Section 1 of the 2000 Act is headed 'Terrorism: Interpretation', and, as amended by the 2006 Act and the CounterTerrorism Act 2008, it provides as follows:
'(1) In this Act "terrorism" means the use or threat of action where— (a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
(2) Action falls within this subsection if it— (a) involves serious violence against a person,
(b) involves serious damage to property,

[50] UN Special Rapporteur Report (2006) UN Doc. A/61/267 at para 44.

62. This definition captures three essential elements required in order for conduct to qualify as *"terrorist"*: it must be deadly or seriously violent or entail the taking of hostages; it must be intended to cause fear amongst the public or to compel the government (or international organisation) to do something specific; and it must be done to *"further an underlying political or ideological goal"*.

63. A 2014 judgment from the Appeals Chamber of the Special Tribunal for Lebanon gave effect to the above principles in defining terrorism, under customary international law, as follows:

> "*In sum, the subjective element of the crime under discussion is twofold, (i) the intent or dolus of the underlying crime and (ii) the special intent (dolus specialis) to spread fear or coerce an authority. The objective element is the commission of an act that is criminalised by other norms (murder, causing grievous bodily harm, hostage taking, etc.). The crime of terrorism at international law of course requires as well that (ii) the terrorist act be transnational*."[51]

64. The establishment of a customary international law rule requires the existence of two things: "*settled practice (*usus*) and the acceptance of an obligation to be bound (*opinio juris*)*."[52] The Appeals Chamber found that "*the national legislation of countries around the world consistently defines terrorism in similar if not identical terms to those used in the international instruments*",[53] which meets the criteria of "*settled practice"*. The Court further held that domestic courts' acceptance of this shared definition of terrorism *"viewed in combination with national legislation and the international attitude of States as taken in international fora, envince that the courts thereby intend to apply at the domestic level a notion that is commonly accepted at the international level*."[54] This was, the Court

[51] Interlocutory Decision On the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Spec. Trib for Leb.) 50 ILM 513 (2011) at para 111. See also Michael Scharf, *Special Tribunal for Lebanon: Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Introductory Note by Michael P Scharf* International Legal Materials, Vol. 50, No. 4 (2011), pp. 509-602, 510.
[52] John Dugard, *International Law: A South African Perspective*, 3rd ed, Juta (2005), 29.
[53] Interlocutory Decision On the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Spec. Trib for Leb.) 50 ILM 513 (2011) at para 91.
[54] Interlocutory Decision On the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Spec. Trib for Leb.) 50 ILM 513 (2011) at para 100.

concluded, a reflection of "*a legal opinion (opinio juris) as to the fundamental elements of the crime of terrorism.*"[55]

65. This Court has emphasised the importance of international law in interpreting laws:[56]

> *"It cannot be controverted that a convention that is ratified by the Kingdom of Swaziland, but not yet enacted locally as an Act of Parliament, is not part of the laws of the Kingdom. An example of such a convention is the Convention of the Rights of the child, which was acceded to by the Kingdom on the 6th October 1995, but is yet to be incorporated into the domestic law. It is however an accepted rule of judicial interpretation, one of universal and hallowed application, that regard must be had to international conventions and norms in construing domestic law, when there is no inconsistency between them and there is a lacuna in the domestic law.*
>
> *…*
>
> *I submit that the voice of the Swazi Nation is heard loud and clear on the question of the freedoms of the child through the Constitutional Provisions ante. The Constitution took the pains of addressing specifically the right of the child in* ***sections 19 (1)*** *and* ***29 (2)*** *thereof, notwithstanding the provisions on the right of the person, in which category the child also falls, as I have hereinbefore demonstrated."*

66. Much of definition of a *"terrorist act"* in the Terrorism Act complies with international law and parts of the definition closely mirror the characteristics stated by the Special Rapporteur. However, the definition is in breach of international law in two important respects: (i) the inclusion of *"an act or omission which constitutes an offence under the Act"*; and subsection

[55] Interlocutory Decision On the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Spec. Trib for Leb.) 50 ILM 513 (2011) at para 100.
[56] Masinga v Director of Public Prosecutions and Others (21/07) [2011] SZHC 58 (29 April 2011) pages 14 and 17.

2(j), which proscribes *"an act or threat of action which … involves prejudice to national security or public safety."*

67. The fundamental concern with the inclusion of offences as defined elsewhere in the Act is that they are then exempted from the requirements that the conduct be done with the intention to *"intimidate the public or section of the public; or compel the Government, a government or an international organisation to do, or refrain from doing, any act"*.[57] The consequence of this is that those additional offences do not then meet the internationally accepted definition of terrorism, as discussed above.

68. Although the conduct mentioned in many of the offences in the Terrorism Act is criminal,[58] this fact alone cannot characterise them as terrorist. As the first Special Rapporteur, Martin Scheinin, observed, *"[t]hat an act is criminal does not, by itself, make it a terrorist act*."[59]

69. The implication of this is that conduct which is criminal, but does not have the requisite deadly nature, and is not motivated by some political or ideological goal and done with the intention of creating public fear or to compel the government to act, cannot be classified as *terrorism*. For example, various acts are criminalised as offences under section 5 of the Act, and so, in terms of the definition, constitute terrorist acts.[60] This does not mean that the conduct cannot be addressed through the criminal law in other ways, but it cannot qualify as *"terrorist"*, with the implications attached to such a classification under international law.

70. Subsection 3 of the definition of "*terrorist act*" does provide some limitation to what constitutes a terrorist act, as it excludes conduct which is committed in pursuance of a "*protest, demonstration or stoppage of work*". However, although these limitations are

[57] Subsections 2(k) and (l) of the Terrorism Act definition of "terrorist act".
[58] An example is section 5(3)(a) which makes it an offence to send another person an explosive device, and section 53(b) which criminalises the sending of a false alarm.
[59] UN Special Rapporteur Report (2005) UN Doc E/CN.4/2006/98 at para 39.
[60] See, for example, section 5(3)(a) which makes it an offence to send another person an explosive device, and section 53(b) which criminalises the sending of a false alarm.

significant, they are not sufficient as they do not cover all forms of conduct and justifiable exercises of constitutional rights are not saved by this limitation.

71. It is therefore imperative that offences categorised as *terrorist* in the legislation meet the international law criteria for crimes of terrorism, and the inclusion of other offences within the definition of *"terrorist act"* renders the definition overly broad and inconsistent with *inter alia* sections 24 and 25 of the Constitution.

72. A far-reaching violation of the Bill of Rights is brought about by subsection 2(j) of the definition of a *"terrorist act"* by the inclusion of conduct involving *"prejudice to national security or public safety"*. This provision is in conflict with the principle of legality as it is far too broad and vague. In addition, it constitutes an unjustifiable limitation to the right to freedom of expression.

73. The example of the Applicants in this matter is a case in point: they were charged with supporting the commission of a terrorist act after chanting slogans. Their actions cannot be classified under any of the aspects in the definition of terrorist act, except 2(j) yet, it would be impossible for individuals to know that chanting slogans might constitute *"prejudice to national security".*

74. This provision therefore constitutes a limitation to the right of freedom of expression, and the question this Honourable Court is faced with is whether this limitation is permissible.

75. Under the first element of the limitations analysis, whether the limitation is *"within the law",* the limitation is too broad to satisfactorily meet this requirement.

76. The phrase "*involves prejudice to national security*" is overly broad and does not set a precise standard of what conduct is criminalised under that provision. The result is that individuals cannot be sure what conduct of theirs will be criminal, and it creates a *"standardless sweep",* as prohibited by the Canadian Supreme Court, and enables law enforcement officials to arrest and charge individuals for a variety of offences.

77. An important requirement of the rule of law is that legal rules must be stated in a clear and accessible manner[61] and impermissibly vague laws are invalid.[62] The test for vagueness is whether, applying the normal rules of interpretation, including those applicable to constitutional adjudication, *"the regulation indicates with reasonable certainty to those who are bound by it, what is required of them."*[63]

78. The definition of "*terrorist act*" is therefore an unacceptably broad one, and should not qualify as a "*law*" under the constitution's limitation provision.

79. Should this Court find that the definition qualities as "*law*" the second question is whether the limitation is designed to achieve one of the purposes listed in the internal limitations to section 24 and 25. The impugned section of the definition relates to "*national security and public safety*", and so it is clear that it relates for the protection of one of the interests listed in section 24(3) and 25(3).

80. However, the Respondents are also required to explain how the legislation will achieve this interest.

81. In a 2006 Report to the United Nations General Assembly, the Special Rapporteur warned that infringing citizens' fundamental human rights can actually harm national security.

> "[*t]he systematic violation of human rights undermines true national security and may jeopardize international peace and security; therefore, a State shall not invoke national security as a justification for measures aimed at suppressing opposition or to justify repressive practices against its population*."[64]

[61] *Dawood and Others v Minister of Home Affairs and Others .("Dawood")* 2000 (3) SA 936 (CC) [47].
[62] *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and* Others 2009 (1) SA 565 (CC) [27].
[63] *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) [109].
[64] UN Special Rapporteur Report 2006 UN Doc A/61/267 at para 20

82. The same point has been in made by Courts in other jurisdictions, including in this region.[65]

83. This jurisprudence that credits the realisation of a peaceful society to the facilitation of free debate, illustrates the difficulty the Respondents have in showing that the Act's harsh limitations of free expression do anything but damage the achievement of a peaceful, democratic Swaziland.

84. The use of national security in the definition of terrorism permits an over-zealous application of the legislation, and does not pass the proportionality test in the limitations analysis.

85. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted in 1995 by experts in international law, national security and human rights (and endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression) address the intersection between human rights protection and the need to secure national security.[66]

86. The Preamble to the Principles declares that the experts are *"[k]eenly aware that some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security*"[67] and that the purpose of the Principles was to "*to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedom*."[68]

87. Principle Two is concerned with "Legitimate National Security Interest":

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[65] *Free Press of Namibia v The Cabinet for the Interim Government of South Africa* [1987] SWA 614 at 625; *Chimakure v Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH) at 41; *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115, HL at 126.

[66] These principles were most recently cited with authority in the case of *Coalition for Reform and Democracy and Others v Republic of Kenya and Attorney General*, Petition 628 of 2014, High Court of Kenya Full Bench, decision on 23 February 2015 at para 64.

[67] Preamble to Johannesburg Principles.

[68] Preamble to Johannesburg Principles.

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."

88. This principle sets a high standard with regard to when national security can be used as a justification to limit individuals' rights; a standard that is not met by the Terrorism Act. Principle Six explicitly permits limitation on the right to freedom of expression only when violence is involved.

> *Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:*
>
> *(a) the expression is intended to incite imminent violence;*
>
> *(b) it is likely to incite such violence; and*
>
> *(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.*

89. The UN Special Rapporteur has explained that considerations of "national security" must be interpreted narrowly.

> "*The rights may be limited only to protect certain enumerated aims/purposes: national security, public order (ordre public), public health and morals and the rights and freedoms of others. The Special Rapporteur recalls that these aims/purposes are not to be interpreted loosely. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights define public safety as "protection against danger to the safety of persons, to their life or physical integrity or serious damage to their property". The same principles state that national security may be invoked by States to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order or used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.*"[69]

90. In a 2015 Federal District Court decision from the United States, Judge James Boasberg warned that "*[i]ncantation of the magic words "national security" without further substantiation is simply not enough to justify significant deprivations of liberty.*"[70] He accepted that the Executive branch of government has the expertise to make policy decisions based on national security, but stated that "*when its chosen vehicle demands significant deprivation of liberty, it cannot be justified by mere lip service*."[71]

[69] UN Special Rapporteur Report 2006 UN Doc A/61/267 para 19.
[70] R. I. L-R v Johnson Civil Action No. 15-11 (JEB), 37.
[71] R. I. L-R v Johnson Civil Action No. 15-11 (JEB), 38.

91. The inclusion of national security grounds in the definition of "terrorist act" without any guidance as to what type of conduct would be regarded as threatening national security means that the definition is a disproportional limitation to the right to freedom of expression.

92. This provision can therefore only be constitutional if it is interpreted to refer to only violent conduct and conduct that threatens the existence of the state itself. Without that interpretation, it is an unjustifiable limitation to the rights to freedom of association and expression.

93. All the other subsections of section 2 refer to conduct that causes, or could cause, serious harm to people or to property, and provide detailed descriptions of the proscribed conduct. Subsection 2(j) is the only aspect that does not comply with these requirements.

Section 11

94. Section 11 of the Terrorism Act specifies that it is an offence to knowingly solicit support for a terrorist group or to knowingly solicit support for the commission of a terrorist act.

95. The offences in section 11 of the Terrorism Act amount to a limitation of the right to freedom of association because they criminalise the support for an organization that has been specified under the Act.

96. As has been mentioned above, the structure of the right in the Constitution does allow for limitation in certain circumstances, as set out in section 25(3). The question for this Court then, is whether the Terrorism Act's limitation of the right is constitutionally permissible.

97. The permissibility of section 11's limitation of section 25 of the Constitution centres around the word *"knowingly*," because it is in that word that the *mens rea* of the crime is located. In the Ontario Court of Justice, Rutherford J referred to *R v City of Sault Ste. Marie* which held that "*it is clear that there are certain offences for which the special stigma attaching to*

conviction is such that subjective means rea *is necessary in order to establish the moral blameworthiness which justifies the stigma and the sentence*."[72]

98. Rutherford J held that the Canadian Criminal Code's terrorism offences were constitutional because *"[t]he subjective fault requirement or* mens rea *involves a knowing provision of assistance, support or benefit to a person or group that the accused knows is engaged in terrorist activity*."[73] This requires the individual's knowledge that the group she or he is supporting is engaged in terrorist activity.

99. In the Canadian case of *Her Majesty the Queen v Khawaja*[74] the Ontario Superior Court of Justice held that "knowingly" had to relate to knowledge about the terrorist activity of an organization.

> "*The moral blameworthiness of such an offence requires that it be shown that an accused both knowingly participated in or contributed to a terrorist group, but also knew that it was such a group and intend to aid or facilitate it's terrorist activity. According the word "knowingly" this broad construction in these offences is consistent with maintaining a high degree of subjective mens rea and accords with the principle of construction set out, in para. 39 of the judgment of Fuerst J. in R. v. Lindsay which I excerpted in part V above. The provisions as to knowledge on the part of an accused should be read and construed in a manner consistent with constitutional norms*."[75]

100. In the United States of America in the middle of last century the legislature implemented stringent domestic anti-communism measures. These included the Smith Act, officially known as the Alien Registration Act of 1940, which prohibited membership of a group seeking the violent overthrow of the government.

[72] Quoted in *Her Majesty the Queen v Mohammed Momin Khawaja* [2007] 147 CRR (2d) 281 at para 29.
[73] *Her Majesty the Queen v Mohammed Momin Khawaja* [2007] 147 CRR (2d) 281, para 42.
[74] *Her Majesty the Queen v Mohammed Momin Khawaja* [2007] 147 CRR (2d) 281.
[75] *Her Majesty the Queen v Mohammed Momin Khawaja* [2007] 147 CRR (2d) 281 at para 38.

101. The author William Prendergast explained that these membership clauses "*make criminal membership in groups that advocate the sort of violence against which the statutes are directed*"[76] and that they "*can be all too readily used against those who lack any mens rea, against the harmless individual who has done nothing to further the illegal purposes of the organization and who may not even be aware of that purpose*."[77]

102. The cases that were brought as a result of these offences are relevant to the present application because they also involved criminalization of conduct, seemingly without a guilty *mens rea*.

103. In *Scales v United States*[78] the Supreme Court was faced with the question of whether that prohibition was constitutional. In holding that it was, the Court provided an interpretation of the legislation that required that, in order to sustain a conviction, the prosecution would have to demonstrate that the accused person was personally involved in criminal conduct.[79] The Court held that the prohibition of membership necessarily required evidence of personal involvement in violence in furtherance of the aims of the organization advocating violent overthrow of the government.[80]

104. This finding corresponds with Prendergast's observation that state laws also required subjective knowledge of illegal activity.

> "*Most state laws, it is true, require proof that an accused had knowledge of the illegal purpose of the organization to which he belonged, in addition to proof of his*

[76] William S Prendergast *Do State Antisubversive Efforts Threaten Civil Rights*
Annals of the American Academy of Political and Social Science, Vol. 275, Civil Rights in America (May, 1951), pp. 124-131, 125-6.
[77] William S Prendergast *Do State Antisubversive Efforts Threaten Civil Rights*
Annals of the American Academy of Political and Social Science, Vol. 275, Civil Rights in America (May, 1951), pp. 124-131, 125-6.
[78] *Scales v United States* 367 U.S. 203 (1961)
[79] The Supreme Court in Conference (1940-1985) edited by Del Dickson.
[80] See Robert G McCloskey, *Deeds without Doctrines: Civil Rights in the 1960 Term of the Supreme Court*,
American Political Science Review, Vol. 56, No. 1 (Mar., 1962), pp. 71-89; William S Prendergast *Do State Antisubversive Efforts Threaten Civil Rights*
Annals of the American Academy of Political and Social Science, Vol. 275, Civil Rights in America (May, 1951), pp. 124-131, and The Supreme Court in Conference, edited by Del Dickson.

membership, for conviction. In this way personal guilt is established in the eyes of the law, and the statute is made safe from attack on the ground that it permits the imputation of guilt by association."[81]

105. This series of cases generated considerable comment in the American legal fraternity. The main area of discussion was the worry that the membership clauses could lead to convictions on the basis of guilt-by-association. Many authors concluded that the effect of the *Scales* judgment was to narrow the conception of membership.

"*Due process does require that guilt be personal, and membership alone, even in an illegal organization, may indeed be constitutionally protected. But the statute here was interpreted as punishing membership only if the petitioner was an "active" member who knew the Party was engaged in illegal activity and who had himself a specific intent to bring about the illegal result. The standard objection to the concept of guilt by association is that it may lead to punishment of the innocent or confused, but the Court argued that these restrictive interpretations forfend that danger*."[82]

106. In 1948 the Harvard Law Review discussed these interpretations of membership clauses.

"Proscription of Membership. - The bulk of the cases arising under prohibitory and discriminatory legislation have involved persons belonging to or joining subversive organizations. Sometimes the statute applies to 'knowing' membership; in such a case it is clear that it does not include one who has joined while ignorant of the group's unlawful objectives and has remained a passive, uninformed member; Ordinarily, however, the statute is unqualified. The obvious harshness of a rule which penalizes nominal membership has led most courts to treat even these

[81] William S Prendergast *Do State Antisubversive Efforts Threaten Civil Rights*
Annals of the American Academy of Political and Social Science, Vol. 275, Civil Rights in America (May, 1951), pp. 124-131, 126
[82] Robert G McCloskey, *Deeds without Doctrines: Civil Rights in the 1960 Term of the Supreme Court*, American Political Science Review, Vol. 56, No. 1 (Mar., 1962), pp. 71-89, 75.

unqualified statutes as in reality condemning only those members who support or believe in the subversive doctrines of the organizations."[83]

107. If this reasoning is applied to the Terrorism Act, then in order to be guilty of an offence, an individual has to have actual knowledge that an organisation they support is involved in terrorism. In other words, in order to be constitutional, the "*knowingly*" in section 11 of the Terrorism Act needs to be interpreted as requiring knowledge of terrorist activity. Such an interpretation would ensure that the Terrorism Act limits the right to freedom of expression as little as possible in order to meet the proportionality test.

108. One of the problems with the offence in section 11(1)(a) relates to the definition of *"terrorist group"* in the Terrorism Act. A textual reading of that provision demonstrates that terrorist group is either "*an entity that has one of its activities and purposes, the committing of or the facilitation of the commission of a terrorist act*" or "*a specified entity*"; the definition is listed in the alternative. The consequence of this is that, while an individual may be reasonably expected to know whether an organization they support has been formally declared a specified entity, there is nothing to indicate how an individual is to know whether their support is for an organization "*that has as one of its activities and purposes*" the commission of terrorism.

109. The use of the word *"support"* in the offence is also flawed, and again creates a concern that the legislation permits prosecutions on the basis of *"guilt by association."* The concept of support of a group implies a relationship even less connected than membership, and if Courts have deemed membership without knowledge of, and personal involvement in, criminal conduct to be insufficient for conviction, then it follows that support for such a group could also not incur criminal responsibility without evidence of active involvement.

110. In the *Scales* judgment, Harlan J held that the Smith Act was "*found to reach only 'active' members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with*

[83] Conduct Proscribed as Promoting Violent Overthrow of the Government, Harvard Law Review, Vol. 61, No. 7 (Jul., 1948), pp. 1215-1224, 1221-2.

the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action."[84]

111. The concept of "support" is analogous to "sympathy". Criminalising an expression of sympathy for an organization is an unjustifiable limitation of the right to freedom of expression.

112. In the premises, it is submitted that the definitions of *"terrorist act"*, *"terrorist group"* and sections 11(1)(a) and 11(1)(b) of the Terrorism Act are unconstitutional and invalid, by virtue of the fact that they infringe the principle of the rule of law and the Applicants rights to freedom of expression and association.

THE SECOND CHALLENGE

THE RIGHTS TO ADMINISTRATIVE JUSTICE AND A FAIR HEARING

The Right to Administrative Justice

113. The right to administrative justice is contained in section 33 of the Constitution and is without any internal limitations.

> 1. *A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.*
> 2. *A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority*

The Right to a Fair Hearing

[84] *Scales v United States* 367 U.S. 203 (1961).

114. The right to a fair hearing is protected by section 21 of the Constitution, and is also without any internal limitations.

> 1. *In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.*
> 2. *A person who is charged with a criminal offence shall be-*
>   a. *presumed to be innocent until that person is proved or has pleaded guilty;*
>   b. *informed as soon as reasonably practicable, in a language which that person understands and in sufficient detail, of the nature of the offence or charge;*
>   c. *entitled to legal representation at the expense of the government in the case of any offence which carries a sentence of death or imprisonment for life;*
>   d. *given adequate time and facilities for the preparation of the defence;*
>   e. *permitted to present a defence before the court either directly or through a legal representative chosen by that person;*
>   f. *afforded facilities to examine in person or by a legal representative the witnesses called by the prosecution and to obtain the attendance of witnesses to testify on behalf of that person on the same conditions as those applying to witnesses called by the prosecution; and*
>   g. *permitted to have, without payment, the assistance of an interpreter if that person cannot understand the language used at the trial.*
> 3. *Except with the free consent of the person concerned and for purposes of subsection (2), the trial shall not take place in the absence of that person unless that person acts so as to render the continuance of the proceedings in the presence of that person impracticable and the court has ordered that person to be removed and the trial to proceed in the absence of that person.*
> 4. *Where a person is tried for any criminal offence, the accused person or person authorised by the accused person shall, if the accused person or person authorised by the accused person so requires and subject to payment of such*

reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

5. *A person shall not be charged with or held to be guilty of a criminal offence on account of any act or omission that did not, at the time the act or omission took place, constitute an offence.*
6. *A penalty shall not be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.*
7. *A person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall not again be tried for that offence or for any other criminal offence of which that person could have been convicted at the trial for the offence, save upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal.*
8. *A person shall not be tried for a criminal offence where that person has been pardoned for that offence.*
9. *A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.*
10. *Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*
11. *All proceedings of every court or adjudicating authority shall be held in public.*
12. *Notwithstanding the provisions of subsection (11), a court or adjudicating authority -*
    a. *may, unless it is otherwise provided by Act of Parliament, exclude from its proceedings persons other than the parties and their legal representatives to such extent as the court may consider -*

(i) *in circumstances where publicity may unduly prejudice the interests of defence, public safety, public order, justice, or public morality or would prejudice the welfare of persons under the age of eighteen years or as the court may deem appropriate; or*

(ii) *in interlocutory proceedings;*

b. *shall, where it is so prescribed by a law that is reasonably required in the interests of defence, public safety, public order, justice, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of the persons concerned in the proceedings, exclude from its proceedings persons, other than the parties and their legal representatives, to such extent as is so prescribed.*

13. *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of -*

a. *subsection (2) (a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;*

b. *sub.section (2) (e) to the extent that the law in question prohibits legal representation before a Swazi Court or before any Swazi court hearing appeals from such a court;*

c. *subsection (2) (f) to the extent that the law in question imposes conditions that should be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or*

d. *subsection (7) to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that any court so trying and convicting that member shall in sentencing that member to any punishment take into account any punishment awarded under that disciplinary law.*

14. In the case of a person who is held in lawful detention, the provisions of subsections (1), (2) (e) and (f) and (3) shall not apply in relation to the trial of that person for a criminal offence under the law regulating the discipline of persons held in such detention.

15. In this section "criminal offence" means a criminal offence under the law of Swaziland, and "proceedings" in relation to a court or adjudicating authority includes the announcement of the decision of the court or adjudicating authority.

115. In *Myeza v Director of Public Prosecutions*[85] this Court stated the following in relation to the right to a fair trial:

> *"The question that begs for determination at this juncture is what then is the intention of the legislature by the right created vide Section 21 (1) of the Constitution of Swaziland Act, 2005, to wit "Right to a Fair and, speedy public hearing within a reasonable time"? Apart from denoting that the right is a component of a fair trial, the section gives one few clues. Recourse must therefore of necessity be had to other jurisdictions where case law has interpreted similar provisions in their constitution, in ascertaining the intent of legislature."*

Section 28 and Section 29(4) of the Terrorism Act

116. The Applicants were charged under section 11(1)(a) as it was alleged that they were supporting PUDEMO. This charge relates directly to the designation of PUDEMO as a *specified entity.* The Applicants accordingly have a clear interest in the provisions that regulate the designation of entities.

117. However, as the Applicants stated unequivocally in their Founding Affidavit, they have brought this application in their own name. Their interest in PUDEMO's designation is as a

[85] (728/2009) [2011] SZHC 79 (28 February 2011) [17].

result of the impact that designation has on them and the charges brought against them. The Respondents' contention that the Applicants have failed to follow the procedures listed in section 28 is without merit, as sections 28(3) and (5) make it clear that it is up to the specified entity concerned to invoke the procedures.[86]

118. The first step in the designation process is that the Attorney General is given the power to make a recommendation to the Minister that the Minister should declare a certain organization a specified entity. The Attorney General can only make this decision if he has *"reasonable grounds to believe" that the organization "(a) has knowingly committed, attempted to commit, participated in committing or facilitated the commission of a terrorist act or (b) is knowingly acting on behalf of, at the direction of or in association with, an entity referred to in (a)*."

119. The Minister can, if he is "*satisfied that there is material to support a recommendation*" made by the Attorney General, declare that the organization is a specified entity.

120. This provision infringes the right to administrative justice, as well as fundamental justice rules and the *audi alteram partum* principle.

121. The Attorney General is under no obligation to hear from the affected organization when he is deliberating on whether or not to recommend that the organization be designated as a terrorist entity. This is a direct infringement of the *audi alteram partem* principle. The rationale for this principle is that:

> "*Procedural fairness in the form of audi alteram partem is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth*

[86] See Fourth Respondent's Answering Affidavit at para 24.

of the participants but it also likely to improve the quality and rationalist of administrative decision-making and to enhance its legitimacy."[87]

122. It is important to note that the participation of the affected individual (or organization) is not merely for their benefit: it assists the decision maker, and makes the decision stronger. The South African Constitutional Court recognized this role in *Janse van Rensburg NO v Minister of Trade and Industry NO*[88] where it held that *"[o]bservance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken*."[89]

123. Without hearing from the affected organization it is difficult to see how the Attorney General can make a decision based on "reasonable grounds".

124. In order to ensure that a person or body who may be affected by an administrative decision, one fundamental principle in procedural fairness is notice of proposed administrative action. In fact, Hoexter characterizes this as one of the "*minimum requirements*".[90]

125. The fact that the process set out in section 28 does not allow for the participation of the affected organization *before* the decision is made infringes the right to administrative justice and is therefore unconstitutional.

126. Section 28 is structurally similar to an analogous provision in the Kenyan Prevention of Terrorism Act, 30 of 2012. After listing the grounds on which the Inspector-General may base his decision,[91] the provision states that "*[b]efore making a recommendation under*

[87] Cora Hoexter *Administrative Law in South Africa*, Juta (2007), 326.
[88] *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 99 (CC).
[89] *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 99 (CC) at para 24.
[90] Cora Hoexter *Administrative Law in South Africa*, Juta (2007), 332.
[91] Section 3 of the Kenyan Prevention of Terrorism Act states:
3. (1) Where the Inspector-General has reasonable grounds to believe that-
(a) an entity has –
(i) committed or prepared to commit;
(ii) attempted to commit; or
(iii)participated in or facilitated the commission of, a terrorist act; or

subsection (1), the Inspector-General shall afford the affected entity an opportunity to demonstrate why it should not be declared as a specified entity."[92] This additional provision ensures that the entity's administrative justice rights are protected.

127. The fact that the organization has an opportunity to apply for a judicial review of the decision taken by the Attorney General and the Minister does not negate the problem that the organization is not permitted to make representations before the decision is made.

> "*…a right to be heard after the event, when a decision has been taken, is no adeq uate substitute for a right to be heard before the decision is taken. There is, as Van Winsen J pointed out in Davies and Others v Administrator, Cape Province, and Another 1973 (3) SA 804 (C), at p 809 B a "natural human inclination to adhere to a decision once taken*."[93]

128. Once the Minister has designated an organization as a specified entity that entity is then entitled to apply to the Attorney General requesting that he recommend to the Minister that the declaration be revoked. If this application is refused, the organisation can then apply to the High Court for a review of the decision.

129. Although the organization has an opportunity to apply to the High Court for a review of the decision to declare it a specified entity there are a number of defects in the statutory process.

130. Section 28(6)(b) enables the Court, on application by the Attorney General, to hear evidence presented by Attorney General, in the absence of the applicant organization and its legal

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(b) an entity is acting - (i) on behalf of (ii) at the direction of; or (iii) in association with, an entity referred to in paragraph (a),
he may recommend to the Cabinet Secretary that an order be made under subsection (3) in respect of that entity.
(2) Before making a recommendation under subsection (1), the Inspector-General shall afford the affected entity an opportunity to demonstrate why it should not be declared as a specified entity.

[92] Section 3(2) of the Prevention of Terrorism Act, 2012 (Kenya).

[93] *Attorney General v Blom* [1988] 2 All SA 592 (A), 604.

representative. The Judge can make such a ruling if he or she believes that disclosure of that information would be "*prejudicial to national security or endanger the safety of any person*."

131. It is a fundamental principle of natural justice that a party be present at his or her trial, and that he or she have a legal representative present. This right is protected in section 21(3) of the Constitution:

> *"Except with the free consent of the person concerned and for the purposes of subsection (2), the trial shall not take place in the absence of that person unless that person acts so as to render the continuance of the proceedings in the presence of that person impracticable and the court has order that person to be removed and the trial to proceed in the absence of that person*."

132. It is not unheard of to exclude applicants and legal representatives from court proceedings when interests of national security are at risk; but it is impermissable to fail to provide for any alternative arrangements.

133. In the United Kingdom, section 10(b) of the Employment Tribunals Act, 1996, states that

> "*[e]mployment tribunal procedure regulations may enable a tribunal, if it considers it expedient in the interests of national security, to do in relation to particular proceedings before it anything of a kind which, by virtue of subsection (5), employment tribunal procedure regulations may enable a Minister of the Crown to direct a tribunal to do in relation to particular Crown employment proceedings*."

134. However, subsection 7 of that Act then requires that the tribunal make arrangements to ensure some form of representation for the affected person.

> *"In relation to cases where a person has been excluded by virtue of subsection (5)(b) or (c) or (6), employment tribunal procedure regulations may make provision—*

a. for the appointment by the Attorney General, or by the Advocate General for Scotland, of a person to represent the interests of the applicant;

b. about the publication and registration of reasons for the tribunal's decision;

c. permitting an excluded person to make a statement to the tribunal before the commencement of the proceedings, or the part of the proceedings, from which he is excluded."

135. The consequence of the above is that hearings under that Act can exclude an applicant and their counsel, but only when a special advocate (who has security clearance) is appointed to represent that applicant.[94]

136. In the European Court of Justice, in *Kadi v Council of the European Union and Commission of the European Communities*, the Court held that reference to national security concerns cannot completely remove protection for fundamental human rights.

> "*it is nonetheless the task of the Community judicature to apply, in the court of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice.*"[95]

137. The European Court of Human Rights held that the complete exclusion of a party and its legal representative, irrespective of national security concerns, without counterbalancing procedures was impermissible.

> "*The court reiterates that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do no place him*

[94] Home Office v Tariq [2012] 1 All ER 58.
[95] *Kadi v Council of Europe* case number T-85/09 at para 134

at a substantial disadvantage vis-à-vis his opponent … The court has held none the less that, even in proceedings under art 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalance by the procedures followed by the judicial authorities … A similar approach applies in the context of civil proceedings. "[96]

138. The Supreme Court in the United Kingdom referred to these European decisions and set out two criteria that must be considered if a closed procedure is to be permissible: "*whether the system is necessary and whether it contains sufficient safeguards*".[97]

139. There are no safeguards in the Terrorism Act as section 28(6)(b) refers only to the power of the judge to exclude the applicant or counsel representing the application. This is a direct infringement of section 21(3) of the Constitution.

140. Section 28 of the Terrorism Act also permits the High Court hearing the review to accept any evidence that would otherwise be inadmissible if that evidence "*in the opinion of the judge is reliable and relevant notwithstanding that the thing would not otherwise be admissible in law*."

141. In the South African Constitutional Court case of *Savoi v National Director of Public Prosecutions*[98] the Court was required to rule on the constitutionality of a provision in the Prevention of Organised Crime Act that permitted a Court to hear "*evidence with regard to*

[96] Kennedy v UK *Application no. 26839/05* at para 35.
[97] Home Office v Tariq [2012] 1 All ER 58 at para 36.
[98] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5.

hearsay, similar fact or previous convictions, … notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render the trial unfair."[99]

142. Madlanga J explained that the historical reasons for excluding hearsay evidence were that it was unreliable but that there are numerous exceptions where the evidence was deemed reliable and therefore admissible.

143. The Constitutional Court concluded that the proviso in the legislation that "*provided that such evidence would not render the trial unfair*" ensured that the section was not constitutionally objectionable.

144. In the Terrorism Act, ordinarily-inadmissible evidence can be admitted in the High Court review proceedings only if that evidence is reliable and relevant; there is no requirement that it not render the trial unfair. Madlanga J discussed the factors a court would have to be considered in deciding whether the admission of evidence would render a trial unfair:

> "*Needless to say, it would be ill-advised to attempt to anticipate instances where the admission of hearsay would be so unfair as to infringe an accused's fair trial right. That is something best left to a trial court. There issues like, to mention but a few, the nature of the evidence, its reliability or lack of it, its probative value and prejudice to the accused would have to be considered*"[100] [footnotes omitted]

145. With respect to similar fact evidence, Madlanga J recognized that Courts have to weigh up the probative value of the evidence against the prejudice to the accused.

> "*The real question should be whether, when looked at in its totality, evidence of similar facts "has sufficient probative value to outweigh its prejudicial effects"; and that is a matter of degree in each case*"[101]

[99] Section 2(2) of the Prevention of Organised Crime Act, 121 of 1998.
[100] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5 at para 49.
[101] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5 at para 55.

146. The most obvious constitutional short-coming in section 28 of the Terrorism Act is that there is no obligation on the trial judge to consider whether the admission of the evidence would be prejudicial to the applicant organization. Admitting evidence on relevance and reliability alone does not necessarily render the hearing fair. Section 28 is therefore an unjustifiable infringement of the right to a fair hearing.

147. It is submitted that sections 28 and 29(4) of the Terrorism Act, by allowing for the designation of associations as terrorist groups, through a procedure which is contrary to sections 21 and 33 of the Constitution, also violate section 25 of the Constitution.

148. The importance of the right to freedom of association has often been emphasized by courts. The European Court of Human Rights has held that *"the State's power to protect its institutions and citizens from associations that might prejudice them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can be used to justify restrictions of that freedom."*[102]

149. In *Zhechev v Bulgaria*, the European Court of Human Rights held that an organization may campaign for a change in the legal and constitutional structures of the State if the means used to that end are in every respect legal and democratic and if the change proposed is itself compatible with fundamental democratic principles.[103]

150. Section 29(4), which is effectively a continuation of section 28, provides that where there are *"reasonable grounds"* in terms of section 28(2) to believe that an entity specified is engaged in terrorist activity, that entity shall be deemed with effect from the date of the notice to have been declared a specified entity. Accordingly, if section 28 is found to be unconstitutional, it follows that section 29(4) is also invalid.

[102] *Baczkowski and Others v Poland* ECHR 1543/06 at para 47.
[103] *Zhechev v Bulgaria* ECHR 57045/00, at paras 49-50.

THE THIRD CHALLENGE: THE SEDITION ACT

Introduction

151. The Applicants endorse and adopt the submissions advanced by the Applicants in case no. 782/2014, which will be heard together with this matter, in relation to the unconstitutionality of the Sedition Act. It is therefore only necessary to deal with the third challenge in summary fashion.

152. The rights to freedom of expression and association have been analysed above and those submissions are not repeated.

The impugned provisions

153. Section 4 of the Sedition Act states that:

> *"Any person who —*
>
> *a. Does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;*
>
> *b. Utters any seditious words;*
>
> *c. Prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or,*
>
> *d. …;*
>
> *e. Without lawful excuse has in his possession any seditious publication;*
>
> *shall be guilty of an offence and liable on conviction to imprisonment not exceeding twenty years or to a fine not exceeding E20,000 and any seditious publication relating to an offence under this section shall be forfeited to the Government."*

154. *"Seditious intention"* is defined in section 3 of the Act as follows:

> *"(1) A "seditious intention" is 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.*
>
> *(2) Notwithstanding subsection (1), an act, speech or publication shall not be seditious by reason only that it intends to —*
>
> *a. Show that His Majesty has been misled or mistaken in any of His measures; or*
>
> *b. Point out errors or defects in the government or constitution of Swaziland as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or*

c. Persuade His Majesty's subjects or the inhabitants of Swaziland to attempt to procure by lawful means the alteration of any matter in Swaziland as by law established; or

d. Point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Swaziland. (Amended L.4/1967.)

(3) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

155. Section 5 of the Sedition Act addresses subversive activities:

"A person who does or attempts to do or makes any preparation to do an act with a subversive intention or who utters any words with a subversive intention shall be guilty of an offence and liable, on conviction, to imprisonment for a term not exceeding twenty years without the option of a fine

1. For the purposes of this section, "subversive" means —

a. supporting, propagating or advocating any act or thing prejudicial to —

(i) public order;

(ii) the security of Swaziland; or

(iii) the administration of justice:

Provided that this paragraph shall not extend to any act or thing done in good faith with intent only to point out errors or defects in the government or constitution of Swaziland as by law established or in legislation or in the administration of justice with a view to remedying such errors or defects;

b. *inciting to violence or other disorder or crime, or counselling defiance of or disobedience to any law or lawful authority;*

c. *intended or likely to support or assist or benefit, in or in relation to such acts or intended acts as are hereinafter described, persons who act, intend to act or have acted in a manner prejudicial to public order, the security of Swaziland or the administration of justice, or who incite, intend to incite, or have incited to violence or other disorder or crime, or who counsel, intend to counsel or have counselled defiance of or disobedience to any law or lawful authority;*

d. *indicating, expressly or by implication, any connection, association or affiliation with or support for an unlawful society;*

e. *intended or likely to promote feelings of hatred or enmity between different races or communities in Swaziland:*

Provided that this paragraph shall not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities;

f. *intended or likely to bring into hatred or contempt or to excite disaffection against any public officer or any class of public officers in the execution of his or their duties, or any of His Majesty's armed forces, or any officer or other member of such a force in the execution of his duties:*

Provided that this paragraph shall not extend to comments or criticisms made in good faith and with a view to remedying or correcting errors, defects or misconduct on the part of such public officer, force or officer or other member thereof and without attempting to bring into hatred or contempt or to excite disaffection against such a person or force…"

The Definition of Subversive and the Offences that Follow

156. The Applicants submit that the definition of *"subversive"* in section 5(2) of the Sedition Act is over-broad and encompasses conduct that is protected by the rights to freedom of association and expression. It is contended that sections 5(2)(a), (b), (d), (e), and (f) constitute unjustifiable limitations to these fundamental human rights and stand to be declared invalid.

157. Firstly, subsections 5(2)(a), (e), and (f) include disclaimers (that conduct under those provisions is not subversive if it is in *"good faith"* and done in an attempt to point out errors), while all the other provisions are absolute. The implication of this for subsection 5(2)(c) is that intending to *"support, or assist or benefit"* actions that are prejudicial to *"public order, the security of Swaziland or the administration justice"* are criminalised without the benefit of the disclaimer. The same three interests are listed under subsection 5(2)(a) (in terms of which support for an act threatening those interests is subversive). However, under subsection 5(2)(a) support is not illegal if it done in good faith with the intent to point out errors, while this is not the case in relation to subsection 5(2)(c). The provision is internally contradictory and illogical.

158. The definition of *"subversive*" also includes elements that are so vague that they do not meet the standards set by the principle of legality. In a 1986 case in Durban, South Africa, the High Court was required to assess validity of regulations made by the State President in terms of the Public Safety Act, 3 of 1953. Although the legal system of parliamentary supremacy in South Africa in the 1980s meant that the Court was not empowered to declare

legislation unconstitutional, the Court held that if the criminal provision was void for uncertainty it could declare the passing of such provision *ultra vires*.[104]

159. In reaching its conclusion that certain regulations were *ultra vires*, the Court held that the provisions did not provide any person – whether a citizen or an adjudicating authority – with the ability to determine what conduct was prohibited.

> "*Counsel for the respondents were specifically asked what the position would be were this Court or any other to be trying someone for the criminal offence of making a 'subversive statement' or hearing an appeal against his conviction for that offence, and were it to find itself quite unable to give any meaning to the definition. How in those circumstances could the person concerned ever be convicted or any conviction be upheld? How could one convict someone for making a 'subversive statement' or dismiss his appeal against a conviction for doing so, if one was unable to understand what a 'subversive statement' was? And counsel conceded, rightly I think, that the Court could never do so*."[105]

160. Didcott J held that the provisions that criminalised *"feelings of hatred"* as subversive were void for vagueness.

> "*We then get to paragraph (d) which deals with 'engendering of aggravating feelings of hostility in the public or any section of the public or any person or category of persons towards any section of the public or person or category of persons'. I repeat, 'engendering … feelings of hostility in … any person … towards any … person'. Counsel for the respondents found himself in great difficulties in arguing that any intelligible meaning could be given to this paragraph, and we share his difficulties. It is unintelligible."*[106]

[104] *Metal and Allied Workers Union v State President of the Republic of South Africa* [1986] 2 ALL SA 584 (D), 591.
[105] *Metal and Allied Workers Union v State President of the Republic of South Africa* [1986] 2 ALL SA 584 (D), 593.
[106] *Metal and Allied Workers Union v State President of the Republic of South Africa* [1986] 2 ALL SA 584 (D), 599.

161. Subsections (e) and (f) refer to *"feelings of hatred or enmity",* and subsection (f) additionally refers to "*excited disaffection*."

162. It is impossible for citizens and law enforcement officials to identify what conduct is covered by these subsections, and so they fail to pass the first test in the limitations analysis as they do not amount to a limitation *"within the law".*

163. It is apparent that the criminalisation of the conduct covered by the subversive definition is designed to protect *"interests of defence, public safety, public order, public morality or public health"* as listed in section 24(3)(a) and 25(3)(a). However, the effect of the subversion offences is to criminalise all forms of expression that may damage public order in any way, and which may, in any way, excite disaffection.

164. It is therefore unlikely that the Respondents would be able to demonstrate that the offences under the subversive activities provisions are *"reasonably required"* to protect public safety, order, morality and health. The evidence before this Court does not warrant this conclusion.

165. However, the definition's most serious short-coming is that it disproportionately infringes the rights to freedom of expression and association. It is necessary for the Respondents to show that the legislation is the least intrusive means available for protecting the interests of public safety – the absolute derogation of citizens' rights in this provision does not met this standard.

CONCLUSION

166. The Applicants submit that section 11(1)(a), 11(1)(b), 28, and 29(4) in the Terrorism Act, together with paragraphs 1 and 2(j) of the definition of *"terrorist act"* and paragraph (b) of the definition of "terrorist group" are inconsistent with the Constitution and invalid. They also request an order declaring that sections 3(1), 4(a), 4(b), 4(c), 4(e), 5(1) and 5(2) of the Sedition Act are likewise inconsistent with the Constitution and invalid.

167. The Applicants contend further that the appropriate remedy is for this Court to strike down these provisions as unconstitutional. This remedy will not result in a lacuna in the law, as the constitutionally valid provisions of the Terrorism Act provide sufficient protection for the legitimate interests of state security. In respect of the Sedition Act, there is other legislation which adequately criminalise conduct which harms public order or public safety without infringing entrenched constitutional rights.

168. This Court is accordingly requested to make an order in terms of paragraphs 1, 2, 5 and 8 of the Notice of Motion.

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