IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 782/14**

In the matter between:

MAXWELL MANQOBA THANDUKUKHANYA DLAMINI	**1st APPLICANT**
MFANAWENKHOSI MBHUNU MNTSHALI	**2nd APPLICANT**
DERRICK DICKSON NKAMBULE	**3rd APPLICANT**

And

THE PRIME MINISTER OF SWAZILAND	**1st RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS	**2nd RESPONDENT**
THE DIRECTOR OF PUBLIC PROSECUTIONS	**3rd RESPONDENT**
THE ATTORNEY GENERAL	**4th RESPONDENT**

APPLICANTS' HEADS OF ARGUMENT

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BRIEF BACKGROUND TO THE APPLICATION

1. The Applicants herein were charged with contravening the Sedition and Subversive Activities Act, 46 of 1938 (the Act). The indictment, issued on 28 May 2013, contains the following charges:

> **Count One:** The accused are guilty of contravening section 4(a) of the Seditious and Subversive Activities Act of 1938 in that upon or about the 19th April 2013 and at or near Msunduza Township, Mbabane area in the Hhohho Region, the said accused persons acting jointly and severally in furtherance of a common purpose did unlawfully attempt, make preparations and conspired with other people to bring hatred and dissatisfaction against the Swaziland Government and the administration of justice.
>
> **Count Two:** The accused are guilty of contravening section 4(e) of the Seditious and Subversive Activities Act of 1938 in that upon or about the 19th April 2013 and at or near Msunduza Township, Mbabane area in the Hhohho Region, the said accused persons acting jointly and severally in furtherance of a common purpose did without lawful excuse did displayed (sic) a huge banner inscribed with seditious publication and did thereby contravene the said Act.

2. In terms of section 4 of the Act –

> *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) Imports any seditious publication, unless he has no reason to believe that it is seditious;*

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.

3. "Seditious intention" is defined in section 3 of the Act:

(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.

4. The charges relate to the Applicants' presence at the scene of a protest, with the assumption that they had intended to participate in the protest, and to their alleged display of a banner

calling for the boycott of the election. The Applicants intend to plead not guilty to the charges against them.

5. The Applicants seek an order declaring that sections 3(1) and 4(a) and (e) of the Sedition and Subversive Activities Act of 1938, are inconsistent with sections 23, 24 and 25 of the Constitution of Swaziland, Act 1 of 2005, and therefore invalid.

CITATION OF THE PARTIES

6. The Applicants bring this Application in their own interest.

7. Section 35(1) of the Constitution of Swaziland provides that –

> *"Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."*

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

   (a) The First Respondent, the Prime Minister of Swaziland, was cited in his capacity as the head of government;
   (b) The Second Respondent, the Minister of Justice and Constitutional Affairs, was cited in his capacity as Minister responsible for tabling bills in Parliament;
   (c) 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
   (d) The Fourth Respondent, the Attorney General, was cited in his capacity as official legal representative of the government of Swaziland.

9. The Third and Fourth Respondents argue that the citation of the First and Second Respondents were unnecessary and "unduly politicised these proceedings".

10. The Respondents appear to be relying on the practice in ordinary civil matters in which the Attorney General is normally cited as the only governmental representative. However, the nature of this Application is not simply civil matter as it involves the interpretation of the Constitution and a determination whether legislation passes constitutional muster.

11. The First Respondent, as well as being the head of government, is ultimately in charge of the conduct of the Royal Swazi Police Service, and as it is the police officers who enforce and apply the legislation, he therefore has a direct interest in the matter.

12. The Second Respondent's responsibility of tabling bills in Parliament means that he does have a direct interest in litigation that may result in legislation being declared unconstitutional. Should this Court find that the Act is an unjustifiable limitation on the right to freedom of expression the Second Respondent may have to initiate proceedings in Parliament to amend the Act or introduce a new Act that does comply with the Constitution.

BURDEN OF PROOF IN THESE PROCEEDINGS

13. The Respondents argue in their Answering Affidavit, at paragraph 21, and in response to paragraph 31 of the Applicants' Founding Affidavit, that the Applicants "must show" why the alleged limitations to fundamental rights caused by section 3(1) and 4(a) and (e) of the Act are not proportional or justifiable.

14. The Uganda Constitutional Court, in the case of *Lyomoki and Others v Attorney General*,[1] held that the onus is on the Applicants to show a *prima facie* case of violation of their constitutional rights. Thereafter the burden shifts to the Respondents to justify that the limitations to the rights in the statute is justified by the Constitution.

[1] *Lyomoki and Others v Attorney General* [2005] 2 EA 127 (UGCC).

15. This was also emphasised in other jurisdictions. In *Attorney General of Trinidad and Tobago v Morgan* 45 [1085] LRC 9, Justice Braithwaite explained:

> "*Where an Act is passed into law … and that Act is one that restricts the rights and freedoms of an individual, in order to impugn such as Act, all that an individual is required to do is to show that one or more of his rights have been restricted. Having done so the burden shifts to the proponent of the Act to show that the provisions of the Act restricting such rights and freedoms are 'reasonable' restrictions. If the proponents of the Act fail to discharge this burden then the Court of competent jurisdiction may pronounce against the validity of the impugned Act…*"[2]

16. The Human Rights Committee has also found that the onus on the State extends to demonstrating the necessity and proportionality of the Act:

> "*When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat*"[3]

17. The Canadian Supreme Court, in *R v Oakes*[4] held that "*the onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation*".[5]

18. The Applicants submit that the Respondents have not submitted any evidence in support of its assertion that the alleged limitation of the rights would in any event be reasonable.

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[2] As quoted by the Kenya High Court in *Nation Media Group Limited v Attorney General* [2007] 1 EA 261 (HCK).
[3] United Nations Human Rights Committee (UNHRC) General Comment 34, 2011, UN Doc CCPR/C/GC/34 at para 35.
[4] *R v Oakes* [1986] 1 SCR 103.
[5] Id, 136J.

HISTORY, ORIGIN, AND RATIONALE OF THE OFFENCE

19. In the Ghanaian case of *Republic v Tommy Thompson Books*[6] the Supreme Court in Accra highlighted the "*necessity of studying the historical background of the impugned laws to find out the circumstances leading to their enactment, the prevailing conditions, the mischief that was intended to be addressed*."[7] The historical context of a law is relevant because it explains why certain phrases were chosen by the legislators, and why certain acts were deemed to be offences.

20. In 2014, the Lusaka High Court in Zambia was also faced with the question of the constitutionality of a colonial era law. In *Chipenzi v Attorney General*[8] the Court held that the legislators' intention in enacting a penal code provision that criminalised the publication of false news was "*to suppress native dissenting views which could have the effect of formenting (sic) insurrection against the colonial rulers*."[9] The Court went on to explain that because the law was enacted at a time when there was no constitutional protection of the right to freedom of expression "*it may have been good law at the time, at least to the ruling elite though not to the freedom agitators*".[10]

21. Courts have acknowledged that the continued use of those colonial era laws has had a detrimental effect on post-colonial society. In *Tommy Thompson* the Ghana Supreme Court observed:

> "*[T]he continued retention of some foreign obnoxious laws on our statute books such as those raised under issue (b) which successive governments have taken advantage of in suppressing persons holding opposing views, have led in no small measure to the stagnant progress of democracy in this country*."[11]

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[6] *Republic v Tommy Thompson Books Ltd and others* [1997-98] 1 GLR 515.
[7] *Id*, 524.
[8] *Chipenzi v Attorney General* (HPR/03/2014) [2014] ZMHC 112 (4 December 2014); [2014] ZMHC 112.
[9] *Id*, J19. See also *New Patriotic Party v Inspector-General of Police* [1993-94] 3 GLR 459, Ghana Supreme Court, 470.
[10] *Chipenzi v Attorney General supra* note 8, J19.
[11] *Republic v Tommy Thompson Books Ltd and others supra* note 6, 528.

22. The Uganda Constitutional Court, in considering the constitutionality of the offence of sedition, noted that the offence originated in England and observed that it had its genesis in the fact that "*colonialists did not want to be criticised*".[12] The court held that all colonial laws must be construed in conformity with the Constitution. In that case, the Court declared the offence of sedition unconstitutional on the basis of its vagueness – "*the wording creating the offence of sedition is so vague that one may not know the boundary to stop at, while exercising one's right*."[13]

23. Sedition was first introduced as a statutory offence in Great Britain from 1661 (although the offence had been part of the common law for many years before that), and many of the provisions of the 1661 Sedition Act were later incorporated into the Treason Act of 1985. The criminalisation of seditious conduct sprung from a desire to protect the monarchy and government from insurrection, and included conduct that was disruptive to public order.

24. The Act was enacted in 1938 – when Swaziland was under colonial rule. It is well-known that the British colonial government was fearful of insurrection in their colonies that may lead to independence. A Sedition Proclamation was introduced in Lesotho in the same year as the Act in Swaziland. The legislation must therefore be seen in that context.

TEXTUAL ANALYSIS OF SECTIONS 3 AND 4 OF THE ACT

25. The Act does not have a general definition section, but instead defines the term "seditious intention" in section 3. The section uses archaic concepts, such as terms like "bring into hatred or contempt" and "excite disaffection", which are reminiscent of a bygone era where individuals' rights were subordinate to the rights of the elite. When the Act is seen in its historical context, and it is understood that it was enacted in a time before the recognition of equal rights for all and in a colonial period characterised by inequality, the harsh restriction of

[12] *Andrew Mujuni Mwenda and Another v Attorney General* [2010] UGCC 5.
[13] *Id.*

subjects' rights makes sense. However, this language is no longer appropriate in an independent Swaziland with a constitution protecting all individuals' fundamental rights.

26. The vagueness of the words used in section 3(1) means that it is impossible for Swazi citizens to have an objective understanding of what conduct is proscribed under the Act. We have already mentioned "bring into hatred or contempt" and "excite disaffection", but "raise discontent or disaffection" and "promote feelings of ill-will and hostility" are just as vague.

27. The fundamental problem with this definition is that the scope is so broad. Promoting feelings of ill-will or raising discontent can conceivably range from merely having a conversation to organising a violent protest. A citizen seeking to exercise his rights to freedom of expression and association in Swaziland therefore has no guidance of how far he could legally go in expressing his unhappiness or criticising the government or judiciary, and it is this complete denial of the right to freedom of expression that makes the Act an unjustifiable limitation of the right.

28. In 2007 the Constitutional Court in Indonesia declared offences relating to "feelings of hostility, hatred or contempt" unconstitutional on the grounds that they did not provide legal certainty and therefore disproportionately hindered the right to freedom of expression.

> "*The expert also mentioned that if Article 154 of the Indonesian Criminal Code is subjectively interpreted, it may be misused and may isolate the principle of* lex certa*. The formulation of the crime of "declaring the feelings of hostility, hatred or contempt may be broadly interpreted in an all-encompassing manner that it may extend to other acts which should not be interdicted in criminal law*".[14]

29. The Court held that the formulation of the offences in vague terms "*may allow power abuse to occur because they may easily be interpreted according to the will of the authority."*[15] This would mean that "*a citizen whose intention was to express his criticism or opinion against the*

[14] Decision number 6/PUU-V/2007 (2007) Indonesian Constitutional Court, 11.
[15] *Id*, 18.

Government, which is a constitutional right guaranteed by the 1945 Constitution, would be easily qualified by the authority as expressing a statement of 'feelings of hostility, hatred and contempt' against the Government as a result of the lack of certainty."[16]

30. The potential for overreach by the Act is best illustrated by the Respondents' Answering Affidavit in these proceedings, where the Fourth Respondent states:

> "*I admit that 'participation in a rally and possessing a banner' are not in themselves criminal activities that should be prosecuted. However, I state that participation in a rally where the attendees excite disaffection against the person of His Majesty the King or Government of Swaziland is a seditious activity that should be criminally prosecuted*."[17]

31. Section 3(2) does set out certain circumstances when speeches or publications that would otherwise be seditious are permissible. These situations include showing that the Majesty has been misled,[18] remedying errors or defects in the government,[19] showing that the Majesty has been misled,[20] persuading citizens to introduce lawful change[21] or pointing out matters which are themselves producing feelings of ill-will.[22] These situations predominately relate to measures designed to rectify existing errors that are creating disorder, and so do not effectively protect the right of citizens to criticise the state actors.

32. Section 4 then uses the definition of "seditious intention" in section 3 to establish the offences under the law. This provision states that any act done with a seditious intention, any words uttered with a seditious intention, and any printing, publishing, selling, distributing or possession of a seditious publication is an offence.

[16] Decision number 6/PUU-V/2007 (2007) *supra* note 14, 19.
[17] Fourth Respondent's Answering Affidavit at para 14.
[18] Section 3(2)(a) of the Act.
[19] Section 3(2)(b) of the Act.
[20] Section 3(2)(a) of the Act.
[21] Section 3(2)(c) of the Act.
[22] Section 3(2)(d) of the Act.

KEY PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

33. Section 2(1) of the Constitution of Swaziland provides that the "*Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.*"

34. Section 14(2) and (3) of the Constitution of Swaziland emphasises that the fundamental rights and freedoms enshrined in the Constitution shall be respected by the Executive, Legislature and Judiciary and enforced by the Courts, irrespective of "political opinion".

35. In such constitutional interpretation, the Courts have emphasised that the Constitution is a living document:

> "*The provisions of the Constitution are not time worn adages or hollow shibboleths. They are vital, living principles that authorise and limit government powers in our nation. They are rules of government. When the constitutionality of an Act of congress is challenged in this court, we must apply these rules. If we do not, the words of the Constitution becomes little more than good advice. When it appears that an Act of congress conflicts with one of those provisions, we have no choice but to enforce the paramount demands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate the challenged legislation*."[23]

36. A fundamental principle of constitutional interpretation is that provisions conferring rights and freedoms should be broadly interpreted, and that provisions which restrict rights and freedoms should be given a narrow construction and should satisfy the principle of legality.[24]

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[23] Wallen CJ in the Supreme Court of the United States in *Troop v Dulles* 356 US 2 L Ed 785 at 590 [1956] as quoted in *Dr James Rwanyarare and Another v Attorney General* [2000] UGCC 2. See also *Attorney General v Dow* 1992 BLR 119 at 166 A-D; *Nation Media Group Limited v Attorney General supra* note 2.

[24] See for example the Botswana Court of Appeal decisions in *Noor v Botswana Co-operative Bank Ltd* 1999 (1) BLR 443 (CA) and *Makuto v the State* 2000 (2) BLR 130 (CA). See also the Uganda Constitutional Court case of *Dr James Rwanyarare and Another v Attorney General supra* note 23 and subsequent case of *Lyomoki supra* note 1; and the Kenya High Court case of *Nation Media Group Limited v Attorney General supra* note 2.

37. A further principle to constitutional interpretation is that the Constitution should be looked at as a whole, with no particular provision destroying another, but each supporting each other.[25]

38. This principle was emphasised by the Malawi Supreme Court in the case of *Nseula v the Attorney General*[26] which held that the Constitution should be interpreted in a generous and broad fashion as opposed to a strict, legalistic and pedantic one.

> "*It is an elementary rule of Constitutional interpretation that one provision of the Constitution form all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution. Such a construction is imperative because the true meaning of the words used and the intention of Parliament in any statute particularly in a Constitution can best be properly understood if the Constitution is understood as a whole. It is a single document and every part of it must be considered as far as it is relevant in order to get the true meaning and intent of any part of the Constitution. The entire Constitution must be read as a whole without one provision destroying but sustaining the other*."[27]

39. Sections 23, 24 and 25 of the Constitution of Swaziland relate to freedom of thought, conscience or religion; freedom of expression; and freedom of assembly and association respectively. These rights should be read within the Constitution as a whole, including section 18(1) of the Constitution which states that "*the dignity of every person is inviolable*".

40. Erin Daly, in her seminal book on the right to dignity asserts that -

> "*Courts are choosing to invoke human dignity in order to say something about deeper constitutional values and about the evolving nature of society. They are using the right to*

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[25] *Dr James Rwanyarare and Others v Attorney General supra* note 23; *Lyomoki supra* note 1.
[26] *Nseula v the Attorney General* MSCA, Civil Appeal No 32 of 1997.
[27] Lord Wilberforce, in a Privy Council judgment, recognised the importance of construing constitutions and specifically fundamental rights generously. He stated: "[Fundamental rights] call for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to." *Minister of Home Affairs (Bermuda) & Another v Fisher & Another* 1980 AC 319 at 328-9. See also *Blantyre Netting Company Ltd v Chidzulo and Others* (1996) MLR 1.

dignity to describe what human beings are entitled to just by virtue of being human… The right to dignity is how we describe what legal claims people can assert to insist that their humanity be recognised."[28]

41. The Applicants argue that the right to dignity is not only a right in and of itself, but that dignity should also be used as a value when interpreting other rights and the justifiability of any limitations to rights. To deny the Applicants the right to express their opinions, to act according to their conscience and to participate in associations of their choice negates their right to dignity.

42. The Applicants assert that the provisions of the Act violate section 23(1) of the Constitution, which provides –

Protection of freedom of conscience or religion

(1) A person has a right to freedom of thought, conscience or religion.

(2) Except with the free consent of that person, a person shall not be hindered in the enjoyment of the freedom of conscience, and for the purposes of this section freedom of conscience includes freedom of thought and of religion, freedom to change religion or belief, and freedom of worship either alone or in community with others.

(3) A religious community is entitled to establish and maintain places of education and to manage any place of education which that community wholly maintains, and that community may not be prevented from providing religious instruction for persons of that community in the course of any education provided at any place of education which that community wholly maintains or in the course of any education which that community otherwise provides.

(4) 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 interest of defence, public safety, public order, public morality or public health; or

[28] Erin Daly *Dignity Rights: Courts, Constitutions and the Worth of the Human Person* (2012) 7.

(b) *that is reasonably required for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited intervention of members of any other religion or belief.*

43. The protection of freedom of conscience is a right that cross-cuts other rights. The UN Human Rights Committee, in its General Comment No. 22 comment on this aspect:

> "*The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18(1) [of the ICCPR] is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others*."[29]

44. Section 23 of the Constitution accordingly reinforces the rights in sections 24 and 25, and illustrates the importance the framers of the Constitution placed on the ability of an individual to hold beliefs, even if such beliefs are different to those of the majority. The extent to which sections 3(1) and 4(a) and (e) of the Act violate sections 24 and 25 of the Constitution are set out further in argument below.

Application of international and regional law

45. Section 238 of the Constitution of Swaziland provides –

> *(1) The Government may execute or cause to be executed an international agreement in the name of the Crown.*
> *(2) An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the government by –*
> *(a) an Act of Parliament; or*
> *(b) a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament.*

[29] Human Rights Committee General Comment 22, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994) at para 1.

(3) The provisions of sub-section (2) do not apply where the agreement is of a technical, administrative or executive nature or is an agreement which does not require ratification or accession.

(4) Unless it is self-executing, an international agreement becomes law in Swaziland only when enacted into law by Parliament.

(5) Accession to an international agreement shall be done in the same manner as ratification under sub-section (2).

(6) For the purposes of this section, "international agreement" includes a treaty, convention, protocol, international agreement or arrangement.

46. Swaziland has ratified a number of international and regional human rights instruments that protect fundamental rights including the rights to freedom of expression, assembly and association.

47. Although international law is not binding in the absence of domestication, it is persuasive and offers guidance on the nature and scope of existing constitutional rights.

48. The African Commission on Human and People's Rights (the African Commission) has confirmed that once a state has signed a treaty it assumes certain obligations in respect of that treaty. In *Legal Resources Foundation v Zambia*[30] the Commission said that *"international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties."*[31] In a similar vein, the United Nations Human Rights Committee, in discussing the freedom of speech provision in the ICCPR, noted that *"[t]he obligation to respect freedoms of opinion and expression is binding on every State party as a whole"*.[32]

[30] *Legal Resources Foundation v Zambia* Comm 211/98.
[31] *Id* at para 60.
[32] UNHRC General Comment 34 *supra* note 3 at para 7.

49. The African Commission commented, in *Constitutional Rights Project v Nigeria*,[33] that although the African Charter does permit limitations to the right to freedom of expression (as long as they are "within the law") that law cannot completely disregard the Charter right:

> "*According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level: this would make the protection of the right to express one's opinions ineffective*."[34]

50. Increasingly, courts in dualist states have acknowledged that they should take note of international treaties which have been ratified by their country.

51. In *Sara Longwe v International Hotels*[35] the Zambian High Court held that the Convention on the Elimination of All Forms of Discrimination against Women was relevant to the Applicant's gender discrimination:

> "*Ratification of such instruments by a national state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute.*"[36]

52. The Kenya Court of Appeal, in the case of *Rono v Rono*[37] held that, despite being a dualist country, international law was relevant in consideration of a case dealing with discrimination.

> "*As a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties… Kenya*

[33] *Constitutional Rights Project and others v Nigeria* (2000) AHLHR 227 (ACHPR 1999).
[34] *Id* at para 40.
[35] *Sara Longwe v International Hotels* 1992/HP/765.
[36] *Id*, J19.
[37] *Rono v Rono* (2005) AHRLR 107 (Kenya Court of Appeal) at para 21.

subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated… However, the current thinking on the common law theory is that both international customary law and treaty can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. Principles 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states: it is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law… That principle, amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women."[38]

53. Similarly, Courts increasingly refer to jurisprudence from comparative jurisdictions as a guide to interpreting constitutional rights.

54. The Ugandan Supreme Court acknowledged this when it stated:

"*It is a universally acceptable practice that decided cases decided by the highest courts in jurisdictions with similar legal systems, which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so*."[39]

FREEDOM OF EXPRESSION

Introduction

[38] *Id*.
[39] *Obbo v Attorney General* [2004] 1 EA 265 (SCU), 270.

55. Freedom of expression is a fundamental human right, and has been acknowledged as such in international, regional and domestic human rights instruments. Just last year, the Zimbabwean Constitutional Court recognised this.

> "*There can be no doubt that the freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection. As such, it is prominently recognised and entrenched in virtually every international and regional human rights instrument*."[40]

56. The Human Rights Committee in its General Comment No. 34, at paragraphs 2 and 3 explains the link between expression and personal development.

> "*Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential in any society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights*."

57. The Universal Declaration of Human Rights of 1948 states in article 19 –

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*."

58. The International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, commits its signatories to protect individuals' rights to various civil and political liberties – including freedom of expression.

> *Article 19*

[40] *Madanhire and another v Attorney General* Judgment No CCZ 2/14 page 7.

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, of through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
    a. *For the respect of the rights or reputations of others;*
    b. *For the protection of national security or of public order (ordre public), or of public health or morals.*

59. The right in the ICCPR is particularly relevant to Swaziland because of its similarities to the Swazi constitutional right. Interpretations of the ICCPR right are therefore useful for this Court to have regard to in aiding the interpretation of the constitutional right.

60. The African Charter protects the right to freedom of expression in article 9, with the only limitation being that an individual express and disseminate his opinion "within the law".

1. *Every individual shall have the right to receive information.*
2. *Every individual shall have the right to express and disseminate his opinions within the law.*

61. As mentioned above, any domestic jurisdiction in Africa cannot adopt legislation that completely removes the protection of right to freedom of expression conferred by the African Charter. This Court must therefore have regard to the African Charter right when interpreting the limitations on the right by the Act.

The Importance and Scope of the Right to Freedom of Expression

62. Freedom of expression is a foundational value and right in all democracies across the globe.

63. In 2002 the African Commission on Human and People's Rights adopted the Declaration of Principles on Freedom of Expression in Africa (the Declaration). The preamble to the Declaration is a stirring endorsement of the need for free expression, and of the movement toward respect for the right in Africa. The Commission reaffirmed "*the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms.*"[41] The Preamble asserts that the Commission is convinced that "*respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy*",[42] and that "*laws and customs that repress freedom of expression are a disservice to society*."[43]

64. In 2012, the African Union Special Rapporteur on Freedom of Expression and Access to Information launched a campaign as part of the ten year commemoration of the Declaration on Principles of Freedom of Expression in Africa. The campaign is aimed at encouraging states to adhere to their obligations under the African Charter and eliminate laws that criminalise defamation, false news, and insult, and overly broad definitions of sedition that inhibit free expression.

65. The African Commission has also highlighted the importance of the right. In *Constitutional Rights Project and others v Nigeria*[44] the African Commission heard a case involving the banning of various newspapers in Nigeria and the arrest and detention of pro-democracy campaigners. The Commission held that "*freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of the public affairs of his country."*[45]

[41] Preamble to the Resolution on the adoption of the Declaration of Principles on Freedom of Expression in Africa.
[42] *Id.*
[43] *Id.*
[44] *Constitutional Rights Project and others v Nigeria supra* note 33.
[45] *Id* at para 36.

66. The Zimbabwean Supreme Court has provided a list of the four purposes of the right to freedom of expression that has been cited in many courts subsequently:

> "*Furthermore, what has been emphasized is that freedom of expression has four broad special objectives to serve:*
> *(i) It helps an individual to obtain self-fulfilment,*
> *(ii) It assists in the discovery of truth and in promoting political and social participation,*
> *(iii) It strengthens the capacity of an individual to participate in decision making, and*
> *(iv) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and change.*"[46]

67. An interesting aspect of the right to freedom of expression is that the right does not belong only to an individual seeking to express his opinion or to share information: it belongs, too, to all potential receivers of that information. This was recognised by the African Commission in *Law Office of Ghazi Suleiman v Sudan (II)*[47] (2003) AHRLR 144 (ACHPR 2003) where the Commission (in citing the Inter-American Court of Human Rights) acknowledged that "*when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right, of all others to 'receive' information and ideas.*"[48]

68. The Constitutional Court in Zimbabwe, has also considered and remarked on this multi-faceted nature of the right. Malaba DCJ identified three dimensions,[49] and explains that the "external dimension" constitutes "*the effect of opinions, ideas and information on the addressee or the audience"*.[50] It is therefore this external dimension of the right that plays an important role in the dissemination of ideas and information in a community. Malaba DCJ explains that

[46] *Mark Giva Chavunduka and another v The Minister of Home Affairs and another* Supreme Court Civil Application number 156 of 1999.
[47] *Law Office of Ghazi Suleiman v Sudan (II)* (2003) AHRLR 144 (ACHPR 2003).
[48] *Id* at para 50.
[49] On page 10 Malaba DCJ characterises the elements of the right as having "an internal dimension (the formation and holding of opinion, ideas and information); a communicative dimension (the expression of opinion, imparting of ideas and information) and an external dimension (the effect of opinions, ideas and information on the addressee or the audience i.e. on the rights of others or public interests listed in section 20(2)(a) of the Constitution).
[50] *Chimakure v Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH), 10.

protecting this aspect of the right ensures that "*[i]t is the battle of minds and the free debate of ideas and information that enjoy the benefits of the protection of freedom of expression*."[51]

69. It is this social dimension of the right – and the fact that receivers of information are as much holders of the right as those disseminating that information – that makes it so relevant to political discourse. Many commentators have reflected on the crucial role freedom of expression plays in a democracy, not only because of an individual's inherent right to express themselves, but also because of its centrality in the protection of the ability to share political views.

70. Rand J in the case of *Boucher v The King*[52] notes that:

> "*There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-wind or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability*."[53]

[51] *Chimakure v Attorney General supra* note 50, 11.
[52] *Boucher v The King* (1951) SCR.
[53] *Id*, 265.

71. In South Africa, Judge Cameron (then in the Johannesburg High Court) emphasised the links between freedom to criticise those in power and the success of a constitutional democracy. *"The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens."*[54]

72. The Supreme Court of Appeal in South Africa also commented on why the right is so intrinsic to democracy and development.

> "*The importance of the right to freedom of expression has often been stressed by our courts. Suppression of available information and of ideas can only be detrimental to the decision-making process of individuals, corporations and governments. It may lead to the wrong government being elected, the wrong policies being adopted, the wrong people being appointed, corruption, dishonesty and incompetence not being exposed, wrong investments being made and a multitude of other undesirable consequences. It is for this reason that it has been said 'that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man'.*"[55]

73. Bhagwanji J of the Supreme Court of India, in *Ghandi v Union of India*,[56] provided a concise summary of the inter-relationship between freedom of expression and democracy.

> "*Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential."*[57]

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[54] *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W), 609.
[55] *Hoho* v *The State* [2008] ZASCA 98 at para 29.
[56] *Ghandi v Union of India* [1978] 2 SCR 621.
[57] *Id*.

74. The need to protect political expression is central to the present case as the Applicants were arrested for participating at a rally calling for the boycott of the 2013 national elections. In *Law Office of Ghazi Suleiman v Sudan* before the African Commission in 2003, the Commission held that *"[i]n keeping with its important role of promoting democracy in the continent, the Africa Commission should also find that a speech that contributes to political debate must be protected*."[58]

75. The Human Rights Committee has also commented on the importance of finding a fine balance between respecting different individuals' and groups' political rights. In their General Comment 34, the Committee says that restrictions on expression related to elections must be carefully balanced.

> "*The first of the legitimate grounds for restriction listed in paragraph 3 is that of respect for the rights or reputations of others. The term "rights" includes human rights as recognized in the Covenant and more generally in international human rights law. For example, it may be legitimate to restrict freedom of expression in order to protect the right to vote under article 25, as well as rights article under 17 (see para. 37). Such restrictions must be constructed with care: while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate, including, for example, calls for the boycotting of a non-compulsory vote*."[59]

76. The General Comment emphasises that the right to freedom of expression includes political discourse, commentary on one's own and on public affairs, canvassing, and discussion of human rights. The General Comment also addresses national security legislation, including sedition laws.

> "*Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition*

[58] *Law Office of Ghazi Suleiman v Sudan (II) supra* note 47.
[59] UNHRC General Comment 34 *supra* note 3 paragraph 28.

laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3."[60]

Swaziland's Obligations to Protect the Right to Freedom of Expression

77. Section 24 of Swaziland's Constitution protects the right to freedom of expression:

1) A person has a right of freedom of expression and opinion.

2) 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 –

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.

78. Section 24(3) of the Constitution contains an internal limitation, and sets out circumstances under which expression can be constitutionally limited.

3) 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

[60] UNHRC General Comment 34 *supra* note 3 at para 30.

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.

79. The right to freedom of expression in Swaziland therefore, while not being absolute, is strongly protected: it can only be limited by a law which is reasonably required for the purposes set out in subsections 3 (a), (b), and (c); and which is reasonably justifiable in a democratic society.

80. The Act is a clear limit to the right to freedom of expression as it criminalises actions, speech, and publications which fall within the definition of seditious intention. The question, then, is whether the legislation constitutes a permissible limitation under section 24(3). In determining this, the Court must establish whether the Act is reasonably required and reasonably justifiable in a democratic society.

ARE THE SEDITION ACT'S LIMITATIONS OF THE RIGHT TO FREEDOM OF EXPRESSION CONSTITUTIONAL?

81. In the present case, a limitations analysis of section 24(1) of the Constitution involves the following questions:

a) Is the right limited by a law of general application?
b) Is the limitation reasonably required in the interests of defence, public safety, public order, public morality or public health?
c) Is the limitation reasonably justifiable in a democratic society?

82. Underlying such an analysis is the understanding that the limitation should not render the right nugatory.

83. The Declaration address the need to ensure that limitations to the right are done only in specific, controlled circumstances. Principle II states that "[*a]ny restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society*."

84. In *Chimakure v Attorney-General of Zimbabwe*[61] the Zimbabwe Constitutional Court remarked that *"[t]o control the manner of exercising a right should not signify its denial or invalidation*."[62] The Human Rights Committee also noted that "*when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.*"[63]

Is the Limitation contained in Law?

85. The first aspect, in line with section 24, that the State is required to prove is that the limitation is done "*under the authority of any law*".[64] It is necessary to determine exactly what is meant by "law" in this provision, because anything that does not constitute "law" would not be a permissible limitation. In that case the enquiry would end there – there would be no need to determine whether it was designed to serve an interest as set out in section 24(3)(a), (b), or (c).

86. The principle of legality is a broad doctrine which ensures that all public officials act in accordance with the rule of law and remain subject to the law. In criminal law this principle has four specific rules: 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; that a definition of a crime should be interpreted narrowly; and that crimes should not be formulated vaguely.[65] It is the last aspect that is relevant for this present matter.

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[61] *Chimakure v Attorney-General of Zimbabwe supra* note 50.
[62] *Id*, 17.
[63] UNHCR General Comment 34 *supra* note 3 at para 21.
[64] Section 24(3) of the Swazi Constitution.
[65] Snyman CR *Criminal Law* Part 1, The Principle of Legality. Accessed through LexisNexis Online, 22 February 2015.

87. In *Affordable Medicines Trust v Minister of Health*[66] Ngcobo J provided an explanation of the doctrine of vagueness:

"*The doctrine of vagueness is founded on the rule of law, which . . . is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly*"[67]

88. In Zimbabwe, the Constitutional Court in *Chimakure* held that for a limitation to satisfy the principle of legality it must "*specify clearly and concretely in the law the actual limitations to the exercise of freedom of expression*."[68] This is to "*enable a person of ordinary intelligence to know in advance what he or she must not do and the consequences of disobedience*."[69]

89. The European Court of Human Rights also held that a law must be accessible and precise in order for it to constitute a limitation to the right "*prescribed by law*." The Court acknowledged that legislation must be flexible so as to accommodate change, and so does not require complete clarity and sets the standard for a law as being of "*sufficient precision*."[70]

90. This is vitally important, because a law that is not clear and precise on what conduct it criminalises is unconstitutionally vague, and so the limitation would fall at the first hurdle.

91. The Act does not provide specific and clear indications of what type of actions and expressions would constitute seditious conduct, and so cannot meet the requirement of "law" as defined above.

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[66] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).
[67] *Id* at para 108.
[68] *Chimakure v Attorney-General of Zimbabwe supra* note 50, 24.
[69] *Id*, 26.
[70] *Sunday Times v The United Kingdom* (1979) 2 EHRR 245 at para 49.

92. As we have mentioned above, the terms "bring into hatred or contempt", "excite disaffection", "raise discontent or disaffection", and "promote feelings of ill-will or hostility" do not sufficiently set out what type of conduct is prohibited under the Act. These terms therefore render the definition of the offence vague and unconstitutional.

Does the Limitation Protect an Interest Listed in Section 24(3)?

93. Section 24(3) of the Swazi Constitution provides a set of listed interests that justify limitation to the right to freedom of expression. The limitation must therefore have as its objective the protection of one of those interests: if it does not, then the limitation is not constitutionally permissible.

94. The constitutional provision allows for the protection of the interests of "*defence, public safety, public order, public morality or public health*";[71] to protect "*the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings*";[72] "*preventing the disclosure of information received in confidence*"[73]; "*maintaining the authority and independence of the courts*"[74]; "*regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication.*"[75].

95. However, the definition of "seditious intention" in section 3 does give some guidance on which of these listed interests are ostensibly being sought to be protected by the Act. The use of phrases such as "excite disaffection", "bring into hatred or contempt", and "ill-will and hostility", and the subsections relating to the protection of the government and prevention of alteration of any matter, create an impression that the Act is designed to protect public order. In addition, section 3(1)(c) of the Act refers directly to the protection of the authority of the administration of justice.

[71] Section 24(3)(a) of the Constitution.
[72] Section 24(3)(b(i) of the Constitution.
[73] Section 24(3)(b)(ii) of the Constitution.
[74] Section 24(3)(b)(iii) of the Constitution.
[75] Section 24(3)(b)(iv) of the Constitution.

96. The Respondents must successfully demonstrate that the Act in fact plays an important role in protecting public order and public safety; that it is "reasonably required" in order to do so.

97. It is interesting to note that, because the notion of public order is so broad, many courts have interpreted it to include the protection of human rights.

98. The Constitutional Court of Zimbabwe in *Chimakure*, which dealt with the offence of publishing false statements, held that:

> "*A law cannot be used to restrict the exercise of freedom of expression under the guise of protecting public order when what is protected is not public order. This is because the maintenance of public order or preservation of public safety is synonymous with the protection of fundamental human rights and freedoms … It is always important to understand and appreciate the meaning of the concepts of public order and public safety. They describe the definitional balancing line between the exercise of the right to freedom of expression and the public interest for the protection of which the State may restrict the exercise of that right*.[76]

99. It is also necessary to point out that courts have recognised that the suppression of opinion and expression may pose more of a risk to public order than the free expression. In *Free Press of Namibia v The Cabinet for the Interim Government of South Africa*[77] the South West Africa High Court held:

> "*Because people (or a section thereof) may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the state or to the maintenance of public order. In fact to stifle just criticism could as likely lead to those undesirable situations*."[78]

[76] *Chimakure v Attorney-General of Zimbabwe supra* note 50, 41.
[77] *Free Press of Namibia v The Cabinet for the Interim Government of South Africa* [1987] SWA 614.
[78] *Id* at 625.

100. The United Kingdom has also recognised the role freedom of speech can play in protecting the safety of a state.

> "*The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country*."[79]

101. 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.

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

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

103. Various forms of the proportionality test have been adopted by courts, but they all are designed to ensure that a limitation does not unduly restrict a fundamental right. The test involves a balancing exercise between the rights of an individual and the rights of a community. The Zimbabwe Constitutional Court in *Chimakure* stated that *"[t]he purpose of the proportionality test is to strike a balance between the interests of the public and the rights of the individual in the exercise of freedom of expression.*"[80]

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[79] *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115, HL at 126.
[80] *Chimakure v Attorney-General of Zimbabwe supra* note 50, 21.

104. The proportionality test to determine reasonableness was famously set out in the Canadian case of *R v Oakes*.[81] In order for a limitation to satisfy this test there must be a rational connection between the limitation and the objective sought to be achieved by the limitation; the limitation must be the least intrusive way in which to achieve that objective; and there must be proportionality between its effects and its objectives.

105. The African Commission explained in *Constitutional Rights Project and others v Nigeria*[82] that *"[t]he justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow"*[83] and that a "*limitation may not erode a right such that the right itself becomes illusory*."[84]

106. The Human Rights Committee has also recognised that restrictions must not be overbroad.

> "*Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected*."[85]

107. The Supreme Court of Canada discussed how overly broad pieces of legislation are not connected to the purpose and effect of the law.

> "*Overbreadth allows courts to recognise that the law is rational in some cases, but that it overreaches in its effect in others … For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the specific individual*."[86]

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[81] *R v Oakes supra* note 4.
[82] *Constitutional Rights Project and others v Nigeria supra* note 33
[83] *Id* at para 42.
[84] *Id* at para 42.
[85] UNHRC General Comment 34 *supra* note 3 at para 34.
[86] *Canada (Attorney General) v Bedford* 2013 SCC 72, at para 113.

108. The European Commission explained that the purpose of the right, and the relationship the right has to a functioning democracy is also relevant in assessing the permissibility of the limitation.

> "*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*"[87]

109. In *Chimakure* the Zimbabwe Constitutional Court specifically noted that the limitation must be linked to the harm that unlimited expression would cause. Malaba DCJ said that that the limitation "*must be a response to the effects of direct and proximate harm or likelihood of harm to the public interest.*"[88] The judge also focused on the need for the limitation to be the least intrusive way of restricting the right when he said that *"[t]he law should not in its design have the effect of overreaching and restricting expression which is not necessary for the achievement of the objective concerned*."[89] The law must be "*narrowly drawn and specifically tailored to achieve the objective pursued by the legislation*."[90]

110. The question of harm is important because the fact that expression may cause some harm to the community's interest is not sufficient to justify that expression's limitation. In *Chimakure* there is an acknowledgement that the free expression of ideas may cause harm – but that only serious harm can lead to a limitation of the right. Malaba DCJ stated that "[*t]he exercise of the right to freedom of expression is not protected because it is harmless. It is*

[87] *Handyside v United Kingdom* 1 EHRR 737.
[88] *Chimakure v Attorney-General of Zimbabwe supra* note 50, 54.
[89] *Id*, 54.
[90] *Id*, 58.

protected despite the harm it may cause."[91] It is therefore not an adequate response when explaining that a limitation is justified that it may cause some form of harm.

111. The Constitutional Court emphasised that "'*[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*."[92]

112. The African Commission also links the acceptability of limitations to expression with the potential harm that expression may cause. Principle XIII explicitly calls on African states to ensure that criminal restrictions "*serve a legitimate interest in a democratic society*,"[93] and states that *"[f]reedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression*."[94]

113. The broad and sweeping nature of the definition of seditious intention in the Act does not restrict prosecution to only those actions that pose "direct, obvious and serious harm" to Swaziland's public safety.

114. The example of the Applicants in this matter is a case in point as they were arrested and charged under the Act despite there being no evidence that their alleged participation in the rally would pose serious harm to public order. There is partly because there is no guidance in the legislation that only conduct that poses serious harm should be criminalised.

115. The well-known British legal author Sir James Stephen wrote extensively on the nature of the sedition offence. In 1883 he argued that "*nothing short of a direct incitement to disorder and violence is a seditious libel.*"[95] The New Zealand Law Commission explained that Sir James believed that "*only a censure of the Government that had an immediate tendency to*

[91] *Chimakure v Attorney-General of Zimbabwe supra* not 50, 57.
[92] Id, 56.
[93] Principle XIII, section 1.
[94] Principle XIII, section 2.
[95] United Kingdom Law Reform Commission Report, 1977, 41.

produce a breach of the peace that may destroy or endanger life, limb or property ought to be regarded as criminal".[96]

116. In 1977, when the British Law Reform Commission reviewed the common law offence of sedition the Report referred to the Canadian case of *Boucher v R* in which the Supreme Court confirmed that an incitement to violence must be present for a conviction of sedition.

> "*It seems to us most unlikely that the courts would now adopt any definition of sedition which goes wider than that expressed in Boucher v R. If this is correct it follows that before a person can be convicted of publishing seditious words, of seditious libel, or of seditious conspiracy he must be shown to have intended to incite to violence, or to public disorder or disturbance, with the intention of disturbing constituted authority*."[97]

117. In the case of *Kedar Nath Singh v The State of Bihar*[98] the Supreme Court of India upheld the constitutionality of the sedition law. However, the Court distinguished clearly between speech or writing which "*excites people to violence or have the tendency to create public disorder*"[99] and strong criticisms of the government which speak "*in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence*."[100] The later type of speech was found to be outside the ambit of the sedition law, and so the Indian Sedition law was interpreted so as to include a requirement of violence in the offence.

118. The Swazi sedition offence does not have the requirement to incite violence, and so is far broader than the offence as defined by Stephen. The fact that there is no link between criminalised conduct and actual, physical harm means that the Act simply cannot meet the

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[96] New Zealand Law Reform Commission Report, 16.
[97] United Kingdom Law Reform Commission Report, 1977, 44.
[98] *Kedar Nath Singh v The State of Bidar* 1962 AIR 955, 1962 SCR Supl. (2) 769.
[99] *Id*.
[100] *Id.*

requirement of proportionality because there is no requirement of a real risk to a listed interest, nor of a causal link between the expression and the risk of harm.

119. The only way in which the legislation could be constitutional would be for the requirement of incitement to violence to be read into the provision.

120. The Act, as it stands, criminalises any expression which may create disaffection – regardless of whether it is peaceful. That goes against the directives of all human rights bodies that basic political expression and dissent – particularly when it is peaceful – should not be restricted.

121. Political debate, by its very nature, will appear to be in opposition to the government. The New Zealand Law Commission recognised that the main motivation for sedition prosecutions was to suppress criticism of government in times of political difficulties. The Report states that most New Zealand prosecutions of sedition "*were not, by and large, advocating violence against lawfully constituted authority, or, if they did at least allegedly advocate violence, it was in response to the violence of government reaction (sending force against the Mäori trying to protect their lands, or against strikers, for example).*"[101]

122. This argument is that at times of unrest "*nearly all vigorous criticism of government might be viewed as resulting from an intention to bring the government into hatred or contempt*",[102] and so courts have used the additional required of incitement to violence to ensure that sedition offences are only used to prevent real, physical harm.

123. In New Zealand, there did not appear to be that additional requirement of physical harm, and so there was a concern that *"[t]he breadth of the definition of seditious intention means that seditious offences can be used to punish political speech that is essentially criticism of government policy, and not simply used to prevent violence*."[103]

[101] New Zealand Law Commission Report, 19.
[102] *Id,* 24.
[103] *Id,* 25.

124. The New Zealand and British Law Reform Commissions made another observation that is relevant to the proportionality analysis in the present case. All the proportionality tests require that, to be justifiable, the limitation must be the least intrusive way in which to protect the interest. Both Law Commissions found that, after concluding that sedition must include an incitement to violence in its elements, there are many other criminal sanctions that would adequately control such conduct.[104]

> "*Where the protection of public order, or the preservation of the Constitution or the Government is at stake, in the Commission's view, there are other and more appropriate criminal offences that can be used to prosecute offending behaviour; offences that do not carry with them the risk of abuse or the tainted history that attaches to the seditious offences. Similarly, in these days of terrorism, while it might be tempting to look to sedition to contribute to the suppression of terrorism, in our view, the seditious offences in the Crimes Act 1961 are not an appropriate response to the threat of terrorism. There are other ways of dealing with such conduct*."[105]

125. The New Zealand Commission stated that the sedition offences are "*steeped in a history of abuse of inappropriate use*,"[106] and that the mischief sought to be prevented by sedition laws could just as easily be address by other criminal sanctions.

> "*Where speech goes further, and crosses the line into inciting violence, rather than using the archaic and politically charged offences of sedition, we consider that such conduct can be adequately and more appropriately dealt with by charges of incitement to commit other offences, as discussed in the next chapter*."[107]

[104] United Kingdom Law Reform Commission Report, 1977, 47.
[105] New Zealand Law Commission Report, 9.
[106] *Id,* 65.
[107] *Id,* 65.

126. New Zealand repealed its sedition offences in the Crimes (Repeal of Seditious Offences) Amendment Act in 2007, and the United Kingdom abolished sedition and seditious libel in the Coronors and Justice Act of 2009[108].

127. Another aspect to consider when assessing the overbreadth of the Act is to determine whether the legislation provides sufficient guidance to officials enforcing it. If it does not, the implementation of the legislation may not satisfy the proportionality analysis.

128. In the Human Rights Committee General Comment 34 it is telling that it emphasises that the proportionality requirements extend to the enforcement of the limiting legislation.

> *"The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law".*[109]

129. Although made in the context of what constitutes a "law", this General Comment also discussed how a piece of legislation can ensure that the principle of proportionality is respected by those enforcing the law.

> "*A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not*."[110]

130. In order for the legislation to pass the proportionality test it must therefore be the least intrusive way to limit the right, and must be narrowly drawn so as to not enable officials

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[108] *Section 73* ***Abolition of common law libel offences etc***
The following offences under the common law of England and Wales and the common law of Northern Ireland are abolished—
(a) the offences of sedition and seditious libel;
(b) the offence of defamatory libel;
(c) the offence of obscene libel.
[109] UNHCR General Comment 34 *supra* note 3 at para 34.
[110] *Id* at para 25.

enforcing the law to infringe the right disproportionately. The Act does not do so, and so cannot pass constitutional muster.

Is the Limitation Reasonably Justifiable in a Democratic Society?

131. The requirement that the law limiting the right must nevertheless be "reasonably justifiable in a democratic society" in effect limits the limitation. This characteristic was identified by Mulenga JSC in the Ugandan Supreme Court in *Obbo v Attorney General*.[111]

> "*In addition, they provided in that clause a yardstick, by which to gauge any limitation on the rights in defence of public interest. That yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as 'a limitation upon the limitation'. The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society*."[112]

132. This limitation of a limitation was also discussed by the Constitutional Court of Uganda in *Andrew Mujuni Mwenda and Eastern Africa Media Institute Ltd v Attorney General*,[113] Case No. 3 of 2006. In that case, the first petitioner was a journalist who presented a televised debate which criticised the president and he was then charged with sedition. The Court emphasised that the burden of proof was on the state to show that what the journalist had uttered prejudiced the public interest as per the limitations to the right to freedom of expression. The Court noted that there were no averments by the State as to what the reactions or feelings of the community were to the televised debate.

[111] *Obbo v Attorney General supra* note 39.
[112] *Id,* 295.
[113] *Andrew Mujuni Mwenda and Eastern Africa Media Institute Ltd v Attorney General supra* note 12.

133. The wording in the Swazi provision may differ from that in the Ugandan one but the concept still remains: notwithstanding the fact that a limitation to the right of freedom of expression be done in furtherance of one of the factors listed in section 24(3), the limitation itself must still be judged against the standard of what is justifiable in a democratic society.

134. There is no objective standard of what is reasonably justifiable in a democratic society, and each case must be assessed on its merits. This was acknowledged by Chaskalson P in the South African Constitutional Court case of *S v Makwanyane.*

> "*The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality. . . The fact that different implications for democracy, and in the case of our Constitution where 'an open and democratic society based on freedom and equality' means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established but the application of those principles with particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality which calls for the balancing of different interests*."[114]

135. The analysis here is similar to the proportionality analysis. In the Zimbabwean case of *Nyambirai v NSSA and another*[115] the Chief Justice set out three criteria to take into account: "*whether the legislative objective is sufficiently important to justify limiting a fundamental right; whether the measures designed to meet the legislative objective are rationally connected to it; whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective*".[116]

136. The Supreme Court of Zimbabwe provided a detailed analysis of reasonableness in *Commissioner of Taxes v CW.*[117] The first important observation of the Court's is that although

[114] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 104.
[115] *Nyambirai v NSSA and another* [1996] 1 LRC 64.
[116] As quoted in *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458.
[117] *Commissioner of Taxes v C W (Pvt)(Ltd.) 52 SATC 77, 1989 (ZS).*

assessments of reasonableness is regularly a legislative function, in issues of constitutionality the Court is required to determine whether a legislative action is reasonable or not.

> "*Ordinarily, where a court is called upon to adjudicate on the effect of a legislative measure, it is concerned only with the validity of the measure, its meaning and its application. It is not concerned with its wisdom or even its reasonableness. These are normally matters solely within the legislative domain. But in this case, by virtue of the proviso to s16(7) of the Constitution, the task of determining whether the proviso to para (f) of s10 of the Capital Gains Tax Act is reasonably justifiable in a democratic society must be faced*."[118]

137. The Supreme Court continued and discussed the character of "reasonableness".

> "*It has been said that the word 'reasonable' implies intelligent care and deliberation – the choice of a course which reason dictates, and that legislation which arbitrarily or excessively invades the enjoyment of a substantive right does not possess the quality of reasonableness – (per Mahajan J in Chintaman Rao v Madhya Pradesh (1950) SCR 759 at 763). With that concept I respectfully agree. The principle of reasonableness strikes at arbitrariness and inequality in State action and ensures fairness and impartiality of treatment.*"[119]

138. The Court in *Commission of Taxes v C W* also referred to *Patel v Attorney General*[120] in remarking on the objective nature of a "democratic society".

> *"... it is necessary to adopt the objective test of what is reasonably justifiable not in a particular democratic society, but in any democratic society. I accept the argument that some distinction should be made between a developed society and one which is still developing, but I think one must be able to say that there are certain minima which must*

[118] *Id*, 84.
[119] *Id*, 84.
[120] *Patel v Attorney General* 1968 Zambia Law Reports 99 at 128-9

be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society."[121]

139. The ECHR has interpreted the term "necessary in a democratic society" to imply the existence of a "*pressing social need*",[122] which would include questioning whether there was an imminent risk to society. The court must also consider whether:[123]

a. In light of the case as a whole, it was "*proportionate to the legitimate aim pursued*";[124]
b. The reasons adduced by the national authorities to justify it are "*relevant and sufficient*";[125]
c. The authorities applied standards which were in conformity with the principles in article 11 of the European Convention; and
d. If the authorities based their decisions on an acceptable assessment of the relevant facts.

140. We have already discussed how fundamental the protection of freedom of expression is in a democracy, and how individual and group participation in the political affairs of a country is impossible without that protection. We submit that the Act's vague formulation of the offences through the definition of "seditious intention" constitutes an almost complete limitation of the right to freedom of expression because it prevents even non-violent expression that is critical of the government. Based on the idea that there is an objective understanding of a democratic society and that all legislation in a democratic society must adhere to the principles of proportionality and equality, it is inconceivable that the Act could be considered to be "reasonably justifiable in a democratic society."

[121] As quoted in *Commissioner of Taxes v C W (Pvt)(Ltd.) supra* note 117, 84.
[122] *Tsonev v Bulgaria* ECHR 45963/99 at para 38.
[123] *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania* ECHR 46626/99 (3 February 2005); *Tsonev v Bulgaria supra* note 122 at para 52.
[124] *Tsonev v Bulgaria supra* note 122 at para 38.
[125] *Id* at para 52.

FREEDOM OF ASSOCIATION

The Importance and Scope of the Right to Freedom of Association

141. The right to freedom of association is also protected in international human rights instruments.

142. Universal Declaration of Human Rights of 1948 in article 20 states:

> *(1) Everyone has the right to freedom of peaceful assembly and association.*
> *(2) No one may be compelled to belong to an association.*

143. The International Covenant on Civil and Political Rights also commits its signatories to protect individuals' rights to various civil and political liberties – including freedom of association in article 22.

> *(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
> *(2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*
> (3) *Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

144. Article 11 of the European Convention on Human Rights protects the right to freedom of assembly and association subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society".

145. The ECHR has held that "*the State's power to protect its institutions and citizens from associations that might jeopardise 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 justify restrictions on that freedom*".[126]

146. The test used by the ECHR to determine whether a limitation of the right to association was justified includes consideration of the following:[127] 1) Was the violation prescribed by law? 2) Did the violation pursue a legitimate government aim? 3) Was the violation necessary in a democratic society? - that is, was there a pressing social need for the violation and was the measure proportional?

147. The ECHR in *United Macedonian Organisation Ilinden and Others v Bulgaria (No. 2)* held that seemingly shocking or radical political and social ideas were protected through the exercise of the right of association.[128]

148. The right is also protected in the ACHPR which, in article 10, provides that every individual shall have the right to free association provided that he abides by the law. Article 11 of the ACHPR provides that "*every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, safety, health, ethics and rights and freedoms of others*."

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[126] *Koretskyy v Ukraine* ECHR 40269/02 at para 51; *Zhechev v Bulgaria* ECHR 57045/00 at para 43; *Association of Citizens Radko & Paunkovski v Former Yuguslav Republic of Macedonia*, ECHR 74651/01 (15 January 2009). See also *Tsonev v Bulgaria supra* note 122 at para 46 (holding that "exceptions to freedom of association must be narrowly interpreted. Their enumeration therefor is strictly exhaustive and their definition is necessarily restrictive").
[127] *Koretskyy v Ukraine supra* note 126 at paras 39-42; *Gorzelik and others v Poland* ECHR 44158/98 (17 February 2004).
[128] *United Macedonian Organisation Ilinden and Others v Bulgaria (No. 2* ECHR 34960/04, ECHR (18 October 2011), at para 33.

149. The African Commission has stated that "*competent authorities should not enact provisions which would limit the exercise of this freedom*"[129] and "*should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards*."[130]

Swaziland's Obligations to Protect the Right to Freedom of Expression

150. Section 25 of the Constitution of Swaziland provides that:

> *(1) A person has the right to freedom of peaceful assembly and association.*
> *(2) 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.*

151. Section 25(3) of the Constitution contains an internal limitation, and sets out circumstances under which the right to associate and assemble can be constitutionally limited.

> *(3) 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,*

[129] *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* 2000 at para 15.
[130] *Id* at para 15; *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR); *Law Office of Ghazi Suleiman v Sudan (II) supra* note 47.

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.

152. Like the right to freedom of expression, the right to freedom of association in Swaziland therefore, is not absolute but can still only be limited by a law which is reasonably required for the purposes set out in subsections 3 (a), (b), and (c), and which is reasonably justifiable in a democratic society.

153. The Act is a limit to the right to freedom of association as it makes it an offence to "*conspire with any person to do any at with a seditious intention*."[131] The Act is also used to prevent individuals gathering to voice their discontent – one example is the present case where the Applicants were arrested at a meeting place. By criminalising all forms of dissent in a group the Act is a disproportional limit to the right.

ARE THE SEDITION ACT'S LIMITATIONS OF THE RIGHT TO FREEDOM OF ASSOCIATION CONSTITUTIONAL?

154. In the present case, a limitations analysis of section 25(1) of the Constitution involves the following questions:

a) Is the right limited by a law of general application?
b) Is the limitation reasonably required in the interests of defence, public safety, public order, public morality or public health?
c) Is the limitation reasonably justifiable in a democratic society?

155. The same analysis as set out under the freedom of expression section applies and is accordingly not set out in detail here.

Is the Limitation contained in Law?

[131] Section 3(4)(a) of the Act.

156. As we have discussed above, an Act has to specify the offence in clear and precise detail. In the same way that the Act's vagueness infringes the right to freedom of expression in that it prohibits all expression by not adequately describing what conduct is proscribed, the Act also infringes the right to freedom of association.

Does the Limitation Protect an Interest Listed in Section 25(3)?

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

157. The same analysis as set out under the freedom of expression section applies and is accordingly not set out in detail here.

Is the Limitation Reasonably Justifiable in a Democratic Society?

158. The same analysis as set out under the freedom of expression section applies and is accordingly not set out in detail here.

CONCLUSION

159. The Applicants accordingly submit that sections 3(1) and 4(a) and (e) violate the rights entrenched in the Constitution of Swaziland, in particular the rights to freedom of expression and association.

160. The Applicants submit that the only appropriate remedy would be for the court to strike down these provisions as unconstitutional.

161. The Applicants submit that doing so will not cause a lacuna in the law as other offences continue to adequately criminalise acts which harm public order or public safety without interfering disproportionately with entrenched constitutional rights.

162. In the alternative, the Applicants submit that the harm caused by the offending sections can be limited by reading in the words "that has the potential to incite violence or lead to serious bodily harm or serious harm to property" after section 4(e) of the Act. This would ensure that convictions of sedition could only occur when there is an "*immediate tendency to produce a breach of the peace that may destroy or endanger life, limb or property"* and bring the offence within the internationally accepted limits.

Advocate Mahlape Sello
Attorney Leo Gama
9 March 2014

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