IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1703/2014

In the matter between:

MARIO THEMBEKA MASUKU	First Applicant
MAXWELL MANQOBA DLAMINI	Second Applicant
And	
THE PRIME MINISTER OF SWAZILAND	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
THE ATTORNEY-GENERAL	Fourth Respondent

AND THREE RELATED MATTERS 2180/09; 96/2014; 782/14.

RESPONDENTS' HEADS OF ARGUMENT

Contents

INTRODUCTION

[1] These applications concern two statutes – the Sedition and Subversive Activities Act, 1938, ("the Sedition Act") and the Suppression of Terrorism Act, 2008 ("the Terrorism Act").

[2] The Applicants seek orders of nullity in respect of these Acts.

[3] If the relief sought is granted, the Terrorism Act will be rendered ineffective and unworkable, and the Sedition Act will be severely curtailed.

THE NATURE OF THE PROCEEDINGS - AN ABSTRACT CHALLENGE

[4] The Applicants' challenge to the constitutionality of sections of the Terrorism Act and the Sedition Act is an *abstract* or theoretical challenge, as is now demonstrated.

[5] The Applicants allege that various charges have been laid against them, a fact which is not in dispute. However, the Applicants then place no positive version before this Honourable Court as to their *actual defence* to these charges.

[6] The criminal proceedings arising out of those charges are still pending, but the Applicants have elected to launch their applications at this stage before any positive finding on the relevant facts have been made by any court.

[7] The Applicants may or may not be acquitted on those criminal charges-and that enquiry is one for the criminal court hearing trial on those charges.

[8] The Applicants could instead:

[a] have elected first to ascertain whether or not they would be found guilty or acquitted in those criminal proceedings and if they were found guilty on the basis of any of those charges, then a decision as regards the constitutional implications, if any of any such decision could be made, and an attack could be launched on the relevant provisions at that stage[1];

[b] alternatively, have elected to take this Honourable Court into their confidence as regards the exact facts of their defence (if any) in the criminal proceedings, and if those facts were agreed to by the

[1] Prince v President, Cape Law Society and others 2001(2) SA 388 (CC); Ex parte Minister of Safety and Security and others; In re S v Walters 2002(4) SA 613 (CC), and Qwelane v Minister of Justice and Constitutional Development 2015 (2) SA 493 (GJ)

Respondents, or otherwise determined, then this Honourable Court could decide the constitutional points on a particular set of facts.

[9] The Applicants have done neither.

[10] The existence of these charges is accordingly:

[a] sufficient to afford the Applicants *locus standi* in the present proceedings;

[b] not sufficient, in the absence of any positive version as to the Applicants' defence to those charges, to establish any actual facts to which the specific provisions of the Terrorism Act or the Sedition Act could be applied in this Honourable Court.

[11] The Applicants' challenge is accordingly entirely *abstract*, in that they argue that the challenged sections of the two Acts are unconstitutional on their face, and that therefore the issues in this application can be decided purely on the text of the Acts read with the text of the Constitution of Swaziland.

[12] A litigant who embarks upon an abstract challenge does so at his own peril.

[13] In ***Savoi v National Director of Public Prosecutions*** *2014 (5) SA 317 (CC)* the Constitutional Court of South Africa said at paragraph 19:

"As mentioned earlier, the Applicants have not placed before the court a specific set of facts, but have brought an abstract challenge";[2]

[14] At paragraph 13:

"So, the Applicants plainly have standing to bring this challenge. This does not, however, make it irrelevant that this challenge is brought in the abstract. Courts generally treat abstract challenges with disfavour. And rightly so. Will hearsay, similar facts or evidence of previous convictions be led at the Applicants' trial? At this stage we simply do not know. Abstract challenges ask courts to peer into the future, and in doing so they stretch the limits of judicial competence. For that reason the Applicants in this case bear a heavy burden — that of showing that the provisions they seek to impugn are constitutionally unsound merely on their face. The analysis that follows demonstrates just how heavy that burden is..";

[15] At paragraph 23:

[23] The answer to the pleaded challenge is that there is simply no vagueness. There is reasonable certainty on what sch 1 is referring to. That the list may possibly incorporate offences which, when viewed individually, may not be expected to fall under the sort of notions that readily come to mind when one thinks of organised crime, does not necessarily translate to vagueness. As I seek to demonstrate immediately below, the Applicants' contention ignores the modus operandi (mode of operation) of organised crime. The argument must fail."

[16] In ***S v Mamabolo (E-TV and Others Intervening)*** *2001 (3) SA 409 (CC)* the Constitutional Court of South Africa said at paragraph 44

"It is also important not to get bogged down in a sterile semantic debate about the difference between, and relative merits of, tests in the abstract.

[2] Underlining has been added by us in various quotations

> *Ultimately, whether the test is worded in this way or that, the real question is whether the trier of fact has been satisfied, with the requisite preponderance depending on the nature of the case,…that the publication of the offending statement brought about a particular result."*

[17] The approach advocated by the Applicants is precisely that warned against by Kriegler J in ***Mamabolo*** – a sterile semantic debate, peering into the future without consideration whether any *real* difficulty of interpretation or application of the impugned statutes arises *on the actual facts of this case*.

[18] As was stated in **Qwelane v Minister of Justice**[3]:

> *"In the circumstances of this case the requirement of convenience falls to be considered in the light of the general rule of practice laid down by the Constitutional Court that, where possible, cases should be decided without reaching a constitutional issue… Counsel for the applicant contended that the constitutional challenge should be heard first, for the reason that, if successful, it may render the remaining issues moot. The contention flouts the rule of practice I have referred to and must for this reason alone fail. But,there is a further ground militating against affording such procedural antecedence to the constitutional challenge: it has by now become clear that evidence will be led in the constitutional challenge proceedings. In this regard another admonition by the Constitutional Court comes to the fore: constitutional challenges in the abstract are to be avoided…. In view of the far-reaching implications attaching to constitutional decisions, the precise facts to which the constitutional challenge is to be applied must be established."*

[19] As was held in ***Minister of Safety & Security, Ex p: In re S v Walters***[4]:

> *"The result is most unfortunate. It is an established principle that the public interest is served by bringing litigation to a close with all due expedition. ….The mere fact that constitutional issues have arisen in a case does not justify piecemeal litigation."*

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[3] Qwelane v Minister of Justice and Constitutional Development and Others 2015 (2) SA 493 (GJ) at paragraph 10

[4] Minister of Safety & Security, Ex p: In re S v Walters 2002 (4) SA 613 (CC) at paragraph [63]

NOT A UNQUALIFIED OR PARAMOUNT RIGHT

[20] Further, the Applicants' approach is flawed in focusing almost exclusively on their perceived rights' of freedom of expression, without any, or adequate allowance for competing rights, *in casu*, the rights to life (section 15 of the Constitution) the right to property (section 19 of the Constitution) the right to public safety and public order (section 24 (3) of the Constitution), all of which are under severe threat by untrammelled activities otherwise proscribed by the Acts in question.

[21] As was stated in ***S v Mamabolo*** [5]:

> *"With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right."*

DESTRUCTIVE-NOT CONSTRUCTIVE

[22] In this regard, the Applicants' abstract assaults on the legislation are entirely destructive in relation to these very real threats to life and public safety.

[23] The Applicants wish to discard what preventative measures are in existence at present in favour of their own perceived interests, but in the process make no positive or constructive recommendations as regards how what would be discarded in favour of their contended for rights of freedom of expression and association, could be replaced by something in any way equivalent or effective

[5] S v Mamabolo (E TV Intervening) 2001 (3) SA 409 (CC)

as an anti-terrorism measure to protect the broader interests of the lives and safety of innocent members of the general public, and their property.

[24] They overlook that they too are members of the public, and are equally deserving of protection at the level of their life and property, which are equally under threat as a result of their own assaults on the legislation.

[25] In the final analysis, what is more important, and which is to be given greater weight in any balancing process-a person's right to life, safety and property; or his right to speak out or associate?

[26] With respect, the Applicants' attack is misdirected, insensible, and procedurally inappropriate.

THE APPROACH TO INTERPRETATION

[27] The starting point in evaluating any constitutional challenge to a statute is to ascertain its correct meaning. This requires a Court first to construe the Terrorism Act applying the normal rules of construction, including those required by constitutional adjudication.[6]

[28] The current prevailing approach to the interpretation of documents is that they fall to be interpreted according to the language used, in the context of the

[6] **Affordable Medicines Trust and others v Minister of Health and others** 2006(3) SA 247 (CC) at para 109.

document as a whole, in its factual matrix, having regard to its apparent purpose, in a sensible manner, all as a unitary process.[7]

[29] As was explained in ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[8]:

> *"interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."*

[30] The Constitutional Court of South Africa has expressly endorsed this passage, stating with reference to it that *"the principles applicable to interpreting written documents are now settled."*[9]

[31] That Court has also held that the technique of "*paying attention to context in statutory interpretation is now required by the Constitution*." [10] And further that: *The process of interpretation, I emphasise, does not involve a consideration of*

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[7] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph [18]; Bothma-Batho Transport (EDMS) Bpk v S Bothma & Seun Transport (EDMS) Bpk 2014 (2) SA 494 (SCA); FirstRand Bank Ltd v Land & Agricultural Dev Bank of SA 2015 (1) SA 38 (SCA) at paragraph [27].

[8] 2012 (4) SA 593 (SCA) at para 18.

[9] **Kwazulu-Natal Joint Liaison Committee v MEC for education, Kwazulu-Natal and others** 2013 (4) SA 262 (CC) at paragraph 129

[10] **Kubyana v Standard Bank of South Africa Ltd** 2014 (3) SA 56 (CC) at para 77.

facts. Matters of evidence do not come into the equation. This is so because statutory construction is an objective process, with no link to any set of facts but in terms of which words used in a statute are given a general meaning that applies to all cases, falling within the ambit of the statute."[11]

[32] Where a statute is grammatically capable of two meanings, one of which complies with the constitution and one of which does not, a court must *"prefer interpretations of legislation that fall within constitutional bounds"* provided the words used are reasonably capable of such constitutionally compliant meaning.[12]

[33] Constitutional interpretation must avoid "*excessive peering at the language to be interpreted without sufficient attention to the contextual scene",* such contextual scene including the historical context of the provision.[13]

[34] The Applicants advocate interpretations of the two statutes under consideration here in a manner that is contrary to this settled approach – insensibly, to produce unconstitutional results, and without regard to the purpose of the Acts as a whole in their proper context.

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[11] At paragraph 78
[12] **South African Airways (Pty) Ltd v Aviation Union of South Africa and others** 2011 (3) SA 148 (SCA) at para 26.
[13] **General Council of the Bar and another v Mansingh and others** 2013 (3) SA 294 (SCA) at para 11.

CONSTITUTIONAL CHALLENGES TO LEGISLATION

[35] In ***Affordable Medicines*** the Constitutional Court of South Africa stated that the exercise of all legislative power is subject to at least two constitutional constraints.

[36] The *first* is that there must be a rational connection between the legislation and the achievement of a legitimate government purpose.[14] Parliament may not act capriciously or arbitrarily. This is an aspect of the principle of legality.

[37] A challenge based on alleged vagueness and uncertainty of meaning falls into this category of constitutional challenge.

[38] In assessing rationality a court must confine itself to its appropriate role, and respect the distinct constitutional role of the legislature. As long as the legislative measure is rational the Court may not substitute its own idea of what is appropriate or reasonable. In the exercise of its legislative powers the legislature has the widest possible latitude within the limits of the Constitution.[15]

[39] The *second* is where a legislative measure is found to limit a fundamental right. Such a limitation must comply with the applicable limitations clause, which, in South Africa, requires the limitation to be contained in a law of general application and to be reasonably justified. In Swaziland the relevant limitations clauses in relation to the rights to freedom of expression and freedom of

[14] **Affordable Medicines** *supra* at para 74.
[15] Ibid at paras 78 and 86.

association are contained in sections 24(3) and 25(3) of the Constitution, and *they require the person challenging the legislative measure to show that it is not reasonably justified*.

[40] To have succeeded on this basis the Applicants would have needed to show firstly that the impugned statutes limit the rights to freedom of expression and association *as those rights have been defined in the Swazi Constitution (put differently, they do not have as of right an untrammelled freedom of expression and association)*; and secondly, only if such limitation is established, that the limitation is not reasonably justified.

Vagueness as a ground of constitutional challenge

[41] As was emphasised by the South African Constitutional Court in ***Savoi*** at paragraph [16]; in ***Affordable Medicines*** Ngcobo J said:

> *"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.'* [16]

[42] The South African Constitutional Court has warned against the misuse of the doctrine of vagueness to impede or prevent the furtherance of legitimate social and economic objectives.[17]

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[16] ***Affordable Medicines*** at para 108
[17] ***Affordable Medicines*** at para 108

[43] It has pointed out that laws framed in general terms may often be better suited to the achievement of their objectives than more detailed and specific provisions would be.[18] The law should not be required to achieve a degree of precision which is not appropriate to the subject matter. A mass of detail can obscure the purpose of the legislation and render it inflexible and therefore less effective.

[44] This is illustrated in ***Savoi*** with reference to the phrase "*pattern of racketeering activity*". The Court, in finding the definition was not vague, said the following at paragraph 25:

> *"It is the diversity of criminal activity, situated in complex organisational structures, occurring over time, where the lines of authority are deliberately obscured, that renders legislation in the nature of POCA a necessity. The concept of a "pattern of racketeering activity'" is thus tailored to meet the multifarious ways in which organised crime manifests itself."*

[45] The Applicants' attacks based on alleged vagueness have the same flaw as the arguments rejected in ***Savoi***. They require a degree of detail that is unnecessary and that would impede the achievement of the purpose of the legislation. Their criticisms require "*shutting one's eyes to the reality*"[19] of how terrorism works.

[46] Put differently, if one is attempting, by the use of statutory language, to prevent the occurrence of an evil that operates in a wide and complex manner, then one can expect the commensurate use of wide and complex language, in an attempt

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[18] **Savoi** *supra* at para 17.
[19] **Savoi** *supra* at para 26.

to match the evil with the legitimate aim of its prevention, deterrence and punishment. How else would it be possible to afford due and proper protection to the legitimate constitutional rights sought to be protected?

[47] The simple answer in ***Savoi*** was that the Prevention of Organised Crime Act 121 of 1998 there under attack was *not vague*, having regard to the realities of racketeering and how it operates, and there was *reasonable certainty* as to what was being referred to; that being all that was required.[20].

[48] The same reasoning applies here.

ESSENCE OF THE RESPONDENTS' CONTENTIONS

[49] The Applicants fail to discharge the difficult burden resting on them as Applicants in an abstract challenge.

[50] They have not established that either of the impugned Acts is irrational and therefore in conflict with the Constitution of Swaziland. To the contrary, both Acts are rationally connected to the achievement of legitimate governmental goals - to protect the rule of law and to protect the public and the State from terrorism.

[51] Further, they have not established that there is no reasonable certainty as to what is being referred to, and have accordingly not established that there is impugnable vagueness or overbreadth.

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[20] Savoi at paragraph [23]

[52] The Applicants have not established any restriction of the rights to freedom of expression and association *as those rights are defined in Swaziland*, nor that such rights as they do establish should win in a competition with the competing rights of a right to life, safety and property, or outweigh such competing rights in the requisite balancing exercise,.

[53] If there is any restriction of the claimed rights, they have not established that such limitation is not reasonably justified.

[54] The impugned Acts strike an appropriate balance between the rights of the individual on the one hand, and the duty of the Government on the other to provide protective measures in respect of the rule of law, and the right to life, safety and property, given the very real and current dangers.

[55] Therefore the application should be dismissed with costs.

THE CHARGES FACED BY THE APPLICANTS

[56] We set out a summary of the charges faced by the Applicants, the sections attacked, and cross referencing to their legal representation, in annexure “A” to these Heads of Argument.

THE ISSUES TO BE DECIDED

[57] In relation to the Terrorism Act the issues raised by the Applicants are the following:

[a] whether the extended definition of "*terrorist act*" contained in paragraph 1 of the definition extends the ambit of the Act beyond its stated purpose of combating terrorism;

[b] whether the words "*involves prejudice to national security or public safety*" in section 2(j) of the definition of "*terrorist act*" are too vague to constitute law;

[c] whether sections 11(1)(a) and (b) of the Terrorism Act criminalise expressions of sympathy for a specified entity's non-violent activities and ideals, and if so, whether this constitutes an unjustified limitation of fundamental rights;

[d] whether the process laid down in the Terrorism Act for the designation of an organisation as a specified entity reposes too much power in the Attorney-General's hands or unjustifiably limits the right to fair administrative action and the right to a fair hearing.

[58] In relation to the Sedition Act the issues that arise are the following:

[a] whether the words "*bringing into hatred or contempt*"; "*exciting disaffection*"; *"raising discontent or disaffection*"; and "*promoting feelings of ill-will and hostility*" are too vague to constitute law; or constitute an

unjustifiable limitation on the individual's rights to freedom of expression and association;

[b] whether the definition of "*subversive*" in Section 5(2) is overbroad or too vague and therefore constitutes an unjustifiable limitation on the rights to freedom of expression and association;

[c] whether because there is no disclaimer in relation to Section 5(2)(c) (i.e. that conduct under these provisions is not subversive if it is in good faith and done in an attempt to point out errors) therefore this is illogical and the Section is internally contradictory;

[d] whether because the Swazi sedition offence does not have the requirement of an intention to incite violence it is broader than is necessary and therefore cannot meet the requirement of proportionality.

THE CONSTITUTION OF SWAZILAND

[59] There are a number of indicators in the constitution of Swaziland that its intention is to be *a unique and home-grown* instrument.

[60] For example the second and third recitals state:

> *"Whereas as a Nation it has always been our desire to achieve full freedom and independence under a constitution created by ourselves for ourselves in complete liberty;*
> *Whereas various vusela consultations, economic and constitutional commissions, political experiments and sibaya meetings have been*

established and undertaken in the last 30 years in search of a sustainable home-grown political order."

[61] The fifth recital is:

"Whereas it is necessary to blend the good institutions of traditional law and custom with those of an open democratic society so as to promote transparency and the social, economic and cultural development of our nation."

[62] Section 2(1) provides:

"This 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."

[63] Section 14, which guarantees the fundamental rights and freedom of the individual provides inter-alia:

(1) (a)… *Respect for life*…"

(1)(b) "… *freedom of conscience, of expression and of peaceful assembly and association and of movement.…";*

(1) (d) "… *Protection from deprivation of property without compensation…"*

(3)"a person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this chapter but subject to respect for the rights and freedoms of others and for the public interest."

[64] Section 15 (1) provides: *"… A person shall not be deprived of life, intentionally…*

[65] Section 19 provides inter-alia that: *"a person has the right to own property…";*

And: *"a person shall not be compulsorily deprived of property…"*

[66] Section 24(3) dealing with the prevention of freedom of expression provides:

"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 –that is reasonably required in the interest of defence, public safety, public order, public morality or public health; 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."

[67] Section 25(3) under the heading "*Protection of freedom of assembly and association*" provides:

"Nothing contained and/or done under the authority of any law shall be held to be inconsistent with or in contravention of the section to the extent that the law in question makes provision: that is reasonably required the interest of defence, public safety, public order, public morality or public health … 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."

[68] The rights to freedom of expression and freedom of association in Swaziland are created with the *built-in restriction* that the ambit of these rights does not extend beyond what is required for respect for the rights and freedoms of others and for the public interest (section 14 (3)).

[69] A law that restricts these rights of expression and freedom of association is deemed not be a contravention of the applicable section of the Bill of Rights if it is reasonably required in the interests of *inter alia* defence, public safety or public order.

[70] The final sentence of sections 24(3) and 25(3) makes it clear that in Swaziland a person challenging a law on the basis that it infringes these rights bears the onus of showing that the law is not reasonably justified in an open democratic society.

[71] The Applicants have not provided evidence establishing that either the Terrorism Act or the Sedition Act are not reasonably justified in an open and democratic society.

[72] They have accordingly failed to bring themselves within the ambit of the protection of the constitutional rights that they seek to assert.

THE PURPOSE OF THE TERRORISM ACT

[73] The submissions that follow in relation to the general nature of terrorism are predicated on the submission that consequent upon the notorious events of the attack on the World Trade Centre buildings in New York, on the morning of Tuesday, September 11, 2001 (known as "911") this Honourable Court can take judicial notice of the modern day scourge of terrorism and its nefarious means of operation.[21] Alternatively, and in any event an effort will be made to adduce evidence before this Honourable Court in the form of an affidavit in this regard.

[74] Terrorism is a relatively modern phenomenon, the word itself having come into common use only in the second half of the twentieth century. Since 911

[21] S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC) at paragraph 175 and footnote 165

governments around the world have acted on a belief that terrorist groups pose a significant danger to the security of the Terrorism Act and the safety of citizens by enacting specialised anti-terrorist legislation.

[75] Legislation is necessary because terrorism cannot be combated effectively using only the existing common law rules or penal codes, which are designed to prevent and punish "*ordinary*" crimes.

[76] Terrorism is premeditated and generally carried out by organisations that are able to co-ordinate the actions of a number of individuals towards the achievement of a common goal.

[77] As a result terrorist organisations are typically set up deliberately to avoid and evade law enforcement. Many of their activities are *prima facie* lawful. Terrorists take advantage of the freedoms they are allowed in an open and democratic society to carry out seemingly innocent activities (like setting up bank accounts, purchasing firearms, taking flying lessons etc) but these activities are secretly co-ordinated towards the perpetration of a terrorist act.

[78] To illustrate the nature of terrorism we use an example. A suicide bomber with explosives strapped to his body detonates those explosives on a busy bridge that connects a rural area to a town. The force of the explosion destroys the bridge and kills the suicide bomber. It also kills the occupants of a school bus that was crossing the bridge at the time, five pedestrians walking over the bridge to town, and ten soldiers guarding the bridge.

[79] The suicide bomber was fifteen years old. He never committed a common law crime before he strapped on the explosives, walked onto the bridge and pressed the detonator. That was the first and only common law crime he committed in his life, he would not have been on any common law crimes "*radar*" or watchlist, and he was both victim and perpetrator of that crime.

[80] But how did he get there? Who drove him to the bridge? Who gave him the explosive vest? Who made it? Who procured the materials for it? Where did he sleep the night before? Who recruited him? Whose idea was it? Who planned it? How does one prevent any of this?

[81] This is not an extreme example. There are widespread public reports as to the use by terrorist organisations of children and women as suicide bombers. The blowing up of a bridge is referred to in one of the charges in the present enquiry.

[82] Anti-terrorist legislation is designed to overcome the inadequacies of the ordinary criminal law in dealing with organised crime of this type; and to target certain specific vulnerabilities of terrorist groups that exist because of the nature of the enterprise they undertake.

[83] The inadequacy of the ordinary criminal law lies in the relative difficulty of imposing liability on the basis of common purpose; that sentencing does not always take account of the greater context of a specific facilitating or enabling crime; and the difficulty of taking preventative action based on crime intelligence

when a crime is known to have been planned, or crimes in general are known to be planned but have not yet been committed.

[84] The specific vulnerability of a terrorist group lies in the fact that its crimes are premeditated and the product of concerted action by a disparate group. It is therefore vulnerable to be infiltrated and found out in advance before it has committed a crime. Law enforcement authorities can tackle a terrorist group in a systematic way by targeting and destroying their support networks, provided there exists a legislative framework permitting them to do so.

[85] Anti-terrorism legislation is aimed at disabling terrorist groups. This is achieved by a variety of means, including by preventing them for operating openly; by removing their support networks and thus their access to resources; by enabling law enforcement officials to act proactively on the basis of intelligence received; and by imprisoning those convicted of terrorist acts for long periods.

[86] The analogies to the ***Savoi*** case and the anti-racketeering measures they found to be lawful, are obvious.

HOW THE TERRORISM ACT ACHIEVES ITS PURPOSE

[87] We now turn to consider certain sections of the Terrorism Act.

Definition of "terrorist acts"

[88] The definition of 'terrorist act' lies at the heart of the Terrorism Act. This is also the feature of the Terrorism Act that leads to the Applicants' challenge to the validity of the Act.

[89] Paragraph 1 of the definition of terrorist act provides:

> *"'terrorist act' means an act or omission which constitutes an offence under this act or within the scope of a counter-terrorism convention."*

[90] Paragraph 2 sets out a list of acts or threats of action, all of which are qualified by these concluding words:

> … "*and is intended, or by its nature and context, may reasonably be regarded as being intended to intimidate the public or a section of the public; or compel the Government, a Government or an international organisation to do, or refrain from doing any act."*

[a] Paragraph 2(f) of the definition provides:

> *"'terrorist act' means.. an act or threat of action which involves the use of firearms or explosives'…;"*

[b] Paragraph 2(g) of the definition provides:

> *"'terrorist act' means …an act or threat of action which involves releasing into the environment or any part of the environment or distributing or exposing the public or any part of the public to (i) any dangerous,*

hazardous, radioactive or harmful substance; (ii) any toxic chemical; (iii) any microbial or other biological agent or toxin;."

[c] Paragraph 2(h) provides:

"'terrorist act' means…. an act or threat of action which is designed or intended to disrupt any computer system or the provision of banking services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;"

[d] Paragraph 2(j) provides:

"'terrorist act' means ….an act or threat of action which involves prejudice to national security or public safety;"

[91] The attributes listed in (a) to (j) *involve an element of harm or damage or the threat of harm or damage.* They are not limited to physical harm or damage, but include intangible harm or damage, for example in the form of disruption of a computer system. Our law recognises that serious harm can occur without physical lesion, and this is in accordance with the realities of modern life.

[92] The qualifier starting with the words "*and is intended*" refers to the secondary intention to achieve a political or social consequence – the intimidation of the public or a section of the public, or the exercise of unlawful pressure on the Government, a foreign government or an international organisation.

[93] The scope of the definition is narrowed by Section 3 which provides that :

> *"any disruption of services committed pursuant to a protest, demonstration or stoppage of work is deemed not to be a terrorist act so long as it is not intended to result in the harm referred to in paragraphs (a) to (e)."*

[94] Sub-sections (a) to (e) deal with actions that cause the death of a person, the overthrow, by force or violence of the lawful government, or the creation of fear of death or bodily injury, serious bodily injury to a person, serious damage to property, danger to the life of a person, or serious risks to the health or safety of the public or a section of the public.

[95] The first challenge to the constitutionality of the Act comes in relation to the first part of the definition of terrorist act which is:

> *"an act or omission which constitutes an offence under this Act or within the scope of a counter terrorist convention."*

[96] The additional statutory terrorist offences are set out in part III of the Act starting at section 5 thereof. These are:

[a] Possession of literature on weapon making without lawful and justifiable reason (Section 5(2));

[b] Offences in relation to the sending or placing of parcels and publishing false alarms (Section 5(3));

[c] Offences committed by corporate officers who directed or acquiesced in the commission of a terrorist act by a corporate entity;

[d] The offences defined in Sections 6 to 21 of the Act, which are broadly offences in the form of collaboration or assistance to terrorist groups or in the commission of terrorist acts.

[97] The effect of Section 1 of the definition is therefore to broaden the general definition contained in Section 2 by creating certain specific statutory offences that do not necessarily contain all the substantive elements of the definition contained in subsection 2.

[98] The offences created by sections 5(2) and (3) *are* narrowly defined terrorist acts in their own right, not necessarily having the attributes of a terrorist act as defined in sub-section (2) nor being accessory to such acts. "

[99] They must be understood within the context of the purpose of the legislation which is to prohibit terrorist activities, not some fanciful imagined activity that on any sensible construction does not fall into ambit of terrorist activity.

[100] As was held in **Affordable Medicines**[22], the problem is caused not by the legislation (which sensibly interpreted provides sufficient constraints), but instead by an overly wide and insensible interpretation:

[22] Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) at paragraph 38

"The answer to the attack on s 22C(1)(a) is that counsel for the Applicants is giving too wide an interpretation on the subsection. The power of the Director-General to prescribe conditions under the subsection is limited by the context in which these powers are to be exercised. Thus the power to prescribe conditions must be exercised in the light of, amongst other considerations, the government purpose of increasing access to medicines that are safe for consumption, the purpose for which the discretionary powers are given and the obligations of medical practitioners who have been issued with dispensing licences. All this provides sufficient constraint on the exercise of the discretionary powers conferred by the subsection.

[101] The remaining offences are accessory offences. They make it an offence and a terrorist act in itself knowingly to collaborate with or assist directly or indirectly in the commission of terrorist acts.

[102] There is no circuitous logic involved in this definition. The effect of subsection 1 is simply to extend the operation of the Terrorism Act to criminalise activities that facilitate and enable terrorist activity.

[103] Section 11(1)(a) provides that a person who knowingly, and in any manner solicits support for, or gives support to, any terrorist group commits an offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years. Section 11(1)(b) provides that a person who knowingly, and in any manner solicits support for, or gives support to the commission of a terrorist act commits an offence and is liable to the same punishment on conviction. Section 11(2) provides:

> *"for the purposes of this section, an offer to provide or the provision of, forged or falsified travel documents to a member of a terrorist group constitutes giving of support to a terrorist group".*

The definition of "terrorist groups"

[104] A terrorist group is defined as an entity that has as one of its activities and purposes the committing of, or the facilitation of the commission of a terrorist act.

[105] Paragraph (b) of the definition of "*terrorist group*" then provides:

> *""terrorist group" means a specified entity."*

[106] A "*specified entity*" is defined as an entity in respect of which a notice under Section 28 has been made, or be deemed by reason of the operation of Section 29(4) to have been made, and is for the time being in force.

[107] Section 28(2) provides:

> *"where the Minister is satisfied that there is material to support a recommendation made under Sub-section 1, the Minister may by notice published in the Gazette declare the entity in respect of which the recommendation has been made to be a specified entity."*

[108] To understand this in context one must have regard to Section 28(1) which provides:

> *"where the Attorney-General, the Commissioner or person responsible for the prevention of corruption or other investigative or financial body has reasonable grounds to believe that:*
> *an entity has knowingly committed, attempted to commit, participated in committing or facilitating the commission of a terrorist act; or*
> *an entity is knowingly acting on behalf of, at the direction of or in association with, an entity referred to in paragraph (a)*

> *the Attorney-General, or any of the other persons mentioned in the sub-section after consultation with the Attorney-General may recommend to the Minister that a notice be made under sub-section 2 in respect of that entity."*

[109] Section 28(4) provides:

> *"Where a notice under section 28(2) makes provision to the effect that there are reasonable grounds to believe that an entity specified in the notice is engaged in terrorist activity that entity shall be deemed with effect from the date of the notice to have been declared a specified entity."*

[110] Thus a specified entity does not merely have as one of its activities and purposes the committing or the facilitation of a terrorist act. It must actually have done so or assisted another organisation to do so, or at least the Attorney-General must have reasonable grounds to believe that it has in fact knowingly committed a terrorist act or assisted another organisation to do so.

[111] It follows that a specified entity falls, by definition, within the primary definition of a terrorist group, in that an entity that has in fact committed terrorist acts is clearly one that has, as one of its activities and purposes, the commission of such acts.

[112] The effect of the specification procedure is not to broaden the definition of terrorist group, but to provide a means for law enforcement officials to categorise an organisation as such and publish that categorisation. That serves to undermine the effectiveness of the terrorist group in respect of future activities by depriving it of the assistance of people who would not otherwise

have known that it is a terrorist group; or who might have known but will be deterred from providing further assistance because of the increased likelihood that they will be found to have guilty knowledge of the terrorism acts of the organisation as a terrorist group.

STRIKING A BALANCE

[113] We submit the Act achieves its purpose of providing a means to combat terrorism by providing a means for law enforcement officials to target the support structures that facilitate and enable the commission of terrorist acts. It does so with sufficient clarity to constitute law. The Terrorism Act's purpose is clearly a legitimate government purpose and does not unreasonably infringe upon or limit fundamental rights.

RESPONSE TO THE APPLICANT'S ARGUMENTS

General

[114] In their arguments the Applicants quote lengthy extracts from the judgments and findings of various overseas Courts and tribunals. What is lacking is any serious attempt to identify and define the ***purpose*** of the two Acts or to examine how that purpose is sought to be achieved. We have addressed that issue first, because it is central to any evaluation of rationality, proportionality and thus constitutionality.

[115] The Applicants also fail to address issues of ***statutory interpretation*** that are central to a consideration of the true meaning and effect of the two Acts. The Applicants do not apply the settled canons of interpretation to arrive at a

meaning that the court will ascribe to the various sections. Instead they tend to choose *unrealistic* interpretations that support their criticisms of the Act, or they resort to the claim that various sections are too vague to be given meaning at all. This approach illustrates the disadvantage of trying to determine constitutional issues in an abstract setting, as the Applicants seek to do.

[116] The Applicants adopt and advance foreign constitutional jurisprudence uncritically, without making sufficient allowance for the specific words used in the Swazi constitution. The result is an uncritical repetition of foreign principles that are not necessarily directly applicable in Swaziland, particularly in relation to the ambit of the rights to freedom of expression and freedom of association, and the approach to be adopted in carrying out a limitations analysis. We base or argument primarily on the written Constitution of Swaziland, looking to foreign jurisprudence only as persuasive authority to the extent it is appropriate to do so.

The Applicants' argument regarding sub-section (1) of the definition of "terrorist act" and the definition of terrorist group

[117] The sub-section extends to include within the definition of "*terrorist act*" activities that are defined as offences elsewhere in the Terrorism Act, but that may not fall within the parameters of the substantive definition of "*terrorist act*" contained in sub-section (2) of the definition.

[118] The Applicants argue that this portion of the definition contains none of the saving provisions contained in the other definitions. The "*saving provisions*" are

the provisions that require the intention behind the terrorist act to be to intimidate the public or a section of the public or to compel the Government, a government or an international organisation to do or refrain from doing any act.

[119] The Applicants argue that that these offences are defined as "*terrorist acts*" irrespective of the perpetrator's underlying primary or secondary intention as required by international law. The Terrorism Act therefore defines offences as terrorist acts that are not terrorist acts in international law. There is therefore no rational connection with the purpose of the act, namely to combat terrorism.

[120] The Applicants argue that the concept of a "*terrorist act*" loses its meaning when the word itself becomes the principle mode of defining itself. It is argued that the definition is circuitous.

[121] The Applicants argue that both sub-section 1 of the definition of "*terrorist act*" and the definition of "terrorist group" are irrational and should be declared invalid and struck out.

The Respondents' reply

[122] The extended offences are all ancillary to and supportive of terrorist acts falling within the primary substantive definition. There is no reason why the definition of terrorist act in the Swazi statute should follow the definition of terrorism as that concept is defined for the purposes of international law.

[123] The extended offences all include the element of *mens rea* in that they require a person to have acted knowingly. That implies awareness that the supported act was committed with the necessary secondary intention. It is rational to combat terrorism by criminalising not only the primary terrorist acts, but also the secondary acts that knowingly facilitate and enable the primary acts to be committed.

The Applicants' argument in relation to section 11(1)(a)

[124] The Applicants argue that section 11(1)(a) is not a justified limitation on the right to freedom of expression because support for a prescribed entity would include support for all non-violent activities and ideals. In other words the Terrorism Act prohibits verbal support for a prescribed entity's non-violent activities and ideals. There is no justification for limiting or prohibiting such support. Verbal or actual support should be prohibited only if it is connected to support that causes actual harm.

The Respondents' reply

[125] The section should be interpreted in a way that is consistent with the purpose of the Terrorism Act and the Swaziland constitution. "*To support*" can mean "*to give assistance, encouragement or approval to*." The context suggests, however, that the section is directed at the provision of material support. This interpretation is supported by section 11(2), which specifies that the provision of forged passports, travel documents and the like amount to giving support. It may be that the term should be interpreted *eiusdem generis*, and would therefore not extend to mere expressions of sympathy. However an expression

of sympathy might, in a certain factual context, amount to the giving of support within the meaning of the section. That is something for a trier of fact to decide in a concrete case. Words have the capacity to cause serious, but intangible harm, as we discuss in greater detail below in relation to the Sedition Act..They also have the potential to facilitate or lead to violent acts.

The Applicants' argument in relation to the Attorney-General's power to recommend specification as a specified entity.

[126] The final argument is that Section 28 reposes too much power in the hands of the Attorney-General, being the power to decide what a terrorist organisation is. There are not sufficient checks and balances before a decision is taken with major consequence for members and supporters. Therefore this provision should be struck out as being constitutionally invalid.

The Respondents' reply

[127] The decision to declare an organisation to be a specified entity is one that is taken by the Minister on the recommendation of the Attorney-General. It is susceptible to reversal by the Minister after receiving representations, and is susceptible to being set aside by the High Court on review.

[128] This is an adequate system of checks and balances in the circumstances.

[129] Parliament is entitled to confer upon an administrator the power to make decisions about how a statute is to be implemented. The South African Constitutional Court has recognised the importance of administrative discretion,

stating *"Discretion… permits abstract and general rules to be applied to specific and particular circumstances in a fair manner."*[23]

[130] Discretionary powers may be broadly formulated where the factors that are relevant to the exercise of the discretion are clear from the Terrorism Act as a whole.[24]

[131] The exercise of discretion by an administrator is in any event subject to the constraints that apply to any administrative action, and the decision-maker should be given credit that he will exercise the power in accordance with the law and the Constitution.[25]

[132] In this regard:

[a] The Attorney General is clearly a very senior and responsible position, and he shall be appointed by the King acting on the recommendation of the Minister responsible for justice after consultation with the Judicial Service Commission.[26]

[b] The qualification for appointment is equivalent to that of a Judge of the Superior Court.[27]

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[23] **Affordable Medicines** *supra* at para 33.
[24] Ibid at para 126.
[25] Ibid at paras 35 and 36.
[26] constitution section 77 (1)
[27] constitution section 77 (2)

[c] In the exercise of the functions vested in the Attorney General by the Constitution, the Attorney General shall not be subject to the direction or control of any other person or authority[28].

[d] He may only be disciplined or removed from office in terms of recommendations following an enquiry by tribunal. [29]

[e] He is accordingly independent and there is no reason to suppose that he will exercise the discretion vested in him in any improper manner.

Applicants' argument regarding paragraph 1 of the definition of Terrorist Act

[133] It is argued on behalf of Masuku and Dlamini that the definition of "*terrorist act*" is overly broad. The inclusion of an act or omission "*which constitutes an offence under the Act*" includes conduct that does not exhibit the required intention to intimidate the public or section of the public or compel the Government… to do or refrain from doing any act.

The Respondents' reply

[134] The extended offences are all ancillary to and supportive of terrorist acts falling within the primary substantive definition. There is no reason why the definition of terrorist act in the Swazi statute should follow the definition of terrorism as

[28] constitution section 77 (8)
[29] constitution section 77 (9)

that concept is defined for the purposes of international law. The Swazi statute is not irrational or unlawful merely because its definition of terrorist act goes further than the international law definition.

[135] The extended offences all include the element of *mens rea* in that they require a person to have acted knowingly. That implies awareness that the supported act was committed with the necessary secondary intention. It is rational to combat terrorism by criminalising not only the primary terrorist acts, but also the secondary acts that knowingly facilitate and enable the primary acts to be committed.

The Applicants' argument relating to section 2(j)

[136] It is argued for Masuku and Dlamini that the definition in Section 2(j) which requires an act or threat of action which "*involves prejudice to national security or public safety"* is too broad and vague and therefore the definition of terrorist act in these respects does not constitute law because of its vagueness and therefore is an unlawful intrusion on the right to freedom of expression and the right to freedom of association, and violates the principle of legality.

[137] If the limitation is law it constitutes an unjustifiable limitation on the right to freedom of expression. It is argued that because national security is undefined, this is a disproportionate limitation. It is argued that this provision can only be constitutional if it is interpreted to refer to only violent conduct and conduct that threatens the existence of the Terrorism Act itself.

The Respondents' reply

[138] National security is a phrase that is capable of interpretation with reasonable certainty.

[139] The problem lies, as highlighted in the **Affordable Medicines** case, in the overly wide interpretation adopted by the Applicants, which does not have sufficient regard to the context, and purpose, of the legislation, the inherently wide nature and complexities of terrorism itself, and a sensible interpretation of the words used.

[140] This problem besets much of the Applicants' interpretation and, to avoid repetition, the Respondents' argument in this regard is not specifically repeated when dealing with each of those individual cases, but nonetheless constitute an answer to them.

The Applicants' argument regarding section 11(1)(a)

[141] It is argued that there is nothing to indicate how an individual is to know whether their support is for an organisation that has as one of its activities and purposes the commission of terrorism.

[142] It is further argued that Section 11 is not justified because support is analogous to sympathy. Criminalising an expression of sympathy for an organisation is an unjustifiable limitation of the right to freedom of expression.

The Respondents' reply

[143] It is for the State to prove the element of knowledge. The question is whether the individual knew that he was supporting a terrorist group. That is a *factual question* that belongs for decision in the criminal case, not in the present abstract challenge.

[144] The Applicants' interpretation is insensible. The section should be interpreted in a way that is consistent with the purpose of the Terrorism Act and the Swaziland constitution. Whether any expression of sympathy would constitute "*support*" is a question that should be decided on the specific facts of a concrete case.

The Applicants' argument regarding section 28 and section 29(4)

[145] The attack on Section 28 and 29(4) is based on an infringement of the right to administrative justice and a fair hearing. These sections are argued to be unconstitutional because an entity is not given a right to a hearing before the Minister can declare it to be a specified entity, and there is no obligation on the trial Judge to consider whether the admission of otherwise inadmissible evidence would be prejudicial to the Applicant organisation.

[146] This refers to Section 28 (7) which states:

> *"the Judge may receive in evidence anything (including information obtained from the Government, institution, or agency of a foreign estate or an international organisation) that in the opinion of the Judge is reliable and relevant notwithstanding that the thing would not otherwise be admissible in law and may base the decision on that evidence."*

Respondents' reply

[147] There is sufficient right of audience afforded given the nature and purpose of the Terrorism Act. What the Applicants suggest would nullify the effectiveness of the section.

[148] The Applicants also overlook section 28(6)(d) and (e), which mitigate the potential prejudice caused by section 29(6)(b).

[149] Obviously the application of the Terrorism Act to the particular facts in a particular case will depend on the decision of the Court at that time, in a normal trial, affording the normal rights of audience. The legislature is entitled to frame legislation on the basis that Judges will perform their role competently and independently.

THE PURPOSE OF THE SEDITION ACT

[150] Sedition is a common law crime in English law.

[151] The Sedition Act, 1938 contains a codified form of the English common law relating to sedition. Substantially identical statutes were in force in a number of Southern African countries and in the Australian state of Queensland in earlier times.

[152] As a result the purpose of the statute and the correct interpretation of its provisions has been the subject of a number of judicial decisions.

[153] In *Magistrate Bulawayo v Kabungo 1938 AD 304* the South African Appellate Division had to interpret the Southern Rhodesia version of the statute. It found, following the English common law, that "*disaffection*" as used in the definition of "*seditious intention*" meant "*discontent or dissatisfaction tending to or accompanied by the use of force, tumult, riot, insurrection or breach of the peace*."

[154] The Appellate Division referred with apparent approval to the statements of *Fitzgerald J in Rex v Sullivan (11 Cox 44)* that the objects of sedition generally in English Law were "*to induce discontent and insurrection, and to stir up opposition to the government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion*."

[155] The Rhodesia and Nyasaland Federal Supreme Court later found this decision to be incorrect in ***R v Nkala*** *1961 (4) SA 177 (FC)*. It rejected the requirement that the words should have a tendency to incite violence or breach of the peace. It then found in ***R v Malianga*** *1963 (4) SA 226 (FC)* that the word should be given its secondary dictionary meaning of "*political alienation or discontent; a spirit of disloyalty to the Government or existing authority.*"

[156] It referred approvingly to a decision of the High Court in Australia in ***Burns v Ransley*** *(1949) 79 C.L.R. 101*, where disaffection was defined as "*disloyalty, enmity and hostility*"; "*estranged allegiance*"; "*hostility to constituted authority*".

[157] Dixon J said the following:

> *"Disaffection…means an estrangement upon the part of the subject in his allegiance which has not necessarily gone as far as an overt act of a treasonable nature. It supposes that the loyalty and attachment to authority, upon which obedience may be considered to depend, is replaced by an antagonism, enmity and disloyalty tending to make government insecure."*

[158] In ***Boucher v His Majesty the King*** [30]a seditious intention was described as an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority.[31]

[159] One form of the offence therefore, in line with its historical content in English law and its more recent definition in the Southern African and Australian cases referred to above, is that it lies in incitement to or inducement of defiance of the authority of the State.

[160] In the context of judicial authority it is uncontroversial that words and statements made by individuals can tend to harm the dignity, repute and authority of the Courts; that this has implications for the rule of law; and that the public interest requires that such statements be punishable as criminal offences.[32]

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[30] (1951) SCR
[31] At para [301].
[32] **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) at para 6.

[161] In ***Victoria Park Ratepayers v Greyvenouw and another*** [33] Plasket J held that contempt of Court *"has at its heart the very effectiveness and legitimacy of the judicial system"* and that a Court, in holding a contemnor in contempt acts as guardian of the public interest.

[162] The South African Constitutional Court has held that the specific form of contempt of Court known as "*scandalising the Court*" remains part of South African law and is not unconstitutional.[34] The definition of this form of the crime of contempt of Court is "*publications or words which tend, or are calculated, to bring the administration of justice into disrepute*." This formulation is not dissimilar to the definition of the forms of sedition set out in sections 3(1)(a), (c) and (d) of the Sedition Act.

[163] The Court in ***Mamabolo***[35] held that the crime of scandalising the Court is one of the devices which protect the authority of the Courts, and implicitly recognised that mere statements have the potential to be *"downright harmful to the public interest by undermining the legitimacy of the judicial process as such."*[36]

[164] The government purpose served by the Sedition Act is the protection of the rule of law. No modern state can enforce the rule of law by coercion alone. Therefore the continued existence of an effective State capable of serving the interest of

[33] [2004] 3 All SA 623 (SE)
[34] **S v Mamabolo (E-TV and others intervening)** 2001 (3) SA 409 (CC)
[35] At para 20.
[36] Ibid at para 32.

its citizens depends on the voluntary submission to the law by a critical majority of citizens.

[165] It is implicit in the idea of the rule of law that all members of society must comply with the law. Therefore the rule of law requires citizens to submit to lawful authority in the public interest. A State obviously has a legitimate interest in preventing violent insurrection. It also has a legitimate interest in preventing *defiance* or *deliberate disobedience* (as opposed to criticism or lawful attempt to effect change) of the law, whether or not accompanied by violence.

[166] This necessarily entails that a State has a legitimate interest in promoting and encouraging voluntary compliance with the law. It therefore has a legitimate interest in maintaining and protecting the allegiance and loyalty of citizens to the King, the Constitution, the Government and its officers. This necessary allegiance or loyalty is not deferential or uncritical. It does not attach to the person or persons in office in their personal capacities, but to the State and its officers as defined in the Constitution in their capacities as such. We submit that this is the legitimate government purpose that the Sedition Act serves.

HOW THE SEDITION ACT ACHIEVES ITS PURPOSE

[167] The statutory offence created by Section 4 of the Act is as follows:

> *"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 it is seditious;
(e) without lawful excuse has in his possession any seditious publication; shall be guilty of an offence…"

[168] Section 3(1)(a) provides:

"A seditious intention is an intention to 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."

[169] Section 3(1)(c) provides:

"A seditious intention is an intention to bring into hatred or contempt or to excite disaffection against the administration of justice in Swaziland; or

[170] Section 3(1)(e) provides:

"A seditious intention is an intention to promote feelings of ill-will and hostility between different classes of the population of Swaziland."

[171] Section 5(2)(a)of the Act reads as follows:

"for the purpose of this section "subversive" means –
supporting, propagating or advocating any act or thing prejudicial to –
(i) public order;
(ii) the security of Swaziland; or
(iii) the administration or justice,
Provided that this paragraph shall not extend to any act or thing done in good faith with intent only to point out errors or defects in the Government or constitution of Swaziland as by law established or any legislation or in the administration of justice with the view to remedying such errors or defects."

[172] Section 5(2)(c) defines subversive as:

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

[173] Sections 5(2)(e) defines subversive as:

> *"Intended or likely to promote feelings of hatred or enmity between different races or communities in Swaziland: Provided that this paragraph shall not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities."*

[174] Section 5(2)(f) defines subversive as

> *"Intended or likely to bring into hatred or contempt or to excite disaffection against any public officer or any class of public officers in the execution of his or their duties, or any of His Majesty's armed forces, or any officer or other member of such a force in the execution of his duties: provided that this paragraph shall not extend to comments or criticisms made in good faith and with the view to remedying or correcting errors, defects or misconduct on the part of such public officer, force or officer, or other members thereof and without attempting to bring into hatred or contempt or to excite disaffection against such person or force."*

STRIKING THE BALANCE

[175] The rights to freedom of expression and freedom of association may be limited under the authority of a law that is reasonably justifiable in a democratic society.

[176] Once it is accepted that the law in question serves a legitimate purpose (as the Sedition Act does for the reasons we have set out above) the next stage of the enquiry is an assessment of reasonableness. Is the extent of the limitation proportional to the purpose sought to be achieved?

[177] Section 3(2) of the Sedition Act provides

> *"Notwithstanding subsection (1), an act, speech or publication shall not be seditious by reason only that it intends to-*
> *show that His Majesty has been misled or mistaken in any of His measures; or*
> *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*
> *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*
> *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."*

[178] Each of sections 5(2)(a), (e) and (f) contain a broadly similar proviso excluding conduct in good faith carried out with a view to remedying errors and defects and removing causes of complaint.

[179] The Sedition Act thus prohibits statements and publications of various types, all of which have in common that they cause or tend to cause harm to the maintenance of the rule of law, and thus to the public interest.

[180] It expressly excludes from its ambit all forms of comment, criticism and advocacy for change carried out in good faith. There is no prohibition at all on

statements in favour of a lawful change of government or system of government. There is no prohibition on the pointing out of the failings of Government with a view to lawfully removing the causes of complaint, be that by way a change of government behaviour, a change of office bearers, a change of government itself, or indeed by a change to the Constitution and system of government.

[181] The South African Constitutional Court has pointed out that freedom of expression does not enjoy superior status in South African law.[37]

[182] In ***Hoho v S*** [38] the South African Supreme Court of Appeal had to decide whether the crime of criminal defamation had been abrogated by disuse, and if not, whether it was compliant with the Constitution.

[183] Criminal defamation is the unlawful and intentional publication of matter concerning another which tends to injure his reputation.[39]

[184] The legal history set out by the South African Supreme Court of Appeal in Hoho shows that criminal defamation is a common law crime according to Roman-Dutch common law, which is also the common law of Swaziland.

[185] The Court held that freedom of expression is not unlimited and must be construed in the context of other values. The relevant other value to be

[37] **S v Mamabolo** *supra* at paragraph 19.
[38] [2008] JOL 22420 (SCA)
[39] Ibid at para 16.

considered in the context of criminal defamation is human dignity. In finding that criminal defamation is still a crime in South Africa the Court recognised that words have the power to cause intangible harm, going beyond physical injury or tangible physical damage. It held that harm to reputation *"may have more serious and lasting effects than a physical assault."*[40]

[186] This accords with the same Court's implict acknowledgement in **Mambolo** *supra* that words alone can be *"downright harmful to the public interest."*[41]

[187] In assessing the proportionality of the Sedition Act the other rights and values that have to be considered are the rights to life (section 15 of the Constitution) the right to property (section 19 of the Constitution) the right to public safety and public order (section 24 (3)(a) of the Constitution).

RESPONSE TO THE APPLICANTS' ARGUMENTS

Applicants' argument regarding subversive activities – overbreadth

[188] It is argued that the definition of "*subversive*" in Section 5(2) is overbroad and encompasses conduct that is protected by the rights to freedom of association and expression. These sections therefore constitute unjustifiable limitations to these fundamental human rights and stand to be declared invalid.

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[40] Ibid at para 35.
[41] **Mamabolo** *supra* at para 32.

[189] It is argued that Section 5 disproportionately infringes the rights to freedom of expression and association.

Respondents' reply

[190] A complaint based on overbreadth is directed at the proportionality of the statute in limiting rights to achieve its legitimate government purpose. The complaint is that the statute goes further than is necessary, and therefore limits the rights unjustifiedly. It *"goes too far and interferes with some conduct that bears no connection to its objective".*[42]

[191] The Applicants' argument fails to consider the purpose of the section, which is broadly to protect the status of Swaziland as a state governed by law, and thus as a state capable of providing its citizens public order, safety and security, and all the other benefits that flow from citizenship of a constitutional state.

[192] These are important purposes, and if the section limits the right to freedom of expression at all, the extent of the limitation is very small. What is prohibited is conduct prejudicial to public order, the security of Swaziland, the administration of justice, inciting violence or disorder, promoting feelings of hatred or enmity and such like. There is no value in expression or association that has these harmful effects. The rights to freedom of expression and association are not paramount, and the ambit of these rights is limited by the rights of others and the public interest. If these rights are limited all by section 5 of the Sedition Act

[42] Attorney-General of Canada v Bedford para [101].

the extent of the limitation is inconsequential when compared to the important purpose served.

Applicants' argument regarding subversive activities – section 5(2)(c)

[193] It is argued that because there is no disclaimer in relation to Section 5(2)(c) (i.e. that conduct under these provisions is not subversive if it is in good faith and done in an attempt to point out errors) therefore this is illogical and the Section is internally contradictory.

Respondents' reply

[194] With respect, this is a fanciful interpretation of the meaning of section 5(2)(c).

[195] Section 5(2)(c) refers to support, assistance or benefit given in relation to acts falling within the definition of subversive contained in sub-sections (b) and (c). That definition does not extend to good faith conduct with a view to lawful remedy or change.

[196] Support or assistance for good faith acts is not covered by section 5(2)(c) in the first place. Therefore it is unnecessary to repeat the disclaimer in that sub-section.

Applicants' argument regarding subversive activities – vagueness

[197] It is argued that the definition of subversive includes elements that are so vague they do not satisfy the principle of legality. Specifically feelings of "hatred or enmity" and "exciting disaffection" are said to be too vague to constitute valid law.

Respondents' reply

[198] We refer to our arguments above that a court should not require a degree of detail that is unnecessary and that would impede the achievement of the purpose of the legislation.

[199] Courts are well capable of determining whether the specific facts of a case satisfy the elements of broadly defined common law and statutory crimes. The phrases criticised by the Applicants are no vaguer than *"words which tend, or are calculated, to bring the administration of justice into disrepute*", for example, which are elements of criminal defamation; or *"pattern of racketeering activity"* contained in the South African Prevention of Organised Crime Act 121 of 1998.

[200] Read in the context of the Sedition Act as a whole the words "hatred or enmity" and "exciting disaffection" have reasonably certain meaning, as we have discussed above.

The Applicants' argument regarding seditious intention – onus to justify

[201] It is argued that the burden of proof rests on the state to justify the limitations to the rights contained in the Bill of Rights. This is with reference to the position in other jurisdictions.

Respondents' reply

[202] The specific words used in sections 24(3) and 25(3) of the Constitution show that in Swaziland the onus rests on the person challenging these sections to show that it is not reasonably required.

The Applicants' argument regarding seditious intention - vagueness

[203] It is argued that vagueness is the main problem in the Act because a citizen seeking to exercise his rights to freedom of expression and association in Swaziland has no guidance as how far he can legally go in expressing his unhappiness or criticising the Government or the judiciary.

[204] The specific phases referred to are bringing into hatred or contempt; exciting disaffection; raising discontent or disaffection; and promoting feelings of ill-will and hostility.

[205] It is argued that because of the vagueness, the limitation on the right to freedom of expression is not contained in law.

Respondents' reply

[206] We refer to our arguments set out above in relation to vagueness.

Applicants' argument regarding seditious intention - reasonableness

[207] It is argued that the limitation does not serve to protect serious harm and therefore it is not proportionate.

[208] It is argued that the Swazi sedition offence does not have the requirement to incite violence and so is far broader than is necessary. There is no link between criminalised conduct and actual, physical harm. Therefore so it is argued, the Act cannot meet the requirement of proportionality.

[209] The Act, as it stands, criminalises any expression which may create disaffection.

[210] It is argued that it is also not proportional because the legislation provides insufficient guidance to officials enforcing it.

[211] It is submitted that the vague formulation of the offences through the definition of seditious intention constitutes an almost complete limitation to the right to freedom of expression because it prevents even non-violent expression that is critical of the Government. This could never be considered reasonably justifiable in a democratic society. In relation to freedom of association it is

argued that by criminalising all forms of dissent in a group the Act is a disproportional limit to the right.

Respondents' reply

[212] As we have argued and demonstrated above:

[a] Words can cause serious but intangible harm to legitimate interests. This is recognised in the common law of many countries including Swaziland.

[b] A sensible interpretation of the Sedition Act could never lead to the conclusion that all criticism of the government is prohibited. To the contrary, all criticism of the government and the constitutional order is permitted, except when it offends legality in respect of defiance of the Constitution and the rule of law.

[c] The definition of seditious intention achieves its purpose of preventing serious harm to the interest of the State in upholding the rule of law, maintaining public order and the safety and security of the individual.

CONCLUSION

[213] The applications should all be dismissed with costs, including costs of Senior and Junior Counsel

DATED AT DURBAN THIS 17TH DAY OF AUGUST 2015.

GD Harpur SC
A Lamplough
Chambers
Durban