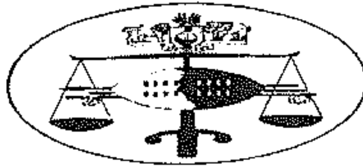

IN THE HIGH COURT OF ESWATINI

CIVIL CASE NO: 1775/2025

In the matter between:

ESWATINI LITIGATION CENTRE	**1ST APPLICANT**
MZWANDILE BANELE MASUKU	**2ND APPLICANT**
SWAZILAND RURAL WOMEN'S ASSEMBLY	**3RD APPLICANT**
MELUSI SIMELANE	**4TH APPLICANT**

And

PRIME MINISTER OF ESWATINI N.O	**1ST RESPONDENT**
COMMISSIONER GENERAL OF CORRECTIONAL SERVICES	**2ND RESPONDENT**
MINISTER OF HOME AFFAIRS	**3RD RESPONDENT**
MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL COOPERATION	**4TH RESPONDENT**
THE ATTORNEY GENERAL	**5TH RESPONDENT**

Neutral Citation: *Eswatini Litigation Centre and 3 others v Prime Minister of Eswatini N.O and 4 others (1775/2025) [2026], SZHC 16, 3rd February 2026.*

Coram: **Mlangeni J., T. Dlamini J. and B. Magagula J.**

Heard: **3rd November 2025**

Delivered: **3rd February 2026**

Summary

Constitutional law – applicants challenging the authority of the State in receiving deportees from the United States of America, who are not citizens of this country – applicants alleging that this was in violation of Section 69(2) read together with Section 238(1) of the Constitution and also in breach of Correctional Services legislation and regulations.

Civil procedure – respondents raised points of law in limine and did not plead over – the legal effect of that discussed. Among the points of law respondents challenging the urgent approach to the court but this argument overtaken by events.

Respondents also argued that neither the applicants nor the respondents have locus standi in judicio. The different aspects of locus standi discussed.

Held: *The applicants do not have a direct interest in the matter, and therefore have no locus standi in judicio.*

Held, further: *There was no need to deal with the other legal issues raised in the matter*

Application dismissed, no order for costs.

JUDGEMENT

(FULL BENCH OF THE HIGH COURT)

Mlangeni J. (T. Dlamini J. and B. Magagula J. concurring).

BACKGROUND

[1] At the time material to this application the local print media was awash with consecutive reports about American ex-convicts who had been flown into this country, said to be five in number. They were reported to have served long prison sentences in that country, for hard-core crimes such as murder, robbery, fraud and rape. They were said to be kept in the country's Correctional facilities under maximum security regime. The palpable yet speculative buzz about the ex-convicts related to the possible motivation and reasons why this country was hosting criminals

from a distant country whose foreign policy on diverse issues was in the spotlight and continues to be so.

[2] There were strident and unmistakably alarmist overtones in the reports, raising issues about the capacity of this country's facilities to keep the allegedly hard criminals contained, the adverse influence they might have upon the indigenous convicts, the possible impact on relations with neighbouring countries and the long-term plan about these people.

[3] What may have added fuel to the debate is the fact that the State was not forth-coming with a comprehensive account on the subject. Its response, at best, was one of assurance that there was no need for concern and panic[1]. It is against this background that this court application was instituted, on grounds of urgency.

THE PARTIES

[4] The applicants are four. The first one is described as "**Eswatini Litigation Centre (ELC), a self-organised Network for pro Human Rights Defender and the rule of Law Lawyers in the country.**" If this description does not resemble hotchpotch, it is certainly inelegant and it is hardly surprising that the

[1] Report of the Prime Minister's Office Portfolio Committee on the debate of the Ministry's First Quarter Performance Report for the Financial Year 2025/26, 23rd July 2025 (annexure 4 to the application).

See also: Prime Minister's media briefing on Saturday, 19th July 2025 as reported by Ntombi Mhlongo in The Times of Eswatini.

respondents have raised a point of law regarding its *locus standi* in *judicio.*

[5] The second applicant is MZWANDILE BANELE MASUKU, an adult resident of Mbabane who is an admitted attorney in this jurisdiction.

[6] The third applicant is described as "**SWAZILAND RURAL WOMEN'S ASSEMBLY (SRWA), a self-organised network of rural women in the country, wherein its core objectives include promoting and protecting the values of the rule of Law, democratic participation, good governance and accountability.**" It is further stated that this applicant is "**duly-registered in accordance with the kingdom's laws since sometime in 2013 and having its principal place of business situate in Manzini, Swaziland.**"

[7] The fourth applicant is described as MELUSI SIMELANE, an adult Swazi citizen and resident of Malkerns in the Manzini Region. Strangely the deponent to the founding affidavit, Mzwandile Banele Masuku, then says of the fourth applicant –

> **"I am a human rights defender, with a keen interest in the democratic values of the constitution."**

[8] The five respondents are –

- THE PRIME MINISTER OF ESWATINI,
- COMMISSIONER-GENERAL OF CORRECTIONAL SERVICES,
- MINISTER OF HOME AFFAIRS,
- MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL CO-OPERATION,
- THE ATTORNEY-GENERAL

in that order.

THE APPLICATION

[9] In addition to the prayer that seeks urgent enrolment of the matter, the applicants pray for orders in the following terms –

9.1 Declaring unconstitutional and void from inception the unilateral agreement concluded by the first Respondent (the Prime Minister) with the United States of America to host third country deportees in the Kingdom for being inconsistent with the provisions of Section 69(2) read together with Section 238(1) of the Constitution;

9.2 Directing and ordering the first Respondent in the public interest to produce/publish and furnish the Applicants with the agreement it signed with the United States of America to receive and detain the five foreign deportees;

9.3 Directing and calling upon the first Respondent to disclose the financial benefits of the unconstitutional agreement it signed with the United States of America with immediate effect;

9.4 Directing and ordering the second Respondent to produce the relevant or necessary documents or instruments authorising it to admit the five foreign deportees at the Matsapha Maximum Correctional Facility in line with the appropriate provisions of the Correctional Services Act read together with the Correctional Services Regulations;

9.5 Directing and ordering the third and fourth Respondents to produce the documents permitting the arrival of the third country deportees in the Kingdom of Eswatini;

9.6 Interdicting and restraining the first and second Respondents from receiving/importing any other third country deportees in the kingdom pending finalisation of the matter by this court;

9.7 Directing that prayers 9.2 to 9.6 operate with interim and immediate effect pending finalisation of the application;

9.8 Costs of suit;

9.9 Further and/or alternative relief.

[10] The application is supported by the founding affidavit of Mzwandile Banele Masuku, who describes himself as a director of the first applicant.[2] The gist of the applicants' case is that the five individuals were deported from the United States of America to

[2] Para 1.1 of the Founding Affidavit.

Eswatini in terms of a bilateral agreement between the two countries; that the said agreement is illegal and unconstitutional in that it infringes Section 69(2) read together with Section 238(1) of the Constitution; and that their being hosted at the correctional facility is not in line with the Correctional Services Act read together with the Correctional Services Regulations.

[11] When the matter first came before me on the 7th October 2025 I made the observation that it raises constitutional issues and that it therefore requires adjudication by a full bench of the High Court. This is self-evident from prayer 3 of the Notice of Motion which seeks "**Declaring unconstitutional and void from inception the unilateral agreement concluded by the 1st Respondent with the United States of America...**" At the same hearing Mr Masuku for the applicants motivated the court to grant interim restraint against the State receiving more deportees from the United States of America. This, Mr Masuku submitted, was based on information "**in the public domain**" that more deportees were coming.

[12] The application challenges the authority of the State to do certain things. From any point of view, it is a matter of considerable magnitude. I adopted the view that to grant interim relief would, in the context of the matter, have the potential effect of prejudging a matter of national importance, especially one that

required adjudication by a full bench of the High Court. In this regard I find fortitude in the following caption –

> "**An interim interdict is not a remedy to which a litigant is entitled as of right if he is able to satisfy, to the necessary extent, each of the requirements ... . The grant of the remedy is always subject to the exercise of a judicial discretion, in which equitable considerations may appropriately be taken into account.**"[3]

[13] In the Roman-Dutch Common Law jurisdictions it is trite that the one who makes a material allegation must prove it. The applicants' case is manifestly predicated upon an alleged contract by and between the first applicant and the United States of America. Ordinarily, the Applicants would be expected and required to furnish a copy of the agreement in order to enable proper determination of the issues that are raised in this *lis*. They have not done so, and it is apparent that they are unable to do so. It is in that view that they seek, in prayer 4 of the application, an order directing the Prime Minister "**to produce/publish and furnish the Applicants with the agreement ...**". The applicants have not stated the Rule of Procedure that enables them to make this demand, neither have they established a principle of substantive law to that effect. Seen in abstract, this could well present an insuperable setback to their case.

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[3] Herbstein and Van Winsen, THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA, 4th Ed (1997), para 1 at page 1079.

[14] *Ex facie* the applicants' papers, it appeared to me that the United States of America has a vested interest in the subject matter of the application, in that if the application was granted the net result might be that the deportees are to be returned to the United States of America. In that extent the United States of America would need to be a party in order to be heard. None of the parties had the inclination to deal with this aspect, so I say no more on it.

[15] In opposition the respondents raised points of law only and did not plead over. This was clearly a conscious decision, not brought about by any exigencies. The respondents having pinned their colours to the mast, it follows that if the points of law are not sustained the factual averments made by the applicants would stand uncontroverted. See MINISTER OF FINANCE V PUBLIC PROTECTOR AND OTHERS.[4] But that, in my view, does not mean that the onus upon the applicant is automatically discharged. The court still needs to be satisfied that the factual basis for the relief, as set out by the applicant, meets muster.

RESPONDENTS' POINTS OF LAW

[16] LACK OF URGENCY

16.1 Respondents submit that the urgency, as alleged by the applicants, falls short of the threshold set out in

[4] (2022) SA 244

Rule 6(25)(b), as interpreted by the courts in this jurisdiction.

16.2 The applicants' attempt to establish urgency is at paragraph 10 of the affidavit of Mzwandile Banele Masuku. The most relevant averments are at paragraph 10.1, wherein the deponent posits the following-

> "**The arrival of the deportees into the country was only brought to light following social media posts from out of the country which caught the majority of the nation by surprise. Developments from then have been reactionary on the part of the respondents...**"

16.3 It is axiomatic that social media reports have dates attributable to them. If the applicants sought, as they did, to have the matter heard ahead of those scheduled in the ordinary course, they should have at least disclosed exactly when the said media reports came to their attention, so that the court is made aware of the period between then and when the applicants came to court. On this aspect alone the applicant's case appears to fall short of the stringent requirements set out in the landmark case of HUMPHREY HENWOOD V MALOMA COLLIERY LTD AND ANOTHER.[5] See also the recent High Court judgment in BONGIWE KIRK in

[5] (1987-1995) SLR vol 4, p48.

re ROBERT RICHARD JAMES KIRK N.O. and OTHERS V THE TRUSTEES FOR THE TIME BEING OF THE KIRK TRUST (NO.16/1993) and OTHERS (1977/2024) [2025] SZHC 284, 9th December 2025, para 13.2 at page 12 of the Judgment.

16.4 However, the aspect of urgency was overtaken by events due to the manner in which the matter unfolded, which includes an attempt by the parties to engage. It is presumably on that basis that the issue was not pursued at the hearing of legal arguments and the court makes no pronouncement thereon.

[17] LACK OF LOCUS STANDI IN JUDICIO

17.1 Both sides canvased this point with considerable gusto. The respondents' position is that neither the applicants nor the respondents have *locus standi*. What is meant by *locus standi* in *judicio*?

17.2 IN THE PARISH CHURCH COUNCIL OF ALL SAINTS V THE DIOCESE OF ESWATINI AND THREE OTHERS[6] I made the following observations –

> **"Busy-bodies exist in every society. By their nature such characters can drag other people to court at a whim. The requirement of *locus standi* in *judicio* ensures that it is not anyone and everyone who can**

[6] (2777/2024)[2025] SZHC 196, 19th September 2025.

> **litigate in a court of law; you need to be vindicating a right that is recognised in law and you need to have a direct interest in the matter which transcends the interest which all citizens have."**

If a court of law was to be seen as a building, then *locus standi* is the door to enter the building.

17.3 There is yet another connotation of *locus standi* in *judicio*. *Ex lege*, there are some impediments which the law imposes to prevent certain categories of persons from personally prosecuting their rights in a court of law. For instance a minor or an invalid are not qualified to institute court proceedings in their own name. It is said that they do not have *locus standi* in *judicio*. A minor sues through its parent or guardian; an invalid sues through a curator. This, in my view, is the first step in the enquiry.

17.4 The respondents' challenge to the applicants' case encompasses both aspects of *locus standi* in *judicio*.

17.5 The second and fourth applicants are natural persons who are adults. They therefore pass the first hurdle. In other words, there is no legal impediment that stops them from approaching a court of law in their own names.

17.6 The first and third respondents are not natural persons. It is therefore necessary to determine whether or not they

meet the legal requirements of artificial persons recognised in law-i.e. corporate entities, statutory entities or otherwise. When the application was launched no proof was attached to show the legal status of the two entities. Subsequent to the hearing of legal arguments on the 3rd November 2025, on the 11th November 2025 the applicants filed Certificates of Incorporation which show, *ex facie*, that the first and third applicants are artificial persons in terms of the laws of this country. This therefore brings *finis* to the first enquiry; all the applicants do qualify to approach a court of law in their own names. It remains to interrogate the second aspect of *locus standi* in *judicio*.

ACTIO POPULARIS

17.7 The present application has all the hallmarks of the *actio popularis*. In simple terms the phrase describes judicial process that is instituted ostensibly on behalf of or in pursuit of an interest of the population in general or on behalf of members of a community in general, to vindicate a public interest. The respondents submit that the *actio popularis* is not part of the law of this country, and therefore anything of that nature is not justiciable. The applicants, goes the argument, do not have an interest that is recognised in law, and therefore have no *locus standi* in the second sense.

17.8 The cause of action, as canvassed by the applicants, is the importation of foreign nationals into this country. The applicants argue that this was done unlawfully, in one way or the other. The respondents submit that the applicants have no personal interest in this; that there is no direct prejudice or injury that they have suffered through the said administrative or political action of the State, and therefore they cannot be let into the door of judicature.

17.9 This discourse is not novel in this jurisdiction. It received microscopic and extensive attention in the Supreme Court case of JAN SITHOLE N.O. and SEVEN OTHERS V THE PRIME MINISTER and SIX OTHERS[7]. In that matter the applicants moved the court to strike down and declare null and void the entire constitution of this country, on the alleged basis that there was no proper and adequate engagement of the people of this country prior to promulgation of the said law. It is worth-noting that in that matter the applicants represented a fairly wide spectrum of interests, including labour movements and political formations.

17.10 Quoting with approval from the case of ROODEPOORT-MARAISBURG TOWN COUNCIL V EASTERN PROPERTIES (PROP) LTD[8], His Lordship Tebbutt J.A. made the following trenchant remarks-

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[7] Appeal Case No.35/2007.
[8] 1933 AD 87.

"The *actio popularis* is undoubtedly obsolete, and no one can bring an action and allege that he is bringing it in the interest of the public, but by our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers damages or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have."[9]

17.11 Making reference to an old Transvaal Supreme Court judgment[10] the court made the point that a litigant must show "**some grievance special to himself**." According to Tebbutt J.A., this position is what obtains in other jurisdictions, e.g. Canada and the United States of America.[11] In the Canadian case of THORSON V ATTORNEY GENERAL AND OTHERS (NO.2)[12] the court made the observation that to accede to the so-called liberal approach to *locus standi* "**would involve the consequence that virtually every resident of Ontario could maintain action: and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available**

[9] At page 14 of the Judgement.
[10] Dalrymple and Others v Colonial Treasurer, 1910 TS 372 at p392.
[11] See pages 15-17 of the Judgment in JAN SITHOLE & ORS, supra.
[12] (1974) 43 DLR 1.

to sustain the right of any citizen of the province ..."[13]

17.12 The case of LAWYERS FOR HUMAN RIGHTS (SWD) AND ANOTHER V ATTORNEY-GENERAL[14] precedes the one of JAN SITHOLE. In the former the then Court of Appeal came to the same conclusion on the issue of *locus standi*, and in JAN SITHOLE Tebbutt J.A concludes –

> "**Nothing that has been advanced by the appellants has persuaded me that this court was incorrect in its decision in that case and I can find no reason why this court should not follow it in the present case.**"[15]

17.13 In the case of SWAZILAND NATIONAL EX-MINERS WORKERS ASSOCIATION AND ANOTHER V THE MINISTER OF EDUCATION AND OTHERS[16] the applicants made a strong submission for a relaxation of the law on *locus standi* in constitutional and public interest litigation, because "**a narrower interpretation would exclude persons seeking to uphold constitutional provisions in the public interest.**"[17] A similar argument was made with much vigour in the JAN SITHOLE case, seeking to make out a case for a

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[13] At para 38 of the JAN SITHOLE judgment, supra.
[14] Civil Appeal N.34/2001.
[15] At para 40 of the Judgment in JAN SITHOLE and OTHERS, supra.
[16] H/C case No.335/09.
[17] Per Agyemang J.in the Ex-Miner's case, supra.

"generous and liberal approach to standing and not non-suit them on the basis of a lack of *locus standi*."[18] In casu the applicants embrace this argument and have urged the court to adopt this liberal approach and find that the applicants do have *locus standi* in the matter. However, legal authorities do not support this submission.

[18] To a certain extent the applicants rely on the judgment of Her Lordship Agyemang J. in SWAZILAND NATIONAL EX-MINERS WORKERS ASSOCIATION, supra. That case is eminently distinguishable from the present one. Therein the applicants sought to enforce chapter III rights and freedoms and relied on Section 35(1) as a basis for *locus standi*. The respondents submitted that the first applicant being a *universitas,* it could not sue on account of an infringement of its members' rights because its interests as a corporate entity are distinct from the interests of its members. The court found this argument to be untenable and articulated the position in the following terms –

> **"It is my view that this issue of the entitlement of children to free primary education gives the right of suit not only to the children who will enjoy the right, but also to the parents who have the duty of providing education to the said children."**

[18] At para 41 of the JAN SITHOLE and ORS Judgement, supra.

[19] But even if it was to be assumed that Her Lordship was overly technical in her interpretation of "**person**", the fact that the second applicant in that matter is a natural person who had a primary school-going child puts the matter to rest. Moreover, the doctrine of stare *decisis* enjoins this court to follow the authority of the higher court, now the Supreme Court.

[20] The applicants have also tendered the authority of SWAZILAND NATIONAL SPORTS COUNCIL V MINISTER OF SPORTS, CULTURE AND YOUTH AFFAIRS AND OTHERS,[19] in urging the court to find that the applicants have *locus standi* in the present matter. I state, without ado, that the said judgment does not advance the applicant's case beyond the threshold. First, it is not an example of the *actio popularis*. In the same way that Ota J. therein found that the applicant was a statutory body[20] capable of suing and being sued, in the present case this court has found that the first and third applicants are corporate entities capable of suing and being sued in their own names. Where the applicants' case fails is in relation to a direct interest in the matter, which has been found wanting. This aspect has had copious discussion ante.

[21] In any event it is my respectful opinion that in the said judgment Her Lordship Ota J. fell in the trap of conflating *locus standi* and jurisdiction, as if the two are intertwined. She observes –

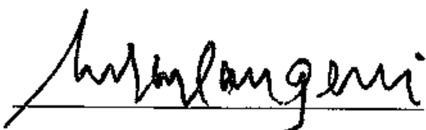
[19] (1455/13)[2013] SZHC 214, 27th September 2013.
[20] At para 33 of the judgment, page 14.

"... where an applicant has no *locus standi*, the court is deprived of the jurisdiction to entertain and determine the action ...".[21]

Her Lordship then proceeds to say that *locus standi* can be raised at any stage, even on appeal. Her stance is based on Nigerian Case Law, which she has cited. My respectful opinion is that it is not so in this jurisdiction. If a litigant raises *locus standi* late in the proceedings, worse still on appeal, issues of waiver and or acquiescence would surely arise. In this jurisdiction it is settled that issues of *locus standi* and jurisdiction are raised *initio litis*.

[22] Because of the weight and certainty of legal authority on the issue of *locus standi*, the present application can only end in one way. The court's hands are tied by the doctrine of stare *decisis*. Because *locus standi* is a threshold issue, there is no need to interrogate the other issues that arise in the *lis*.

[23] The application is therefore dismissed. We make no order in respect of costs.



MLANGENI J.

[21] At para 24 of the judgment, page 12.

I agree ______________________

T. Dlamini J.

I agree ______________________

B. Magagula J.

For the applicants: **Attorney M. Masuku, appearing with M. Mabuza.**

For the respondents: **Attorney N.G. Dlamini appearing with Mr S. Hlawe.**