IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.2792/2006

In the matter between

Jan Sithole N.O.	**1st Applicant**
Mario Masuku	**2nd Applicant**
People's United Democratic Movement	**3rd Applicant**
Dominic Tembe	**4th Applicant**
Ngwane National Liberatory Congress	**5th Applicant**
Swaziland Federation of Trade Unions	**6th Applicant**
Swaziland Federation of Labour	**7th Applicant**
Swaziland National Association of Teachers	**8th Applicant**

And

The Prime Minister	**1st Respondent**
Swaziland Government	**2nd Respondent**
Minister of Justice and Constitutional Affairs	**3rd Respondent**
Attorney-General	**4th Respondent**

Chairman; Constitution Drafting Committee **5th Respondent**

Speaker of the House of Assembly **6th Respondent**

President of Senate **7th Respondent**

CORAM: MAPHALALA J.

ANNANDALE J.

MAMBA J.

For Applicants: MR T.R. MASEKO (with Mr Shilubane)

For Respondents: MR J.M. DLAMINI (Attorney General) and MR. M. VILAKATI

JUDGEMENT

17th SEPTEMBER, 2008

MAMBA J.

[1] In the main application, the Applicants seek the following Declaratory Orders namely; That the Application:-

(a) particularly the third and fifth Applicants and other political organizations, are entitled and have a right, to be recognized, registered and to organize, operate and engage in free political activity in Swaziland, including the right to participate in free and genuine democratic elections, as political organizations without hindrance, intimidation and/or harassment by the second respondent and all its agents, pursuant to **Section 25 of the Constitution of Swaziland Act 001 of 2005** as well as under international human rights and international customary law.

(b) have a right and are entitled to be involved, participate and to be part of any independent structure, institution or mechanism established to manage, govern or organize national elections or any other elections to be conducted pursuant to the 2005 Constitution of Swaziland.

[2] The Applicants have filed two interim or interlocutory applications, the first of which was filed and served on the 23rd June, 2008. In this application the Applicants seek to join the Elections and Boundaries Commission and the Judicial Service Commission as the 9th and 10th Respondents respectively. There is also a prayer to declare "the appointment of the members of the Elections and Boundaries Commission - unlawful on the ground that it is inconsistent with section 90 of the Constitution."

[3] On the 8th July, 2008, notice was filed and served to amend this interim application by adding a prayer;

> *"That the Composition of the Judicial Service Commission, the 10th Respondent in these proceedings is unconstitutional on the ground that it is not independent contrary to the provisions of* ***section 159 (1)*** *as read with* ***section 173 (1), 178 and 183*** *of the Constitution, and consequently its purported advice to his Majesty the King on the appointment of the Elections and Boundaries Commission is null and void and of no force of effect."*

[4] I shall herein refer to the Judicial Service Commission and the Elections and Boundaries Commission as the JSC and EBC respectively.

[5] In the second interlocutory application, the Applicants sought on an urgent basis, for an order.

1.2 Calling upon the Respondents to show cause, if any, on a date and time to be determined by this honourable court, why;

(c) The Respondents, particularly the ninth Respondent their agents or principals should not be interdicted and refrained from proceeding with the elections process, including the holding of Primary and Secondary elections scheduled for the 2nd and 3rd August, 2008 as well as 17th September, 2008, pending the final determination of the issues under Case No. 2792 of 2006. Alternatively;

(d) Staying the whole electoral process pending final determination of Case No. 2792/2006.

[6] The application, which I shall refer to as the second interlocutory application was filed and served on the 31st July, 2008. It was set down and heard by a full bench on the next day in view of the fact that the electoral steps sought to be interdicted were to take place on the 2nd and 3rd August, 2008. This was contained; it was common cause, in the Swaziland Government Gazette Extra Ordinary Number 98 dated and published on the 29th July 2008.

[7] An affidavit by one Thamsanqa Hlatshwayo, the Secretary General of the 5th Respondent is filed in support of the Application. It is also supported by an affidavit by Mario Masuku who is the President of the 3rd Respondent. Both deponents declare that they are duly authorized to make their respective affidavits. (I can only assume that these deponents aver that they have been duly authorized by their principals or their principals' authorized agents). Mr. Masuku further expresses his organization's interest and desire to hold *"free and fair democratic elections in accordance with section 25 as read together with section 84 (1) of the Constitution in light of Section 1 thereof."*

[8] As in the main application and first interim order, the Respondents, through the office of the 4th Respondent, did not file any affidavit in opposition to this interim application but raised points of law *(in limine)* namely that:

(a) The matter was not urgent because "the Applicants knew that after the resolution of Parliament elections should be held within sixty days interms of section 133 and 136 of the Constitution. However, the Applicants did nothing up until the eleventh hour, why they had

all the time and platform, to seek the interdict.……."

(It is common cause that parliament was dissolved at the end of June, 2008).

(e) As there are no averments that any of the Applicants are registered voters, they have not shown that they have the *locus standi io* seek to interdict the electoral process.

(f) There is no resolution by any of the Applicants, authorizing Hlatshwayo to make this application, and

(d) The application fails to satisfy the requirements of an interdict.

[9] After hearing arguments on both sides on the 1st August, 2008, this application; the 2nd interim application was dismissed by both my colleagues and the reasons for doing so were not given at the time. The court indicated that such reasons shall be incorporated in the main judgment.

[10] I was unable to agree to the dismissal of the application and what follows are my reasons for it.

[11] As indicated above, the Respondents raised four objections or points of law to the application and I deal with each in turn below.

[12] First, **I** consider the issue of *locus standi,* as I believe it is logical for me to do so because of the nature of the main application herein and in particular the nature of the relief sought. The 3rd and 5th Respondents are political parties. They claim, or derive their right to be or exist on their members' basic human rights or freedom of association. This right or freedom is confirmed and enshrined in Section 25 of the Constitution of Swaziland (herein after referred to as the Constitution).

[13] The relevant provisions of this section provides that;

"25, (1) A person has the right to freedom of peaceful assembly and association.

(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and association, that is to say, the right to assembly peacefully and

associate freely with other persons for the promotion or protection of the interests of that person."

[14] The Attorney General, on behalf of the Respondents conceded; and properly so in my view, that the afore-quoted Constitutional provision do sanction the formation of Political parties; or perhaps expressed differently, he conceded that there is no provision in the Constitution that prohibits the formation of political parties or such other organizations. **Section 19(1) of the Constitution of the Republic of South Africa** is very explicit in its provisions and stipulates that;

"(1) Every citizen is free to make political choices, which includes the right;

(a) to form a political party;"

[15] The formation of political parties is one thing; and what these political organizations are constitutionally permitted or entitled to do, and how they do what they do, another totally different. The European Court of Human Rights held in the **United Communist Party of Turkey 1998 4BHRC1** that the right or freedom of association included a right to form or join a political party and in that case it protected the existence and prohibited the dissolution of an existing party.

[16] The "core business" - if **I** may borrow a phrase from the corporate world, -of political parties and formations is to sell their political views and agendas or policies to the public. These relate in the main to public affairs at both local and national governance. The right to freedom of association, which encompasses the freedom to form or join a political party or organization is an instance or incident of democracy. **Andreas O'shea** in his Article on **International Law and the Bill of Rights** in **Bill of Rights Compendium** (Lexis Nexus) (issue 5) at 7A - 9 9 - 7 A - 101 states that:

"The principle of democracy developed from national constitutions arising out of the struggles between the power of Kings or governments (often foreign) and the people. It is expressed, for example, in the English Bill of Rights of 1689, the Declaration of Independence of United States of 4th July 1776 and the French Declaration des Droits de L'Homme et du Citoyen du 26 Aout 1789. The *Oxford Dictionary* defines democracy as "government by the whole population, usually through elected representatives". An examination of state practice may very well reveal an emerging customary right to democracy. [In South Africa] the right to democracy and the incidental right to make political choices and form political parties is protected by section 19 of the Bill of Rights....Respect

> for the right to participate in government can be achieved directly in the form of a referendum or direct participation. It can also be achieved indirectly through representative government. The right only belongs to citizens and then only citizens with legal capacity. ...The expression of the will of the people in periodic and genuine elections necessarily implies that right to form political parties which can take up opposition to the ruling party. The same can be said for the right to participate in government or public affairs since minority groups may never get the party of their choice into power but can at list have limited participation in government structures and public debate through the formation of opposition parties. This goes to the very essence of democracy."

[17] In the main application, the Applicants seek an order permitting them to participate in the national Parliamentary and Constituency Elections. This includes being allowed to register as voters and to campaign and or canvass for support or votes from the public. This to my mind, with due respect, seems to be the very business of Political parties, generally. Whether or not the 3rd and 5th Respondents have the right to do so or are entitled in terms of our constitution, is yet to be determined by this court in the main application. That the Applicants have no *locus standi* to interdict the elections because they are not registered as voters, is in my respectful view, erroneous. It puts the cart before the horse, simply because the Applicants want to halt the process and obtain a declaratory order that they may participate in the elections. The declaration will open the way for them to register.

[18] To hold at this stage of the proceedings that they have no *locus standi* because they are not registered voters would be to hold that they have no right to vote in the forthcoming national parliamentary elections. And after the elections if they are successful in the main action, they would only be able to exercise their rights in the next national elections after five years. This can not, in my respectful view be just. It would be tantamount to the irreparable harm required to satisfy an order for an interdict.

[19] In the earlier judgment by a full bench of this Court that was confirmed on appeal by the Supreme Court, this court held that the Applicants had no *locus standi to* claim for the particular prayers that were under consideration, namely to set aside or suspend the entire Constitution. That is, my reading and understanding of that judgment.

The stated case before the **Supreme Court under appeal Case 35/2007** (unreported) was *inter alia;*

"7.1 whether or not the full bench erred in law and in fact in holding the appellants had no *locus standi* to challenge the Constitution of Swaziland. And at page 21 paragraph 38 the court quoted with approval the Canadian Supreme Court where it said

> "An individual has not status to challenge the Constitutional validity of an Act of Parliament unless he is specially affected or exceptionally prejudiced by it. The plaintiff in this action had only the same interest as any other tax payer in Canada."

This the court did after referring to **Dalrymple and others V Colonial Treasurer 1910 TS 372 where Wessels C.J.** said that;

> "Courts of law have required the Applicant to show some direct interest in the subject matter of the litigation or some grievance special to himself." (see also paragraph 40 at page 23).

[20] The subject matter of the litigation is the determinant in the inquiry. The Applicants' exclusion from the electoral process perceived or otherwise is in my respectful view their direct interest in the matter and this is peculiar to them qua political parties. Indeed one may ask; if political parties have no *locus standi* to challenge their exclusion from participating in parliamentary elections, who has such *locus standi?*

[21] I would therefore dismiss the objection based in *locus standi.*

[22] If the interdict is refused and the Applicants are successful in the main application, the elections would have proceeded without them. They would have to wait for at least five years before they can exercise their rights to participate in their own governance. On the other hand, granting the interdict would result only in a temporary stay of the election process. No doubt this would occasion substantial costs or expense on the Government but this inconvenience and expense pales in significance to the injustice to be suffered by the Applicants if the interdict is refused. After all the Respondents who are in essence the government, have the wherewithal to carry out the task and have the responsibility to treat all its citizens fairly. The balance of fairness thus favours the Applicants. By virtue of their standing as political organizations, they have in my judgment established a *prima facie* right to the relief sought and the irreparable harm they shall suffer by being disenfranchised or being denied the chance to participate in the forthcoming elections.

The requirements for a temporary injunction were eloquently stated by Corbett J. (as he then was) in **LF Boshoff Investments (Pty) Ltd VCT free Municipality 1969 (2) SA 256 (c) at 267 A-F** as follows;

> "Briefly these requisites are that the Applicant for such temporary relief must show;-
>
> (g) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
>
> (h) that if the right is only *prima facie* established, there is a well grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right:
>
> (i) the balance of convenience favours the granting of interim relief; and
>
> (j) that the Applicant has got no other satisfactory remedy."

[23] It is not insignificant that when the publication of the Gazette referred to above was made, this court had partly heard arguments on the main application and the 1st interim application and due to some unforeseen circumstances, the full bench could not be constituted on the appointed date for completion of argument. The Applicants, cannot in my respectful view be blamed for not immediately filing the interdict when this occurred. The Applicants were entitled to expect that the main application, and the *joinder* application would be finalized before the dates for the elections were published or set. This court heard arguments on the 21st July, 2007 and then postponed the case to the 24th July, 2007 for completion. It was on the above last date that the court could not be constituted and the case had to be rescheduled. I do not think that these events or circumstances should have propelled the Applicants to file this restraint application sooner than they did. The objection founded on the lack of urgency is rejected.

[24] I now examine the alleged want of authority by Hlatshwayo and Masuku to launch this application for an interdict. The gravamen of the objection by the Respondents is that these two persons are not those persons authorized by their respective constituencies (the Applicants herein) in the main application to sign and or execute

court documents on their behalf. It should be remembered though that this is not a fresh or new application. This interlocutory application is, by that very description not different and separate from the initial or main application. The main application was filed more than two (2) years ago. The parties, throughout these proceedings have been represented by the same attorneys, the Applicants have acted en bloc. And finally, and perhaps most importantly, the deponents in question state their respective representative capacities and aver that they have been "duly authorized to sign this affidavit on behalf of all the Applicants." There is nothing to gainsay this averment that has been made under oath. In the circumstances of this case I find this objection nothing but a mere quibble whose only aim and effect can only delay the application from being heard on its merits. Consiquently the Applicants have proven that they have a prima facie right to take part in the elections, that this right has been violated or is about to be breached by their exclusion from the process and if the interdict is not granted, they shall not be able to vote in the forthcoming elections. They are therefore entitled to the interdict.

[25] I now examine the 1st interlocutory application. This application was filed on the 23rd June, 2008 and set down for hearing on the 21st July 2008; that being the date on which the main application was to be heard. This application was followed on the 8th July, 2008 by a notice to amend same. The notice seeks to join EBC and JSC as Respondents in the application and also declare their respective existence, composition and operation unconstitutional and therefore null and void and of no force and effect in law. The application is on notice and supported by an affidavit by Vincent Ncongwane. There is, however, no explanation why it is being filed at this stage of the proceedings and why and how it is necessary for the just adjudication of the main application.

[26] The Applicants contend that the appointment of the members of the EBC

> "is unconstitutional in that, it has been appointed contrary to the provisions of Section 90 (1) of the constitution as is not multi - membered to other stakeholders in the electoral process and that the commission must not be dependent on any authority or be seen to be in favour of the Tinkhundla form of Government. In other words, there must be no perception that it
> lacks autonomy as is the case at present.....the Applicants contend that
> there is nothing to suggest that the members of the Commission are not independent."
> And finally, Ncongwane concludes, that, "there is no way a commission staffed by Public Officers can be said to be independent.

[27] Read in its proper context, I think the underlined word (i.e. not) ought not to be there. The contention by the Applicants is that there is no evidence to show that the Commission is independent. But again that is a conclusion and the facts upon which it is based are not stated. In any event I do not think that it is sufficient for the Applicants in this case to merely allege that the Commission is not independent because the Applicants have no evidence to the contrary. This is equivalent to saying "the commission is not independent because it is not independent." It does not say much, does it? The rest of the attack is on the individual members of the EBC and relates to the individual qualification or lack thereof of the members of the commission.

[28] There is no requirement anywhere in the Constitution that the commission must as a matter of law, comprise members of all the different societal groupings in the country; including those not aligned to any recognized grouping. The contention that the independence of the commission can only be guaranteed if the membership of the commission comprises the multiple political and non political formations in the country, is in my view erroneous.

[29] As stated above the only indication or inkling one gets of the complaint of unconstitutionally of the EBC is that it "is unlawful on the ground that it is inconsistent with section 90 of the Constitution" and of the JSC, that it

> "is unconstitutional on the ground that it is not independent contrary to the provisions of section 159 (1) as read together with section 173 (1), 178 and 183 of the Constitution,"

[30] That is all that is alleged by the Applicants. Such * bold but bald averments, unexplained and not motivated constitutes bad pleading in my judgment and is not different from a plaintiff proclaiming in a summons to a defendant that:

> "You owe me a million Emalangeni but I will tell you in court why I say so."

That is ambushing your opponent. In argument Applicants' counsel for the first time, submitted that the JSC was unconstitutionally constituted by the involvement of the Principal Secretary for Justice as its secretary. **I** hereunder set out the relevant provisions of the Constitution to illustrate the utter vagueness of the Applicants' intended amendments.

> "90 (1) there shall be an independent authority styled the Elections and Boundaries Commission ("the Commission") for Swaziland consisting of a

chairperson, deputy chairperson and three other members.

159 (1) There shall be an independent Judicial Service Commission of Swaziland, hereinafter in this chapter referred to as "the Commission".

173 (1) There shall be independent and impartial service commissions established in terms of this Constitution or any other law for the better management and exercise of certain powers and functions regulating the public service or any part or aspect of the public service.

178 In the performance of its functions under this Constitution, a service commission shall be independent of and not subject to any Ministerial or political influence and this independence shall be an aspect of the exercise of any delegated powers or functions of the Civil Service Commission or any other service commission or similar body.

183(1) Every service commission shall set up and maintain a competent and qualified secretariat consisting of a secretary and support staff as determined by the body responsible for the public service management or any law."

[31] The Respondents' response to this application is two-fold. First, that the entities sought to be joined as respondents have no *locus standi* to sue and be sued and secondly, that the prayers intended to be included are not incidental or subsidiary to the prayers in the main application and in any event, they are of a Constitutional nature and should as a rule, have been raised when the main application was initiated or in a fresh and different application. In support of the last objection Counsel for the Respondents referred us to the Supreme Court judgment in the case of **JERRY NHLAPHO AND 24 OTHERS V LUCKY HOWE**

N.O. (in his capacity as liquidator of VHIF limited in Liquidation) appeal case 37/07 (delivered on the 22nd May, 2009) where RAMODIBEDI J.A. had this to say;

".....Constitutional jurisprudence must be developed in a cautious and orderly manner rather than haphazardly. Constitutional issues must therefore ordinarily be properly pleaded and canvassed. See for example **Prince V the President, Cape Law Society and others, 2002 (2) SA 794 (cc); S v Mhlungu and others 1995 (3) SA 867 (cc); Kauesa v Minister of Home Affairs and others 1996 (4) SA 965 (NmSC).** The remarks of Ngcobo J. in **Prince's** case at

paragraph [22] are singularly apposite, namely;-

> "[22] Parties who challenge the Constitutionality of a provision in a statute must raise the Constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasize that all this information is necessary to warn the other party of the case it will have to meet so as to allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that it sought."

[32] Although the above remarks specifically refer to a constitutional challenge on a statute, they apply with equal force to a Constitutional challenge on the composition or membership of a Constitutional body such as in the present application. The only mention of the JSC by Vincent Ncongwane is found in paragraph 3.2. of his affidavit where he says the JSC.

"is a Constitutional body duly established in terms of section 159 of the Constitution as read with Act 13 of 1982, having its principal place of business at the Ministry of Justice, Usuthu Link Road, Mbabane."

The next and final mention of the commission by the Applicants is contained in the prayer I have referred to above. This prayer raises a Constitutional issue; namely the Constitutionality of its composition and by extension its operation. To seek a declaratory order of unconstitutionality on the basis that the JSC is not independent, contrary to the law, without laying out why, how or in what respects it is said it is unconstitutional, is in my respectful view, meaningless. The Applicants have been found woefully wanting in this respect and the Application for *joinder* and amendment must fail. Because of this conclusion, it is not necessary for me to consider the further objection relating to whether or not the EBC and JSC have the necessary *locus standi to* sue and be sued.

[33] I am in respectful agreement with the judgement of Maphalala J. in the main application (that it should be dismissed).

MAMBA J