IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 2783/08

In the matter between:

SWAZILAND COALITION OF CONCERNED CIVIC ORGANISATIONS TRUST	1ST APPLICANT
COMFORT MDUDUZI MABUZA	2ND APPLICANT
HENRY TUM DU-PONT	3RD APPLICANT
MANDLA INNOCENT HLATSHWAYO	4TH APPLICANT
JAN JABULANI SITHOLE	5TH APPLICANT
MUSA PETROS DLAMINI	6TH APPLICANT

and

ELECTIONS AND BOUNDARIES COMMISSION	1ST RESPONDENT
CHIEF GIJA DLAMINI	2ND RESPONDENT
MZWANDILE FAKUDZE	3RD RESPONDENT
NKOSINGUMENZI DLAMINI	4TH RESPONDENT
GLORIA MAMBA	5TH RESPONDENT
MCUMBI MAZIYA	6TH RESPONDENT
JUDICIAL SERVICE COMMISSION	7TH RESPONDENT
ATTORNEY – GENERAL OF THE KINGDOM OF SWAZILAND	8TH RESPONDENT
GOVERNMENT OF THE KINGDOM OF SWAZILAND	9TH RESPONDENT
MINISTER OF JUSTICE AND	

CONSTITUTIONAL AFFAIRS 10TH RESPONDENT

CORAM	:	Q.M. MABUZA –J
FOR THE APPLICANT	:	ADV. P. KENNEDY INSTRUCTED BY MR. K. MOTSA OF ROBINSON BERTRAM
FOR THE RESPONDENT	:	MR. M. J. DLAMINI, ATTORNEY GNERAL OF SWAZILAND

JUDGMENT

Introduction

[1] The Applicants are members of a Trust called the Swaziland Coalition of Concerned Civic Organisations Trust, the 1st Applicant. The relief sought was an order.

(1) declaring the purported appointment of the members of the Elections and Boundaries Commission (EBC) unlawful and invalid;

(2) declaring the Commission unlawfully constituted;

(3) declaring the members ineligible for appointment;

(4) declaring all actions and decisions taken by the members of the EBC to be unlawful an invalid.

(5) declaring that the members of the EBC had no legal right or power to exclude or preclude the applicants from providing voter education to members of the public.

(6) an order for costs including the certified fees of Counsel and

(7) Further and or alternative relief.

The orders sought against the 1st – 6th Respondents as well as the 8th Respondent

[2] Points of law were raised on behalf of the Respondents save for one short answering affidavit by the third respondent. There were no answering affidavits on the merits filed by the Respondents. At the hearing the

original points of law were amended and Counsel proceeded with the following points of law:

2.1 That the Trust was not valid

- for lack of a charitable object, and

for vagueness.

2.2 That the Applicants had no ***locu standi*** to bring this application in that:

(a) they lacked the appropriate interest

they have suffered no prejudice.

[3] The objects of the Trust:

Clause 3 of the Trust Deed states that:

"The object of the Trust is to create a fund for public, and civil educational purposes within the Kingdom of Swaziland including promotion and protection of civil and human rights of the general public of Swaziland and other objects as the Trustees in their discretion may deem fit and acceptable on the understanding that this shall be a Charitable Trust as contemplated under section 12 (vii) of the Income Tax Order no. 21 of 1975 (as amended).

<u>Validity of the Trust</u>

Mr. Dlamini for the Respondents submitted that the Trust was invalid by reason of the vagueness of its

principal object being political.

[4] Mr. Dlamini argues that the objects are so bad, vague and indeterminate that the Trust is incapable of enforcement. To illustrate his point Mr. Dlamini poses certain questions such as what is meant by civil education? And states that the clause is not capable of rational construction free of speculation. The other question posed by Mr. Dlamini is: 'voter education' an example of 'civil education purpose or of the protection and promotion of (democratic) civil and human rights or both? His answer is that the clause is vague.

If on the other hand as stated by the Applicants in para. 18 of the Founding Affidavit "voter education", complied with promotion and protection of democratic and other civil and human rights, provided to members of the general public ... is an example of a "civil educational purpose" then such object or purpose

would not qualify the Trust as a "charitable trust" in terms of the Income Tax Order 1975 or the common law.

[5] Mr. Kennedy's counter argument with regard to allegation of vagueness is that is that the objects of Trust are not unacceptably vague and in support thereof cites Cameron ***et al*** in Honore's South African Law of Trusts which states:

> "Because of the public interest in trusts for pious causes, or charitable trusts, they are benevolently construed …. Provided the founder has made clear that the purpose is charitable, the object need not be expressed with the precision otherwise required. In Estate Villet v Estate Villet (1939 CPD 152) the court upheld a trust in favour of 'such charitable institutions or other deserving objects or persons in needy circumstances' as the trustees should think fit. The court also decided that if some objects of the trust are non-charitable objects are not thereby vitiated… In Ex parte Henderson where the testator provided that his 'executors might make one or more gifts or loans for charitable, philanthropic, aesthetic, religious, educational, medical, gardening, sporting or other purposes whereby benefits will be given to one or more persons or animals', the trust following Villet's case was held valid, though gardening or sporting purposes might not be charitable."

[6] I agree with Mr. Kennedy's submission. The objects of

the Trust are in my view clear, there is nothing vague about them.

[7] Mr. Dlamini's further submissions were the trust is not a charitable trust as contemplated by the Income Tax Order, 1975 or the common law. Mr Kennedy's counter-argument is that for the purposes of a trust to be charitable, it is not necessary that they be religious. He cited the case of Marks v Estate Gluekman 1946 AD 289 where it was held that an educational trust is in for a pious cause. He also pointed out that the definition of exempt organisation in the Income Tax Order, 21/1975 section 2, includes an organisation which is an ecclesiastical, charitable, or educational institution of a public character.

[8] I am in agreement with Mr. Kennedy's submissions particularly in the light of the case of Exparte Hendersen and Another NNO, 1971 (4) SA 549 D at 553 H- 554 C wherein Miller J (as he then was) referred to

the lack of a comprehensive definition of the term "charitable purposes."

See also 1820 **Settlers National Monument Foundation v Van Aardt,** 1877 (2) SA 368 (E) at 370 G. It was held that…

[9] Mr. Dlamini submitted further that the Trust was invalid because its main object **is political**. To support his argument Mr. Dlamini cited two cases namely the **Bona Law Memorial Trust v The Commissioners of Inland Revenue** 17 Tax cases 508 (KBD) (1933 and Ex parte Dornfontein –Judith's Paarl Ratepayers Association 1947 (1) SA 476 (WLD). In the Bona case all the trustees were leaders of the conservative Party and the trusts activities were directed at advancing the cause of the party. At page 516 the Commissioners concluded:

> **"In the case before us we are unable to hold that the Conservative purpose is subsidiary … In our opinion, the political or party object of the trust is the primary object, and we hold therefore that the Bonar Law Memorial Trust, is not a charity within the meaning of the Act and that the claim fails."**

[10] In Ex-parte Doorfontein, a ratepayers body, an unincorporated association, had been established for purposes of selecting candidates for election to the Johannesburg City Council, and assisting them to secure their election, in order to advance the political objectives of the Ratepayers Association.

It was held that the primary object of the association was of a political rather than a charitable nature. The test was continued to be whether the public benefit is served, rather than party political interests.

[11] Mr. Dlamini argued that "voter education" seen in the light to promote and protect democratic, civil and other human rights is s political purpose which for all intents and purposes invalidates the Trust as the Court cannot deal with a political object. He gives as proof the

present application that the primary or principal object of the Trust is political and the attack on the Respondents regarding their appointment and qualifications.

[12] Mr. Dlamini's arguments cannot be correct. The coalition which comprises of different organisations is not a political party nor are their objects designed to further any political purpose or policy. The Trust's stated object is to create a fund for educational purposes, to serve the general public and protection of civil and human rights of the general public. The Trust seeks to advance public awareness of the civil and human rights that all citizens enjoy, including their democratic rights as voters. This in my view is an educational purpose for the benefit of the general public and is therefore a "pious" or "charitable" cause. The present application is not an attack on the Respondents. It is brought on the basis of a right that

every citizen has to uphold and defend the Constitution in terms of section 2 (2) thereof, which states that:

> **The King and Ingwenyama and all the citizens of Swaziland have the right and duty at all times to uphold and defend this Constitution."**

Legal Personality of Trust:

[13] The Respondents challenge the Trust's ability to bray these proceedings on the basis that it lacks legal personality. There is substance in this submission and Mr. Dlamini has set out the law clearly in regard thereto. However, as Mr. Kennedy has pointed out this is not a case where only the Trust has brought the application. Each of the Trustees is also an Applicant (the 2nd to 6th Applicants). The Trustees have the necessary standing to bring this application. The Trustees have all been cited as co-applicants and as such pass the test in terms of section 2.2 of the Constitution that all citizens of Swaziland have the right and duty at all times to uphold and defend the Constitution.

[14] In answer Mr. Dlamini argued that if the citing of the Trust as a party is based on clause 8.15 which authorises the trustees to engage in legal proceedings for or against the Trust "in the name of the Trust" then the trustees cannot be parties in the same application

as the right to sue vests either in the trust or the trustees. In support of this agreement he cited **Rainsford v Trustees** of the Salisbury Club 1914 AD 499, 502.

[15] In Rainsford an application was brought against the trustees of a club in relation to actions taken by members of a committee and not by the trustees. It was held that relief could not be sought against the trustees in respect of a decision to which they were not a party. Mr. Kennedy relied on the decision in Rainsford to counter Mr. Dlamini's argument that the Trust and Trustee cannot be parties to the same action.

[16] The next attack on the application by Mr. Dlamini is that the 2nd Applicant in his founding affidavit states that he is duly authorised by the Resolution (Annexure B1) to bring the present application on behalf of all the Applicants. Annexure B1 he argues is defective as it

bears a solitary signature out of the five trustees, therefore Annexure “B1” cannot be authority for bringing the present application or all the trustees. He continues that there is nothing in Annexure “B1” which authorises the 2nd Applicant to “bring” the application or make the founding affidavit “on behalf of all the Applicants.”

[17] Mr. Kennedy concedes that it is true that one of the resolutions is signed by only one trustee but that there is another resolution which is signed by all of the other trustees. Consequently, there are two identical documents which were signed separately, presumably at different times by the different trustees. Both documents are marked Annexure “B1” and Mr. Dlamini’s argument overlooks this fact. Mr. Kennedy is correct that this does not render the authorisation defective. The contents of the two resolutions is the same and it confirms authorisation that these

proceedings be brought.

[18] Mr. Dlamini advanced the argument that the Applicants had no ***locus standi*** to bring this application because they kicked direct and substantial interest in the subject matter. In support of this submission Mr. Dlamini relies on the common law principle which is to the effect that where a statute prohibits the doing of a certain act, the question whether a party has ***locus standi*** to seek the enforcement of that statutory provision, depends on whether the statutory provision was enacted in the interests of a particular person or class of persons. This principle was developed. **Dalrymple and Others v Colonial Treasury** (1910 TS 372 at 379 and **Patz v Greenward Co.** (1907 TS 427) and applied in **Jacobs v en 'n Ander v Waks** 1992 (1) SA 521, A at 533J – 534 E, and **Bamford v Minister of Community Development and Auxilary Services**: 1981 (3) SA 1054 (c) at 1059G – 1060 B.

Mr. Kennedy has helpfully summarised what an Applicant must show in terms of this approach namely; that

- he or she has an adequate or direct interest in the relief sought;
- the interest must not be too far removed;
- the interest must be actual and not abstract or academic; and
- it must be a current interest, and not one which is hypothetical: See **Jacobsen 'n Ander v Waks** 1992 (1) JA 521 (A) at 533 J – 534E; **Kalbatschenko v King NO and Another** (2001) 4 AU SA 107 (c) at 114 A-D.

[19] These are common law principles which apply to private law disputes not public law disputes and have been recognised as such in other jurisdictions such as South

Africa whose cases have persuasive influence on our legal jurisprudence. This approach is captured in De Ville Judicial Review of Administrative Action in South Africa: at 400 wherein Professor De Ville analyses the judgments in **Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others:** 1996 (1) SA 984 (CC) in particular the majority judgments of Chaskalson P (as he then was) and a supporting judgment of O'Regan J. The learned author has this to say that this approach:

> ".. requires the abandonment of formalistic 'tests' for standing in favour of a broad, contextual approach, which takes account of a range of factors in every case to decide whether the applicant has the required standing. The question of standing is intricately linked with issues relating to the justifiability and subject matter of the dispute, the possibility of other responsible challenges to the validity of the action in question, the purpose of the legislation, the powers and duties of the authority whose decision is challenged, the position of the applicant in relation to such powers and duties and to the alleged breach, the merits of the challenge, the

importance of the issue raised, and the remedy applied for … As pointed out by O'Regan J:

'[e]xisting common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous.'

O'Regan J then adds that the lines between the two types of litigation can often be blurred, but that one can nevertheless say that different considerations may be appropriate in litigation of a public character to determine whether a person has standing. This approach also signifies a different role and responsibility for the courts in a constitutional democracy, namely to ensure that constitutional rights are honoured:

As the arm of government which is entrusted primarily with

the interpretation and enforcement of constitutional rights … [the courts carry] a particular democratic responsibility to ensure that those rights are honoured in our society. This role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.'

With the emphasis being placed upon the objective (in) validity of law or conduct (as opposed to the subjective positions of the parties to the dispute) the standing of litigants becomes less important in constitutional (and administrative law) cases. Of primary importance, as pointed out by O'Regan J, is upholding the Constitution … This approach, with its emphasis on maintaining the rule of law, stands radically opposed to the approach of the courts under the common law, which was based rather on a subjective standard of control …" (My emphasis)

This approach in effect states that the requirements for legal standing should be less stringent in the area of public law as opposed to

private law disputes: A view I fully support.

[20] Mr. Dlamini has further contended that the Constitution was enacted or the general public and it cannot be that every member of the public has a right of action in case of the breach of the Constitution. This argument in my view is incorrect. Section 22 of the Constitution that the King and iNgwenyama and all the citizens of Swaziland have the right and duty at all times to uphold and defend the Constitution (my emphasis). Applicants 2 – 6 as individual pass this hurdle, using the more conventional common law approach applied to private dispute.

[21] The Trusts's objects and activities include providing voter education. When members of the Coalition tried to conduct voter education in Nhlangano and Big Bend the police intervened stating that it was only the EBC who could provide voter education. This belief is

misplaced because section 90 (7) (b) simply provides that one of the functions of the EBC is to **"facilitate civic or voter education as may be necessary in between elections."** It does not state that this is the sole prerogative nor does it state that this entails control and supervision. To "facilitate" means make easy or easier." See the SA Concise Oxford Dictionary. There clearly is a dispute between the Applicants and the EBC as to the true role and authority of the EBC under the substantial, actual and current interest in the relief that is sought in the proceedings. The Applicants have ***locus standi*** .

[22] Section 90 (3) (c) states that:

> ***"A person shall not be appointed member (sic) of the Commission where that person …***
>
> ***(c) is a public officer other than judge of a superior court or magistrate."***

The Applicants have submitted that the 2nd

Respondent, Chief Gija was a public officer at the time of his appointment and is consequently disqualified by section 90 (3) (c) to be appointed a member of the EBC. At the time of his appointment he held the following public positions:

- he was employed as an engineer by the Swaziland Water Services Corporation (a statutory body falling under the control of the Government in terms of the Water Services Corporation Act 12 of 1992.

- He was a member of the Land Management Board appointed under section 212 (1) of the Constitution and entitled to receive allowances under section 212 (3) of the Constitution; and

- He is the holder of the office of Chief, which is a public office of emolument under the Swazi Administration Order and paid allowances from public monies.

[23] Similarly, the third respondent was disqualified because he too held a public office at the time of his appointment (and apparently for some time thereafter) – namely that of Deputy Attorney General.

[24] In the case of the fourth respondent, she was, at the time of her appointment, employed as a rural psychologist by the Swaziland Ministry of Agriculture.

[25] In the case of the fifth respondent, she was, at the time of her appointment, a lecturer in languages employed by the University of Swaziland. It is submitted that this constitutes a public office, for it is an office in the service of a public institution paid for out of public funds.

[26] Accordingly, the second to sixth respondents were disqualified because they held public offices at the time

of their appointment as members of the EBC.

[27] In the case of the sixth Respondent, Ncumbi Maziya, he was at the time of his appointment employed by the Swazi National Treasury. He is also a long serving aide to the iNgwenyama.

[28] Except for the 3rd Respondent the 2nd to 6th Respondents did not file any answering affidavits. The contents of the answering affidavit by the 3rd Respondent are not relevant consequently it is not necessary for me to deal therewith. Mr. Dlamini for the Respondents attempted to deal with merits in his submissions but as he did not file any answering affidavits his submissions are irrelevant, there is no need for me to address those either. Mr. Dlamini merely raised points of law which I have dealt with above.

[29] I agree with the Applicants that the commissioners are disqualified in terms of section 90 (3) (c) of the Constitution because at the time the 2nd to 6th Respondents were appointed they were all public officers. They are neither judges or magistrates who are exempted by the section. The terms “public officer”, “public office” and “public service” are defined in section 261 xxxxxx (l) of the Constitution on as follows:

> “public office” means... any office of emolument in the public service; public officer” means ... the holder of any public office ... and “public service” means the service of the Crown in a civil capacity in respect of the Government of Swaziland.

[30] A further submission by the Applicants with which I

agree is that the 2nd to 6th Respondents do not possess the qualification of a Judge of the Superior Courts except perhaps the 3rd Respondent who holds a law degree and has worked at the attorney General's chambers for many years. At the time of his appointment to the Elections and Boundaries Commission he was deputy attorney General of Swaziland. The qualifications of a judge of a supreme court are set out in section 154 of the Constitution, which is headed "qualification for appointment to the superior courts" The section states:

> **154 (1) A person shall not be appointed as a Justice of a superior court unless that person is a person of high moral and integrity and in the case of an appointment to-**
>
> (a) **the Supreme Court,**
>
> (i) **that person is or has been a legal practitioner, barrister or advocate of not less that fifteen years practice in**

Swaziland or any part of the Commonwealth or the Republic of Ireland; or,

that person is, or has served as, a Judge of the High Court of Swaziland or Judge of a superior court of unlimited jurisdiction in civil and criminal matters in any part of the Commonwealth or the Republic of Ireland for a period of not less than seven years; or,

(ii) **that person is, or has served as, such legal practitioner, barrister or advocate as mentioned in paragraph (a) (i), and as such Judge as mentioned in paragraph (a) (ii) for a combined period of that practice and service of not less than fifteen years;**

(b) **the High Court.**

(i) that person is or has been a legal practitioner, barrister or advocate of not less than ten years practice in Swaziland or any part of the Commonwealth or the Republic of Ireland, or

(ii) that person is, or has served as, a Judge of a superior court of unlimited jurisdiction in civil and criminal matters in any part of the Commonwealth or the Republic of Ireland for a period of not less than five years; or

(iii) that person is, or has served as, such legal practitioner, barrister or advocate as referred to in paragraph (b) (i) and as such Judge as referred

to in paragraph (b) (ii) for a combined period of such practice and service of not less than ten years.

Part of the functions of the Elections and Boundaries Commission set out in section 90 (7) of the Constitution as follows:

(a) "... to ensure fair and free elections at primary and secondary or other level; and

(c)review and determine the boundaries of tinkhundla areas for purposes of elections."

The function of ensuring that elections are free and fair requires the expertise of someone with legal qualifications such as a Judge. Deciding whether elections are free and fair requires a determination based on the law. (See Jabulani case).

[31] The knowledge and application of administrative land is necessary in determining disputes which arise after any

elections. This entails the application of the rules of natural justice which only a person with legal qualifications is conversant with.

[32] The function of review requires a legal qualification. The procedures and principles of review are normally carried out by the superior courts (see Rule 53) and legal principles have to be applied. The determination of boundaries is bound to raise disputes between the various chiefdoms. A person with the qualifications of a judge would be competent to make a determination otherwise the superior courts would be in undated and clogged with cases which the commission if properly constituted would be able to determine with relative ease. The Superior Courts would in the majority of cases deal with reviewing the decisions of the Elections and Boundaries Commission instead of being a first instance for trivial matters as has been the case with past cases.

[33] In addition to the above observations, the incumbent chairman is a Chief and it is unseemly that he should determine the boundaries of the tinkhundla areas falling under other chiefdoms. This has the effect of giving him a special status above the other chiefs which itself is bound to cause disputes of which he cannot be a judge in his own case. The frames of the Constitution were alive to the meanings of these words, this explains the requirement that the Commissioners shall possess the qualifications of a Judge of the superior courts. The provision is mandatory not discretionary.

[34] The requirements are that the Commissioners should be persons of high moral character, proven integrity, relevant experience and demonstrable competence in the conduct of public affairs. Mr. Kennedy for the Applicants prudently refrained from challenging the

requirement of high moral character proven integrity. He submitted that he had no doubt that the Commissioners were of high moral character and proven integrity. His challenge was in respect of their "relevant experience and demonstrable competence in the conduct of public affairs." I agree with Mr. Kennedy that at the time of their appointment the Commissioners did not have experience relevant to their prospective duties in the EBC.

[35] The second requirement is a potpourri of sorts making it difficult to interpret as a stand alone phrase. If seems to me that it qualifies or describes the qualities required of the Commissioners. It is my considered view that the "or" only be "and". It would then read as follows:

> S9 " (1) The King and iNgwenyama shall be paid such emoluments and shall have such Civil List as may be prescribed.
>
> (2) Any remuneration prescribed under this section shall be a

> charge on and paid out of the Consolidated Fund and shall not be reduced during the continuance in office of King and iNgwenyama.

This would make sense of the mandatory requirement of “shall” and also be commensurate with section 154 which provides that “a person shall not be appointed as a Justice of the superior court unless that person is a person of high moral character and integrity (my emphasis).

[36] I am alive to the fact that in interpreting provisions of the Constitution judges may not make them mean what they wish them to mean. Corrections of statutes if any are the purview of the Legislature not the judiciary. xxAppointments not made on the advice of the Judicial Service Commission (JSC).

[37] The Applicants further seek disclosure of the nature of the advice and or information given by the JSC to His

Majesty. This disclosure is directed at the Commissioners. The Commissioners did not suggest themselves for appointment. In my view disclosure ought to have been directed to the JSC who was cited as the 7th Respondent at paragraph 13.5. The Applicants have stated that there was no relief sought against the 7th Respondent. It was merely cited because of its possible interest in the issues raised in the proceedings (my emphasis). This approach was clearly wrong and unfortunate that the JSC was not called upon to respond to the Applicants' allegations. The Constitution clearly mandates the JSC at section 90 (2) as follows:

2. "The members of the Commission shall be appointed by the King on the advice of the Judiciary Service Commission."

[38] The question is whose names did the JSC submit to the

King for appointment. Alternatively what advice was given to Ngwenyama by the JSC that made him believe that the Commissioners he was appointing qualified in terms of the Constitution. Unfortunately none of the members of the JSC filed any answering affidavit in order to shed some light on this issue. Their silence in such a crucial matter is deafening and alarming. It they submitted to His Majesty a list of names of people who qualified in terms of the Constitution why have they not said so. What have they to fear if they carried out their mandate according to the dictates of the Constitution? If they gave His Majesty correct advice and he did not take it, they should say so. I do not believe that the Head of State would deliberately and wantingly breach the Constitution. He undertook to be the first defender of the Constitution on the 25 July 2006 at eSibayeni when he unveiled it to the nation and declared it to be the supreme law of the land. The responsibility for the failure to adhere to the

Constitution must be placed squarely on the JSC. Their failure to file answering affidavits stating their position reinforces this perception.

[39] Mr. Dlamini has argued that the JSC is protected from disclosing such information by section 179 of the Constitution. He goes on to state that the advice of the JSC being "Communication" to the King is protected in terms of that section and that such advice may not be disclosed or made the subject of judicial inquiry. In other words, so the argument goes, the advice is not a justice able issue. Unfortunately the section referred to does not mention the King. This is what it says:

> **Section 179 " A person shall not in any legal proceedings be permitted or compelled to produce or disclose any communication, written or oral, which has taken place between a service commission or any member or officer of that service commission, and the Government, or a line Minister, or any officer of the Government, or between any member or officer of a service commission and its chairman, or between members or officers of a service commission, in exercise of, or in connection with the exercise of, the functions of a service**

commission, unless a judge of a superior court orders otherwise.

[40] Mr. Dlamini is clearly wrong. As is evident from my emphasis a judge of a superior court is empowered to order such communication. Perhaps what Mr. Dlamini refers to is whether or not the Head of State can be compelled to state why he did not follow the advice of the JSC but we are not dealing with this enquiry in the present case. The Applicants' failure to compel the JSC to disclose the communication is their own doing and they fail on this point.

START

[41] Section 90 (5) of the Constitution requires that "members of the Commission shall be appointed for a period not exceeding 12 years without the option for renewal."

[42] The Applicants contend that one of the means of ensuring the independence of the EBC and its members is to fix the period for their appointment at its commencement. That there should be no danger of the premature termination of their appointment if their actions do not please the authorities. The appointment

of the EBC members in Legal Notice 32 of 2008 states:

> **"The members of the Commission are appointed for a period no exceeding 12 years."**

[43] It is the Applicants' submission that the legal notice fails to specify the actual period for which members are appointed. It is vague and meaningless for it can mean any period equal to or less than 12 years, whether one day, one year, five years or 12 years validity so the argument goes, requires that the action in question is reasonably capable of meaningful Constitution. See R v Pretoria Timber Co (Pty) 1950 (3) SA 163 (A) at 176 F-H; R v Jopp 1949 (4) SA 11 (N) at 13 – 14.

[44] The Applicants go on further to state that on a proper interpretation of Section 90 (5) of the Constitution, the period must be fixed for the duration of such

appointment when it is made. The only limitation permitted is that the period shall not exceed 12 years and that there is no possibility of renewal. This however, does not permit the appointment to be for an undefined or unspecified period. A fixed period would give the Commissioners independence and security of tenure. An unfixed term of office constitutes a constant threat of termination and a serious compromise to their independence. They contend that the legal notice is fundamentally flawed and und untenably vague and it falls to be declared to be unlawful and invalid.

[45] The Respondents counter-argument is that the wording of the notice is acceptable because it follows the wording of section 90 (5). In response to the challenge that the legal notice is untenably vague, the Respondents contend that the draftsmen (of legal notice) cannot be blamed for complying with the formal

wording of the enabling legislation. If any formulation is vague it must be the Constitution itself which the Applicants should have seen before the Constitution came into force. By what right do the Applicants now complain? The Respondents further state that the EBC members are protected in their tenure and may not be arbitrarily removed. The fact that the tenure may not be renewed does mean that it must be reasonably long. So if there is any doubt as to the exact term the members would be entitled to a legitimate expectation of 12 years.

[46] The term legitimate expectation was coined in Trails' case. It was born of similar uncertainty as the failure to fix any determinate. There is no need for the EBC members to have to rely on this uncertain principle when their term of office can be fixed at the beginning of their appointments. This principle is an extension of the audi rule. The EBC members would have to first

test it in court and even then there is no guarantee that they would be the victors. There is no need for them to be vulnerable. This challenge by the Applicants must therefore succeed.

Declaring all actions and decisions taken by the members of the EBC to be unlawful and invalid

[47] The above prayer was not pursued because of the provisions of the Interpretation Act, No. 21 of 1970. Section 16 states:

> "Where by law a board, commission committee or similar body, whether corporate or unincorporated, is established, then, unless the contrary intention appears, the powers of the board, commission, committee or similar body, shall not be affecte by-
>
> (a) a vacancy in the membership thereof,
>
> (b) the fact that it is afterwards discovered that there was defect in the appointment or qualification of a person purporting to be a member thereof;
>
> (c) .."
>
> (my emphasis)

Consequently, no order is made with regard to this prayer.

Provision of voter education

[48] Section 90 (7) (b) states that the functions of the EBC shall be:

> "to facilitate civic or voter education as may be necessary in between elections".

[49] The Applicants contention is that the members of the EBC have no legal right or power to exclude or preclude the Applicants from providing voter education to members of the public. One of the objects of the Trust is the provision of voter education. In support of this submission the Applicants have set out hearsay statements attributed to the second Respondents. These are inadmissible and it will serve no purpose for me to repeat them here. In Swaziland we do have an Act which amends the law of hearsay and similar to the Law of "Evidence Act 45 of 1988" of South Africa. We

still follow the old rigid common law rules which does not permit the admission of hearsay evidence. To further re-inforce their submissions, the Applicants have told of an incidence of 6 June 2008 where they tried to carry out voter education at Ka Mhlaba NCP in the Shiselweni District and members of the Royal Swaziland Police intimidated them and they were forced to abandon their meetings. The Respondents acknowledged that the section 90 (7) (b) did not give the EBC exclusive power or function to provide voter education. The Respondents submitted that it was the sole prerogative of the EBC to facilitate voter education. This meant that no one properly embark on voter education without first knocking at the door of the EBC to introduce themselves, reveal their programme and obtain the green light. With the authority to facilitate it is the business of the EBC to know persons providing voter education and maintain oversight on the credibility of those persons and the programmes they

offer the public: otherwise subversive elements may be allowed free rein with counter productive results.

[50] Mr. Dlamini's argument is totally at variance with the constitution. Section 24 Protection of Freedom of Expression; section 25 Freedom of Assembly and Association; section 26 Protection of Freedom of Movement. These sections have their own limitations which even the EBC would have to comply with in its stated voter with regard to voter education.

[51] In light of the aforegoing application succeeds to the following extent:

1. The purported appointment of the second, third fourth, fifth and sixth respondents as members of the Elections and Boundaries Commission (the first respondent) is hereby declared unlawful and invalid.

2. That the Elections and Boundaries Commission is declared not constituted lawfully.

3. That the second, third, fourth, fifth and sixth

respondents are hereby declared not eligible for appointment as members of the Elections and Boundaries Commission.

4. No order is made in respect of this prayer

5. The first respondent and its members are hereby declared

Finally, counsel for both the Applicants and Respondents are hereby commended for their invaluable assistance to the Court in their will prepared presentation and extensive research in respect of both texts and cas authorities

Q.M. MABUZA -J