# IN THE HIGH COURT OF SWAZILAND

**HELD AT MBABANE CASE NO. 341/07 & 764/07**

**In the matter between:**

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| **KHANYAKWEZWE ALPHEUS MHLANGA** | **APPLICANT** |
| **SWAZILAND POLICE UNION** | **APPLICANT** |
| **AND** | |
| **CORRECTIONAL SERVICES UNION** | **APPLICANT** |
| **VERSUS** | |
| **THE COMMISSIONER OF POLICE** | **1ST RESPONDENT** |
| **THE PRIME MINISTER OF SWAZILAND** | **2ND RESPONDENT** |
| **THE COMMISSIONER OF LABOUR** | **3RD RESPONDENT** |
| **ATTORNEY GENERAL** | **4TH RESPONDENT** |
| **CORAM** | **ANNANDALE J** |
| | **MABUZA J** |
| | **MAMBA J** |
| **FOR APPLICANTS** | **MESSRS TR MASEKO** & PM SHILUBANE |
| **FOR RESPONDENTS** | **MESSRS M FAKUDZE** & M. VILAKATI |

## JUDGEMENT

## 31ST JANUARY, 2008

MAMBA J:

[1] There are two cases before the court. These cases were consolidated and heard together because the issues involved and the relief sought in both of them are the same.

[2] The Applicants under Case No. 341/2007 are Khanyakwezwe Alpheus Mhlanga and the Swaziland Police Union. Under Case No. 764/07, the Applicant is the Swaziland Correctional Services Union.

[3] The Swaziland Police Union is an association of Police Officers who are members of the Royal Swaziland Police Force Services. The other which is referred to above is an association of members of His Majesty's Correctional Services Officers whose aims and objectives are *inter alia* according to its constitution "to represent, advocate, defend and promote the welfare of [its] members through social dialogue... to represent its members in dispute and conflict management at the work place [and] to bargain collectively on behalf of its members."

[4] The Police Union has, in general terms, the same aims and objectives. They are in others words, Workers' Unions and I shall hereinafter refer to both of them as the Applicants. The Applicants were formed in the first quarter of 2007.

[5] The respondents are the Commissioner of Police and the Commissioner of His Majesty's Correctional Services, The

Commissioner of Labour, The Attorney General and the Prime Minister

[6] After their formation, the Applicants separately applied to the Commissioner of Labour to have them registered. The Applicants relied on section 32 of the Constitution in their respective applications. Both applications were refused by the Commissioner who stated that section 3 of the Industrial Relations Act 1 of 2000 (as amended) (hereinafter referred to as the IRA) specifically excluded or prohibited the registration of trade unions by members of the Royal Swaziland Police Force, His Majesty's Correctional Services and the Umbutfo Swaziland Defence Force. The Commissioner advised the Applicants that as there was an apparent conflict between the provisions of the Constitution and the provisions of the IRA, he was not the person best placed or equipped to resolve that conflict. It is this reply by the Commissioner of Labour that has prompted this application wherein the Applicants seek *inter alia*, the following reliefs:

> "1. Declaring section 3 of the IRA to be null and void and of no force or effect in law on the ground that it is inconsistent with the Provisions of the Constitution as the Supreme law of the land.
>
> 2. Declaring section 18 of the Prisons Act 40 of 1964 to

be null and void and of no force or effect in law on the ground that it is inconsistent with the provisions of the Constitution as the Supreme law of the land."

[7] Also sought to be declared null and void and of no force and effect is, by extension or necessary implication, regulation 19 of the Police regulations made under the Police Act Number 29 of 1957 (hereinafter referred to as the Police Act).

[8] The applications are opposed by the respondents who have argued that the laws and regulations sought to be struck down as unconstitutional are in fact not inconsistent with any of the provisions of the Constitution. That is, as I understand it, the sum total of the respondents' defence herein.

[9] The issues raised in this application relating to the provisions of our young Constitution have, as far as I know, never been the subject of adjudication before in this jurisdiction. This court is therefore treading on virgin territory. My task has, however, been eased by the very comprehensive heads of argument and authorities that were filed by Counsel on both sides. Their industry and assistance is much appreciated.

[10] Submissions were made and completed on the 25th May 2007 and judgement was reserved. That is a long time ago. The public and in particular the litigants deserve an apology for this. As a member of the collective, *mea culpa*. I regret that judgement was not delivered before today. It was all due to certain administrative oversights within this Court.

[11] The starting point is, in my judgement, section 32 (2) of our Constitution which lays down that:

> " (2) A worker has a right to-
>
> (a) freely form, join or not to join a trade union for the promotion and protection of economic interests of that worker; and
>
> (b) collective bargaining and representation."

Closely linked or associated with these provisions of the Constitution is article 25 of the Constitution which I quote here in full:

> ¡°25 (1) A person has a right to freedom of peaceful assembly and association.
>
> (2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and association, that is to say, the right to assemble peacefully and associate freely with other persons for the

promotion or protection of the interests of that person.

(3) Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b)That is reasonably required for the purpose of protecting the rights of freedoms of other persons; or

(c)That imposes reasonable restrictions upon public officers,

Except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society.

(4) Without prejudice to the generality of subsection (2), nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

(a) For the registration of trade unions, employers organizations, companies, partnerships or cooperative societies and other associations including provision relating to the procedure for

registration, prescribing qualifications for registration and authorizing refusal of registration on the grounds that the prescribed qualifications are not fulfilled; or

(b) For prohibiting or restricting the performance of any function or the carrying on of any business by such association as is mentioned in paragraph (a) which is not registered.

(5) A person shall not be compelled to form or belong to an association."

[12] Based on the above provisions, the Applicants argue that, first, their members are human beings, and are therefore entitled to all the fundamental human rights guaranteed in the constitution. Secondly, their members are workers and as such are entitled as per section 32 (2) of the Constitution to freely join and be members of a trade union which is "for the promotion and protection of their economic interests and collective bargaining and representation." Thirdly, Applicants argue that by being employed as Police officers and Prison Warders, they have not ceased being human beings – they have not, in other words, lost their humanness-nor are they "a special breed of human nature simply because they are members of the security forces." I shall return to this argument later in this judgement.

[13] The respondents have based their defence or argument mainly on the provisions of section 39(3), 39(6) and 25(a) of the Constitution.

[14] These provisions are as follows:

> ¡°39(3) In relation to a person who is a member of a disciplined force of Swaziland, nothing contained or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 15, 17 or 18. …

(6) In this Chapter, unless the context otherwise requires …
¡°disciplinary law" means law regulating the discipline of any disciplined force; -
¡°disciplined force" means-

(a) an air, military or naval force;

(b) the Swaziland Royal Police Service;

(c) the Swaziland Correctional Services.

"member" in relation to a disciplined force, includes any person who, under the law regulating the discipline of that force, is subject to that discipline;"

[15] The respondents aver that the Applicants, whose members are members of the Disciplined Forces, are prohibited by law to form or join a trade union and that this prohibition or restriction is sanctioned by the Constitution. If the Constitution sanctions the prohibitions, the

respondents argue, the pieces of legislation which provide for these prohibitions, may not be said to be inconsistent with such Constitution.

[16] Section 18 of the Prisons Act provides that :

> ¡°18 (1) A prison officer who is a member of a trade union, or any other association, the object, or one of the objects, of which is to control or influence salaries, wages, pensions or conditions of service of prisons or conditions of service of prison officers, or any other class of prisons, shall subject to the laws relating to the public service be liable, at the discretion of the Minister, to be dismissed from the service and to forfeit any rights to a pension or gratuity.

(2) The decision of the Minister that a body is a trade union or an association to which this section applies shall be final.

(3) This section shall not be deemed to prohibit prison officers from becoming members of a prison officers staff association as approved by the Minister by notice published in the Gazette.”

[17] And regulation 19 of Police regulations states that:

> “19. It shall not be lawful for a membership of the force to become, or after the expiry of one month after the promulgation of this regulation to remain a member of any political association or any trade union or any association having for its objects, or one of its objects the control of or influence on the pay, pensions, or conditions of service of the force:
>
> Provided that a member of the Force may become a

member of an association the membership of which is, by its Constitution, confined solely to members of the Force."

[18] Section 3 of the IRA provides that:

> ¡°3 This Act apply to employment by or under the Government in the same way and to the same extent as if the Government were a private person but shall not apply to:-
>
> (a) Any person serving the Umbutfo Swaziland Defence Force established by the Umbutfo Defence Force Order, 1977;
>
> (b) The Royal Swaziland Police Force; and
>
> (c) His Majesty's Correctional Services established by the Prisons Act ..."

[19] These are the 3 pieces of legislation that the Applicants want to be declared null and void and of no force and effect in law. The Applicants argue that these laws are inconsistent with those provisions of the Constitution which guarantee the right of every human being to join an association of his own choice; or more specifically, the freedom of every worker to freely join and be a member of a trade union.

[20] In answer to the above, the Respondents have argued that the very same Constitution in subsection 3 of section 39

stipulates that no disciplinary law or regulation of the disciplined forces may be held to be inconsistent with the provisions of Chapter 3 of the Constitution other than section 15, 17 and 18. The rights or freedoms alleged to be violated fall under the said Chapter. The argument is taken further by alleging that, in as far as it pertains the Prisons department, the provisions of section 18 of the Prisons Act- prohibiting membership of a trade union – constitute a disciplinary measure.

[21] In argument before us both parties were, I think, in agreement that:

(a) The Constitution is the Supreme law of the land and consequently if the 3 pieces of legislation sought to be declared invalid are adjudged to be inconsistent with the Constitution, then they must, to the extent of such inconsistency be declared unconstitutional and null and void.

(b) The Swaziland Constitution has a Bill of Rights guaranteeing fundamental human rights and freedoms to all persons it governs, and the constituent members of the applicants are some of such human beings.

(c) As per the Constitution, Swaziland is an avowed open, free and democratic country.

(d) Fundamental rights provisions in a Constitution must be given a broad and generous interpretation.

(e) Some fundamental rights and freedoms are not absolute and may be legitimately constitutionally restricted or limited where necessary and under reasonable circumstances even in a Constitutional Democracy.

[22] I do not think it would serve any useful purpose to burden this judgment with an excursus on the meaning of the various concepts such as fundamental human rights and or freedoms, free or open and Democratic Society or State, Broad and Generous interpretation and the Supremacy of the Constitution.

[23] In determining the issues involved herein, I shall bear in mind what **GAUNTLETT JA said in ATTORNEY GENERAL v MOPA (2002) AHRLR 91 (LeCA 2002)** referring with approval to what was said by the Constitutional Court in South Africa in the case of **STATE v MAKWANYANE 1995 (3) SA 391** that:

> "A Constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different

organs of state, including Parliament, the executive and the court, as well as the fundamental rights of every person which must be respected in exercising such powers… [The learned Judge continued and said]

¡°We went on (by reference to other jurisdictions) to stress the consequential fact that constitutional instruments are interpreted in a different way from ordinary statutory provisions. The interpretation of rights provision entails, we said, a broadly purposive approach, involving the recognition and application of constitutional values and not a search to find the literal meaning of statutes. This, however, remains an exercise to be undertaken within limits. We quoted in this regard with approval the judgement of KENTRIDGE Ag J (speaking for a unanimous court) in State v Zuma 1995 (2) SA 642 (CC):

We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language used by the law giver is ignored in favour of a general resort to "values" the result is not interpretation but divination."

I shall not attempt to divine what our Constitution says in the sections under consideration in these applications.

[24] The rights of workers as enshrined in section 32(2) of the Constitution, seems on the face of it to be absolute in the sphere of the areas covered thereby. The section is specific as to who it refers; namely human beings who are workers, generally. The freedom of association is also in general terms specifically provided for in section 25 of the Constitution. Closely connected with this right, is the right or freedom of expression in section 24 of the same

Constitution. Section 20 provides for the right to equality before and under the law in all spheres of life. These rights and freedoms are contained in Chapter 3 of the Constitution.

[25] Section 39 is the last section under Chapter 3 and generally lays down or prescribes the boundaries and limits within which the rights and freedoms in that Chapter are to apply. It provides the exceptions and the people exempted or excluded from and the extent and scope to which those rights are to be applied and exercised or enjoyed.

[26] For instance, section 39(2) as quoted above provides that “reasonable requirements as to the communication or association with other persons or as to the movement or residence of those officers” may be included in the terms and conditions of service of public officers notwithstanding the equality provisions in section 20, the freedom of expression guaranteed in section 24 and the freedom of assembly and association stated in section 25 of the Constitution. The operative or defining phrase there is “reasonable requirements.” This subsection refers to public officers only. But can it be said then, in the circumstances, to be either in conflict with the general guarantees stated in sections 20, 24 and 25 or to be discriminatory of or against Public officers? I do not think so.

[27] These constitutional provisions acknowledge or take cognisance of the fact that public officers qua public officers at times have access to and or are entrusted with sensitive and confidential State information in the performance of their public duties. In their capacity as public officers, they are not ordinary employees. Whilst they remain human beings and workers, their office is such that it is different from or dissimilar to any other ordinary office that it may be deserving of special treatment, commensurate with the dictates or needs of each particular situation.

[28] This reasoning applies with equal force, in my judgement, to the provisions of Section 39(3). These provisions prescribe the persons to whom the right applies or excludes those to whom it does not apply and stipulates the circumstances wherein such exclusion applies; namely, under a “disciplinary law”.

[29] Members of the applicants are members of the Disciplined Forces. This is common cause. They are human beings. They are workers. But they are special too. Their name or appellation says it all. They are the Disciplined Forces and the rest of us, the Civilian Population. Their office and the work they do and how they do it, sets

them apart. They are law enforcement agents. They are entrusted with the responsibility to maintain law and order. The Police have the onerous obligation or duty to protect all of us. Their shorter Siswati motto captures this rather well; *"Silihawu LeSive"*-We are the Shield of the Nation. In short, theirs is a specialized, highly sensitive national or public office.

[30] For the aforegoing reasons, I hold that there is no conflict or discord between the provisions of section 32(2) and section 39(3). The submission that section 39(3) takes away that which section 32(2) gives is in my view incorrect. That being the case, there is no need for me to embark on an exercise of harmonizing the two sections.

[31] The provisions of section 38 of the Constitution are instructive in this respect. That section provides that:

> "38 Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-
>
> (a) life, equality before the law and security of person;
>
> (b) the right to fair hearing;
>
> (c) freedom from slavery or servitude;
>
> (d) the right to an order in terms of section 35(1); and
>
> (e) freedom from torture, cruel, inhuman and

degrading treatment or punishment."

[32] My reading of this section is that the enjoyment of the rights and freedoms listed herein is absolute and not derogable; the rights and freedoms are themselves non derogable. As the right or freedom of association is not in the set above, the Constitution impliedly acknowledges that this right or freedom may be limited or it is not one of those rights or freedoms that may suffer no exception. In the case of **YOUNG, JAMES AND WEBSTER v THE UNITED KINGDOM**, a judgement of 13 August, 1981, the European Court on Human Rights stated that; "the right to form and to join trade unions is a special aspect of freedom of association…"

[33] Section 39 (3)of the Constitution makes whatever is "contained or done under the authority of a disciplinary law" of a Disciplined Force not to be inconsistent with the provisions of Chapter 3 of the Constitution, other than the three sections referred to above. The net effect of all this is that the Constitution (per s39 (3)) says that whatever is done under or contained in a disciplinary law of a Disciplined Force shall be deemed to have been in accordance with the Constitution or at least not inconsistent with the provisions of Chapter III thereof.

[34] The applicants have not denied that section 18 of the Prisons Act and regulation 19 of the Police Act constitute a Disciplinary law of a Disciplined Force. They have, however, sought to have these laws set aside on the grounds that they are “draconian… and colonial and archaic and not consistent with an open, just, honest and democratic society,” which Swaziland is.

[35] This may be true but the Constitution does not share this view. It has said whatever is contained in or done under those laws is or shall not be held to be inconsistent with the provisions of Chapter III of the Constitution. It follows, I think, that if the prohibition or restriction may not be inconsistent with the Constitution, whether the prohibition is demonstrably justified in a free and democratic society or reasonable, does not come into the reckoning.

[36] For these reasons, I would dismiss the Applicants’ contentions on these two pieces of legislation. Because of this conclusion it is not necessary for me to consider the further arguments pertaining to section 3 of the IRA.

[37] I would therefore dismiss both applications. Counsel were in agreement that we should make no order as to costs.

That is the order.

[38] As an epilogue to this judgement, I make the following observations:

1. There is a lot to be said for or in favour of according all workers without exception or distinction to freely join or become members of a trade union of their choice. This would, *inter alia*, give more and effective meaning to the Bill of Rights contained in Chapter 3 of our Constitution and accord with Swaziland's obligations under the various international instruments to which she is signatory.
2. The 3 pieces of legislation that were under the spot light in these applications, need to be reconsidered as a matter of urgency.
3. Perhaps, as a starting point, consideration should be given to allowing members of the Disciplined Forces to form and join and be members of a trade union of their choice but without the right to go on strike. This, I believe, is the current position in England regarding Prison Officers.

**MAMBA J**

**I AGREE.**

**ANNANDALE J**
**I DISAGREE. MY REASONS WILL FOLLOW IN DUE COURSE.**

**MABUZA J**