IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 4548/08**

In the matter between:

SPHASHA DLAMINI

JAN SITHOLE

VINCENT NCONGWANE

WANDILE DLUDLU

DR. ALVIT DLAMINI

MARIO MASUKU

AND

THE COMMISSIONER OF HIS MAJESTY'S CORRECTIONAL SERVICES

THE ATTORNEY GENERAL

CORAM **ANNANDALEJ**

MAMBA J

MONAGENG J

FOR APPLICANTS **MR TR MASEKO**

FOR RESPONDENTS **MR S KHULUSE**

JUDGEMENT April,

2009

THE COURT:

[1] The 6th Applicant, Mr. Mario Masuku is the President of a political party known as the People's Democratic Movement otherwise known as PUDEMO and hereinafter referred to as such. He is a Swazi citizen and is currently in detention at the Matsapha Central Prison facing a charge under the Suppression of Terrorism Act Number 3 of 2005. This is the initial charge, but it would appear that after his attorneys complained to the office of the Director of Public Prosecutions that Mr Masuku had been wrongly charged as the Suppression of Terrorism Act came into effect after the 27th September, 2008, that being the date upon which the offence was allegedly committed, the office of the Director of Public Prosecutions served him with an alternative charge under the Sedition and Subversive Activities Act. The status and or propriety of these charges is not in issue in these proceedings but we mention them for the sake of completeness of the reason why Mr Masuku is in detention.

[2] The first Applicant, Siphasha Dlamini is the Secretary General of PUDEMO whose youth wing, the Swaziland Youth Congress is headed by the 4th Applicant as its President.

[3] Mr Jan Sithole and Mr Vincent Ncongwane represent two of the major trade union movements in the country; the Swaziland Federation of Trade Unions and the Swaziland Federation of Labour and they are their respective Secretaries General. They are the 2nd and 3rd Applicants herein, respectively.

[4] The 5th Applicant, Dr Alvit Dlamini is the President of a Political Party known as the Ngwane National Liberatory Congress, which operates in Swaziland and has its principal place of business in Mbabane.

[5] The two respondents are the Commissioner of Correctional Services (formerly known as Prisons) and the Attorney General and are cited herein in their nominal

capacities as the agents of the Government of the Kingdom of Swaziland.

[6] None of the Applicants herein, bar the 6th Applicant have been charged with any criminal offence and they are not under any detention of any sort. They have launched this application seeking what in effect is a declaratory order that it be declared that they, "... the next of kin and other persons who may be reputable friends, associates and colleagues whether from within or without Swaziland, outside the categories of immediate next of kin, legal representatives or doctor" of the 6 Applicant have a right to have reasonable access and confidentiality to the 6th Applicant during his incarceration. They have all said they regard the sixth applicant more than just another fellow citizen but as a brother. They all have worked with him, so they say, for many years in what is referred to in their papers as, according to the second applicant, "the struggle for social justice and for the betterment of the lives of the many ordinary citizens of Swaziland" or according to the second and third applicants, "the struggle for the full democratization of Swaziland." Theirs is purely an act of comradery. (As would be expected, the 6th Applicant supports this application).

[7] It is perhaps appropriate that we should mention at this stage that before the Application was filed in court, some people, including some of the Applicants herein, who wanted to visit the 6th Applicant in jail were refused permission to do so by the 1st Respondent. In response to a letter from the 6th Applicant's attorneys seeking clarification on the 1st Respondent's stand on such visits, the 1st

Respondent, by letter dated 20th November, 2008 stated as follows:

> "Kindly be informed that in dealing with the issue of visits to our Correctional Institutions, we adhere to section 16 (6) (b) of the Constitution of the Kingdom of Swaziland, 2005. In terms of this section, the next of kin, legal representative and personal doctor of the arrested or detained person shall be allowed reasonable access and confidentiality to him/her. Therefore, all persons not falling within the ambit of the aforementioned section may be allowed into the prison at the discretion of the officer in charge of the prison."

[8] The respondents have substantially maintained this position in their opposition

to this application. In paragraph 8.1 of the first respondent's opposing affidavit, the Commissioner states that besides the above cited constitutional provisions, his refusal to allow visits by persons other than those enumerated therein,

> "has been due to other factors such as the safety of the accused person coupled with the duty of care the state bears towards the accused, interest of society in seeing to it that criminal suspects are brought to book and prison rules and regulations which empower the officer in charge to put in place measures that will ensure the smooth flow of the operations of the prison having regard to the safety of inmates and everyone concerned, as well as to bring to the attention of all concerned the seriousness of the menace of terrorism and the necessity to ruthlessly suppress it wherever it shows its ugly head."

[9] The final bit in the above quotation by the officer in charge of the prison where the 6th Applicant is being kept is a most unfortunate aberration and is grossly misguided. The very idea of acting ruthlessly on detainees charged under any offence is totally unacceptable. The duty to punish those who have fallen foul of the law resides with the courts and not the Prison Warders or those in charge of prisons. Convicts go to prison and lose some of their freedoms and liberties for the duration of their incarceration, as punishment. The 6th Applicant has, in any event, not been convicted of the charges he is facing. He is still innocent until proven otherwise in a court of law. Un-sentenced detainees are not imprisoned as punishment or for punishment. There can therefore be no question of him being punished at this stage, let alone by the prison authorities.

[10] Article 16 (6) (b) of the Constitution of this country, which is the main section under the spotlight in this application provides as follows:

> "16(6) Where a person is arrested or detained ...
>
> (b) the next-of-kin, legal representative and personal doctor of that person shall be allowed reasonable access and confidentiality to that person..."

Section 93(1) of the Criminal Procedure and Evidence Act 67 of 1938 also provides that:

"93(1) Subject to any law relating to the management of prisons or gaols, the friends or legal advisers of an accused person shall have access to him." Subsection 2 of section 93 deals with the right of the detained person

to be assisted by his or her legal advisor during a preparatory

examination.

[11] The Respondents argue that article 16(6) (b) lays down the three categories

of persons who have a right to visit a prisoner and these are the next-of-kin, the doctor and the legal representatives. Any other persons falling outside these three categories have no such right and may only do so at the mercy or absolute discretion of the prison authorities. That is the nub of the objection by the Respondents.

[12] This constitutional provision does not appear to us to be an exclusion clause. There are no words in that section or anywhere else in the Constitution that suggest otherwise. If the drafters of the Constitution intended to limit this right to those mentioned therein, they would have clearly and unambiguously said so. For instance the word "only" would have been inserted at the beginning of the relevant subsection or the sentence would have read:

> "No person other than the next-of-kin, legal representative and personal doctor of that person shall be allowed access and confidentiality to that person." (The underlined words have been inserted by us).

[13] We observe that section 93(1) of the Criminal Procedure and Evidence Act mentions the friends of the detainee but not the next-of-kin or the personal doctor of such person. There is, however, no conflict between the aforesaid constitutional provisions and this section. Rather, the two provisions are complementary. But again, the sum total of both, does not constitute an exhaustive or closed set.

[14] According to the OXFORD UNIVERSAL DICTIONARY ILLUSTRATED (Revised 3rd Edition) Vol. I **'friend'** is defined as "one joined to another in mutual benevolence and intimacy, ...a mere acquaintance, ... a kinsman or relation, ... one who wishes (another, a cause etc) well; a sympathizer, patron, or supporter,... one not an enemy; one who is on good terms with another, not hostile or at variance; one who is on the same side in warfare, politics, etc".

The term 'friend' therefore covers a wide spectrum or manner of people of goodwill, including ones doctor, lawyer or next of kin, spouse or partner or religious counsellor. The very restrictive and narrow interpretation sought to be placed by the Respondents on section 16 (6) (b) of the Constitution seems to ignore the fundamental principle that a constitutional provision should be read in favour of rather than against the granting or restricting of a right. A broad liberal

or generous purposive approach has to be employed. A restrictive approach - confining the section to only the literal and specified persons stated therein would limit the detainee's visitation rights to such persons. It would exclude for instance, the detainee's business partners or associates or work-mates. It would also exclude the detainee's witnesses and friends.

[15] Commenting on the South African Constitutional provisions on the issue **Professor Frans Viljoen** in Bill of Rights Compendium at

5B-42 states that:

> "next-of-kin" should be given a broad interpretation to include members of the "extended family", prevalent in indigenous family relations in South Africa. Enforcement or section 35 (2) (f) is not made dependant on the availability of state resources and should be interpreted to grant the widest access possible. The four categories are joined together by the word "and" (and not "or"), implying that a visit by anyone from any one of the categories does not exclude visits by anyone from another category."

Similar pronouncements were made by the South African Constitutional Court in S v Zuma 1995(2) SA 842 (CO at paragraphs 15-16 where the court referring to the provisions of the then interim Constitution stated that:

> "Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.... The caveat is of particular importance in interpreting section 25(3) of the Constitution."

[16] Perhaps one of the most basic considerations to bear in mind in the interpretation and enforcement of basic fundamental Human Rights is that these rights are interlinked and intertwined and they frequently overlap. No individual or single right has or enjoys an independent existence. Each of the several rights and freedoms

contained in the Bill of rights must therefore be read, in the majority of cases, together or in conjunction with one or more other rights. For example, the detainee's right to be visited by his legal representative is based on and linked to and with his right to a fair trial, which is the ultimate aim or foundation of our justice system. The right of a detainee to have access to his legal representative, and to have adequate or sufficient time and opportunity to prepare for his trial,

must surely also encompass the right to have access to and consult with his witnesses. These need not fall into one of the categories listed in article 16(6)(b) of the Constitution. A denial of the right to consult with ones witnesses would be a denial to a fair trial. In **Golder v UK Government,** a judgement of the European Court on Human Rights delivered on 21st February, 1975 the court stated that: "It would be inconceivable ... that article 6 and 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantee, that is, access to a court

These remarks are, mutatis mutandis, apposite in this case. The right to a fair trial is backed up or supported by these pre-trial post-arrest rights and guarantees, amongst which is the right under consideration herein.

[17] The above example illustrates, in our view the interdependence of most basic Human Rights and also illustrates the fallacy and absurdity that is involved in the Respondents' arguments herein that because none of the applicants falls into any of the categories stated in article 16(6)(b), this application should fail. The content and scope of the right is much wider and co extensive than the literal interpretation advocated thereto by the Respondents. It is a right to communicate in a restricted environment and on matters not too remotely connected with the detainee's captivity, - to communicate with the world outside of his place of captivity. A Constitution is, generally speaking, considered to be a flexible document and it is the duty of court in interpreting its provisions, to maintain this flexibility. It is this flexibility that allows it to be *"a document for all seasons".* We do not see any particular advantage to be gained either in precision, clarity, lucidity or simplicity in referring to such of the detainee's friends as "reputable", "genuine", 'family', or 'real'. The rights of all these people to visit the prisoner or detainee are of course subject to the right of the detainee to refuse to be visited by any of them. The pre-trial procedural rights are a pre-requisite for a fair trial: "...the whole makes up the right to a fair hearing." (**Golder's case** supra).

[18] For the aforegoing, the conclusion is inescapable that what is set out in article 16 (6) (b) are the minimum conditions rather than the exclusive category of who has a right to visit the prisoner. This conclusion finds support in **Johan de Waal et al** : THE BILL OF RIGHTS HANDBOOK (3rd ed. 2000) at 510 where the authors state that:

"The common law principles may afford more protection to arrested, detained and accused persons than the Constitution, but the common law may not provide less protection than that guaranteed by the Constitution. In principle, the Constitution must therefore be interpreted independently of the common law to establish a minimum standard against which the common law may be tested."

(We have added the emphasis).

[19] The United Nations General Assembly Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (9/12/75) refers to standard minimum rules for treatment of Prisoners of which regulations 37 and 92 thereof provide as follows:

"37 Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals both by correspondence and by receiving visits.

92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution."

Commenting on the above rules Essop M Patel and Chris Watters, Human Rights at 342, submit that:

"1 [The above] rules are not intended to describe a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions. 2 In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations."

[20] A close and careful consideration of our Constitution and all the literature and authorities consulted and cited herein make it plain to us that the categories of persons mentioned in article 16(6) (b) of the

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Constitution constitute or make up the basic or standard minimum conditions rather than the exclusive categories of persons who have a right to visit a detainee. Consequently we allowed the application and granted the following order:

> "(1) The first to fifth Applicants, the next-of-kin, associates, friends, colleagues, legal representatives, religious counsellors and medical doctors of the 6th Applicant have a right to have reasonable access and confidentiality to him whilst he is in prison, subject to existing prison regulations relating to visitors.
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> (2) The Respondents are to pay the costs of the Application.
>
> (3) Reasons for judgement shall follow in due course.

[21] These then, are the reasons for judgment.

ANNANDALEJ

MAMBA J

MONAGENG J