IN THE HIGH COURT OF SWAZILAND

Case No. 132/2013

In the matter between:-

MARWICK T. KHUMALO N.O	**1st Applicant**
COMMON WEALTH PARLIMENTARY ASSOCIATION OF SWAZILAND	**2nd Applicant**
THE EXECUTIVE COMMITTEE OF THE COMMONWEALTH PARLIAMENTARY ASSOCIATION OF SWAZILAND	**3rd Applicant**

and

AUDITOR GENERAL	**1st Respondent**
CLERK OF PARLIAMEMT	**2nd Respondent**
CHAIRPERSON PARLIAMENTARY SERVICE BOARD	**3rd Respondent**
ATTORNEY GENERAL	**4th Respondent**
MINISTER OF FINANCE	**5th Respondent**

Neutral citation: *Marwick T. Khumalo N.O. and 2 others v Auditor General and 4 others* (132/13) [2013] SZHC 56 (6th March 2013)

Coram: HLOPHE J

For the Applicants: Mr. Z. D. Jele

For the Respondents: Mr. S. Gama

Heard: 21st and 25th February 2013

Delivered: 6th March 2013

Summary:

Application proceedings to declare audit of the second Applicant by Auditor General illegal or alternatively to set aside report on the basis that Applicants unreasonably refused an extension for two weeks –Section 207 (3) and (4) of the Constitution of Swaziland considered alongside section 13 (3)of the Audit Act 4 of 2005 –Effect of the said sections discussed –Effect of a submission to being audited by the applicants taken together with an agreement to audit the second Applicants affairs considered – A party to proceedings not allowed to approbate and reprobate –Whether second Applicant a private entity – Application to strike out certain averments introduced for the first time on the basis of a Replying Affidavit dealt with –Whether case made for review – Applicants given opportunity to respond to issues or weaknesses raised in Management Report but not utilizing opportunity. Applicants not entitled to the said extension –Application dismissed with costs.

JUDGMENT

[1] The Applicants who comprise the chairman of the Commonwealth Parliamentary Association of Swaziland, which is the second Applicant herein, and the executive committee of the latter, instituted application proceedings under a certificate of urgency seeking the following reliefs:-

(a) Dispensing with the rules, forms and manner of service and enrolling this matter to be heard as one of urgency.

(b) Condoning the Applicants for none compliance with the rules, forms and manner of service.

(c) That a rule nisi do hereby issue calling upon the Respondents to show cause on a date to be fixed by the above Honourable court why an order in the following terms should not be made final:

(i) The first Respondent is hereby interdicted and or restrained from releasing the audit report about the Applicants to any Government department and /or Cabinet and /or Statutory organization and /or third parties.

(ii) The first Respondent does not have the power to audit the affairs of the Applicants and therefore the audit report prepared by the first Respondent is hereby declared invalid and (sic) set aside.

(iii) The audit report prepared by the first Respondent is hereby reviewed and set aside.

(iv) Costs of suit.

(v) Pending finalization of the matter, prayer 3.1 is to operate with interim and immediate effect.

[2] The matter came before me on the 1st February 2013 whereupon an undertaking was made by Respondent's counsel that they would not distribute or release the final report pending finalization of the matter, which was then set for hearing the following week, the 7th February 2013, with the time limits having been set on when the subsequent papers were to be filed by the parties going forward.

[3] I must say that the undertaking referred to above which was a result of consensus between the parties counsel, obviated the need for the court to determine whether or not the Applicants met the legal requirements entitling them to an interim relief or order *qua* the rules of court considered together with the relevant applicable principles.

[4] Despite the matter having been set down to proceed on the 7th February 2013, the Respondents were not able to file their opposing or answering affidavit. I was informed that it had already been agreed between counsel that the undertaking made by the Respondent was to be extended pending finalization of the matter. This was in the absence of counsel for the Respondents Mr. Gama, with Applicant's counsel being the one who communicated the terms of their agreement to the court. Mr. Jele who appeared for the Applicants further made an application that the matter be referred to the uncontested motion of the following Friday. I found this application to be strange as it was effectively

seeking that a matter with which I was seized as the court, had to be moved from the court allocated same and given to another court. Upon enquiring from Mr. Jele why the matter was to be postponed to the uncontested motion concerned, he said the purpose was to have time limits and hearing dates of the matter set before the Judge who would be presiding in such motion court. Normally such matters (urgent application) would be referred to the Registrar for him to find an available Judge if one before whom it was set could not hear it. I can only clarify that when Mr. Gama eventually appeared in court on a subsequent day, he denied that their agreement entailed the postponement of the matter to some motion court but merely a postponement to enable them file the appropriate papers.

[5] Not persuaded by the reasons behind the application I declined it and instead directed that the matter be referred to the Registrar for him to place it before an available Judge taking into account the urgency pleaded. I actually so ordered to discourage parties from embarking on what has come to be known as forum shopping, where parties would choose for themselves Judges to hear their matters.

[6] I was later handed the file by the Registrar to continue with the matter, who clarified he had already allocated the matter to me pointing out that I was seized with the matter. Given that it was an urgent application, I called the parties for the allocation of a hearing date including the fixing of time limits for the filing of the necessary pleadings. This I did on the 12th February 2013. It was agreed that the matter proceeds on the 19th February 2013 with all the pleadings having had to be filed by that

date. The matter ended up not proceeding on this date however after a request was made by the Applicants and granted, postponing it to the 21st February 2013, allegedly because Applicants' counsel was indisposed.

[7] There was however later filed by the Applicants, for hearing that same day an urgent interlocutory application in terms of which there was sought an order joining the Honourable Minister for Finance in the proceedings. It was said that the joinder of the said Minister was prompted by the opposing affidavit which had made it clear that the report whose release was sought to be interdicted had already been released to the Minister who was meant to table it in Parliament anytime in keeping with the procedure on such reports. This order was sought with interim effect pending finalization of the matter.

[8] The amended prayer for the interdict sought, which now included the Minister of Finance was couched in the following terms:-

> *"Interdicting and restraining the Minister for Finance from distributing and/or circulating and/or tabling in the House of Parliament the Audit report into the Swaziland Branch of the Commonwealth Parliamentary Association received from the Auditor General pending finalization of the review application brought by the applicants."*

[9] When the matter was called before me, I was informed by both counsel that there was no objection to the grant of the joinder sought even though the parties were not agreeing on the amended prayer for the

interdiction of the Minister for Finance from releasing the report to what I will loosely term third parties. The Respondents indicated they had no difficulty with the undertaking they had hitherto made being extended in its initial form but were not agreeable to a grant of the amended interdict relief being sought particularly in the manner in which it was couched and the possible effect it had. The parties eventually agreed that I did not have to determine the grant or otherwise of the amended prayer sought against the minister for finance as they had reached consensus that the undertaking as initially made by the Respondents would now include the Minister for Finance who would also not release the Audit Report. This route was more a practical approach inspired by the fact that the hearing of the matter was only two days away at the time.

[10] The summary of the facts as revealed in the pleadings, particularly the correspondence relied upon by the parties are that sometime around May 2012, the first Respondent, in exercise of what it termed its statutory powers, embarked on the audit of Parliament. It was during this audit, according to the first Applicant, that the first Respondent wrote to him as the chairman of the second Applicant, demanding certain documents for purposes of audit of the second Applicant's affairs. The Applicants objected to such a demand stating that the second Respondent was an independent voluntary association which although having a relationship with Parliament in so far as all its members were members of Parliament, was independent of Parliamentary Control or even of Government. In fact it was contended that whereas the Government of Swaziland did from time to time

donate or contribute some money into the coffers of the second Applicant, that did not give it the right to audit the finances of the second Respondent because its position was not different from that of other contributors or donors. In fact in the letter of the 8th May 2012, annexure "MK 4" written by the first Applicant, he went on to clarify that he was no controlling officer of a Governmental ministry, which according to him is the one the first Respondent was entitled to audit. It was stated in that same letter that the intended audit was politically motivated as the letter had been copied to the Ministry of Finance.

[11] It was contended further that the second Respondent was a creature of its Constitution, which did not provide for it to be audited by the first Respondent but that it would be audited by auditors appointed by it in terms of the said Constitution. A copy of the said Constitution was also annexed to the application.

[12] The first Respondent disputed that it had neither the authority nor the right to audit the affairs or accounts of the second Respondent. It contended that its powers as regards what institutions it can or cannot audit are covered in section 207 of the Constitution of the Kingdom of Swaziland as read together with sections 11 and 13 of the Audit Act No.4 of 2005.

[13] These sections it was contended entitled it to audit any institution which controls public funds. It was contended that the second Respondent was in control of such funds and had, as at that period controlled millions of

Emalangeni worth of public funds, with which the second Respondent was subvented by the Swaziland Government.

[14] It was contended by the Applicants that the intervention by the first Respondent through the then intended audit exercise was political interference which should not happen. Firstly because the second Applicant was an independent entity and secondly because it conducted its own auditing functions as envisaged by clauses 8 (5) and 8 (6) of the CPA Swaziland's Constitution. It was contended that the said Constitution did not empower the first Respondent to audit an institution or entity like the second Applicant as it is not one of the institutions contemplated by sections 207 (3) and 207 (4) of the Constitution of Swaziland.

[15] On the other hand the Respondents, particularly the first Respondent, contended that its authority and indeed duty to audit the second Applicant's affairs stemmed from the Constitution of Swaziland read together with sections 11 and 13 of the Audit Act 4 of 2005 which provided particularly at section 13 (3) that the first Respondent had a duty to audit any institution which was in control of public funds as long as he was of the view that public interest required she does so or where there was a complaint made.

[16] According to the first Respondent, it was auditing the affairs of Parliament when it noted that some money was transferred from Parliament's and the Pan – African Parliament's budgets and paid into the account of the second Applicant. This to her amounted to

misappropriation for the benefit of the second Applicant. She was in her view entitled to follow up on these monies as this conduct meant it was in the public interest for her to audit the affairs of the second Applicant. Her attempts to obtain the necessary documents from the first Applicant as chairperson of the second Applicant to enable her conduct the audit were not successful. The facts reveal that the first Applicant wrote to the first Respondent and objected saying the second Applicant was independent as stated in the foregoing paragraphs. When the first Respondent wrote back and explained that the law in the form of the above mentioned sections of both the Constitution of Swaziland and the Audit Act No. 4 of 2005 entitled it thereto, the first Applicant wrote back clarifying that he was looking forward to having the court determine if it were so or words to that effect and further went on to stop the first Respondent from ever communicating directly with him again as he was no controlling officer. The first Respondent went on to seek the documents it wanted to audit the accounts of the second Applicant, from the Clerk to Parliament who was hitherto the controlling officer of Parliament. The same officer was also the Secretary to the second Applicant.

[17] This prompted the Clerk to Parliament to write to the Attorney General's office and seek a legal opinion on whether first Respondent had any power to audit the accounts of the second Respondent. The first opinion sought revealed that the Auditor – General had no such powers.

[18] What becomes apparent though is that the officer of the Attorney General who provided the opinion concerned had not referred to section

13 (3) of the Audit Act 4 of 2005 at all, which appears to be a pertinent section to the circumstances of the matter. That section is couched as follows:-

> "13 (3) *The Auditor General may, whenever he considers it to be in the Public Interest, or upon receipt of a complaint, investigate, audit and report on the accounts and financial statements of any statutory body or <u>any other institution in control of Public Funds</u>."*

I shall revert to this aspect of the matter later on in this judgment.

[19] The first Respondent did not accept the opinion by the officer in the Attorney General's office referred to above, but instead made the same enquiry, the Clerk to Parliament had sought from counsel in the Attorney General's Chambers. To come to the conclusion referred to above, the officer or counsel responsible for the opinion concerned at the Attorney – General's Chambers, had considered the provisions of section 207 (4) of the Constitution of Swaziland as read with paragraphs 8 (5) and 8 (6) of the Constitution of the second Applicant. The officer concerned had concluded that according to section 207 (4) of the Constitution, a body corporate established by law will be audited as envisaged in the said law. He had also concluded that clause 8 (5) and 8 (6) had provided how the audit is to be carried out. In fact the counsel concerned had concluded as such because in his view, the Constitution establishing the second Respondent amounted to a law, entitling it to be considered as a body corporate as envisaged by section 207 (4) of the Constitution of Swaziland.

[20] The same counsel who had prepared the earlier opinion, prepared another one at the instance of the first Respondent this time around. The upshot of this opinion was to confirm that where the Auditor General considered it in the public interest to audit the affairs of an entity in control of public funds like the second Applicant in this matter, she had the power to audit such an entity. The same thing would apply in a case where a complaint had been made. It would appear that the first Respondent still went on to see the Attorney – General himself and tabled her problem before him.

[21] The opinion that the Attorney General personally prepared answered the first Respondent's inquiry in two ways; Firstly that the second Applicant, whilst a Voluntary Association, was not a private entity as contended when considering the fact that it was formed by members of Parliament of Swaziland and the fact that its own letter heads bore the Commonwealth Insignia alongside the Swaziland National coat of arms. Secondly, even if it was a voluntary association, it was an entity or institution envisaged in terms of section 13 (3) of the Audit Act 5 of 2005. Such institutions may be audited by the Auditor General in the case of the Auditor General finding it to be in the public interest for him to do so or owing to a complaint having been made in view of the fact that it controlled Public Funds. The Attorney General's opinion was therefore that the Auditor General was entitled to audit the affairs of the second Applicant and also went on to nullify any other opinion contrary to this one.

[22] I need to mention that before even the first legal opinion could be sought from the Attorney General, the first Respondent had, on the 29th May 2012, written annexure "PTN 11" to the Clerk to Parliament to *inter alia* express her disappointment at not receiving the documents to enable her carry out the audit on or before the set date, namely the 23rd May 2012. Of significance at this point was the following sentence in the memorandum concerned.

> *"It is therefore with immense disappointment that the Auditor General has to report the situation to Government who will have to resolve the matter."*

[23] It would appear that it was as a result of the continued failure to avail the required documents to enable the audit of the second Applicants' affairs/accounts and further as a consequence of the foregoing excerpt from annexure "PTN 11", that the second Respondent (Clerk to Parliament) had her status as Controlling Officer withdrawn or revoked by the Minister for Finance. It is common course, that the withdrawal of the said status of the Clerk to Parliament paralyzed the operations of Parliament as its financial affairs in particular could not be operated. It was this paralysis, according to the first Respondent, and not political pressure and a persuasion by the third Respondent that the latter instructed the Clerk to Parliament by means of annexure "MK 9" to release the documents sought by the first Respondent for auditing the affairs of the second Applicant, pointing out that her failure to release such documents was bringing the operations of Parliament to a halt.

[24] A meeting to resolve the impasse and apparently lead to a release of the required documents was meant to be held between the Applicants and the first Respondent on the 3rd October 2012. This meeting was however not successful because, according to the Applicant the team of auditors brought by the first Respondent included one Ndabezayo Dlamini, who the first Applicant insisted be removed because he would be prejudiced against him as they had had a bad working relationship when the officer was based in Parliament.

[25] The first Applicant wrote a memorandum, "PTN 4", to the Clerk to Parliament, which was copied to the first Respondent, recording these developments. Of significance in that recordal is what the first Applicant alleged in the last paragraph of the said letter when he stated as follows:-

> *"The CPA leadership remains committed to cooperate with the Audit Office however, that cooperation should be on a mutual basis."*

[26] This excerpt in my view remains clear proof of a total submission by the Applicants to have their affairs audited by the first Respondent. Indeed the outcome of the subsequent meeting confirmed not only the submission in my view but also an agreement reached between the parties.

[27] The meeting in question was held on the 24th October 2012. Indeed this meeting was referred to as an entry meeting. Its significance was that the parties agreed that the second Respondent was henceforth entitled to

audit the affairs of the second Applicant, as can be deciphered from what was stated in annexure "PTN 14", where the Auditor General wrote in the following words to the Clerk to Parliament, on the second paragraph:-

> *"An entrance meeting was held with the CPA (Swaziland) Executive Committee on the 24th October 2012, where all documents and records pertaining to the operation of the associations account were requested in order to commence the audit. The Executive Committee directed the auditors to request all information pertaining to the CPA account from the Clerk to Parliament who is the Secretary in terms of the CPA branch Constitution."*

[28] In the same letter (PTN 14) the first Respondent went on to list the items she needed from the second Respondent which amounted to 15 in number. Indeed the Clerk to Parliament did as requested and provided under cover of annexure "PTN 15" all the items requested which were listed in a schedule explaining them one by one. What will be of significance among these items is item 9 on the list relating to <u>"Income and Expenditure Supporting Documents".</u> The schedule explains these documents in the following words:-

> *"The information can be obtained from the attached bank statements and Financial reports."*

Furthermore on the face of annexure PTN 15 and its schedule, no mention is made of any missing documents, which were to be supplied

later contrary to the first Applicant's assertions in this regard. I shall otherwise revert to this aspect of the matter later on in my judgment.

[29] Of significance in this regard was the confirmation per the letter of the 30th October 2012, PTN 14, that an agreement had since been reached between the Applicants and the first Respondent on what documents were to be included in the list together with the fact that whatever documents were required, such were to come from the Clerk to Parliament. Of significance is that "all documents and records pertaining to the operation of the Association's account were requested in order to commence the audit."

[30] Having received the documents availed, the first Respondent embarked on the audit which culminated in the Management Report or Draft Report by the first Respondent which was given to the Applicants, through the point of contact agreed upon namely the Clerk to Parliament. This draft Report required the Applicants to give their responses or comments on the issues thereat raised. This report, according to the first Respondent, was handed over to the Applicants through the Clerk to Parliament, the second Applicant's Secretary, on the 29th November 2012. The Draft Report depicted scary details of huge amounts paid to certain members of the second Respondents without any reasons for paying them being revealed. Other huge amounts were withdrawn as cash payments from the accounts of the second Applicant without explanations or details being availed why they were withdrawn. Other huge amounts were shown in the Draft Report as having been transferred into certain undisclosed accounts. In

my view these amounts would have called for an immediate reaction to clarify the only impression created. Otherwise the payments or withdrawals which called for an explanation on the face of the Draft Report amounted to millions of Emalangeni.

[31] It was stated *exfacie* the Audit Report that the Applicants were required to explain these issues which were referred to as weaknesses in the Report by the 31st December 2012. Notwithstanding this date having arrived and passed, no explanations or response was given to the first Respondent's request per the Management Report. The first Respondent a wrote memorandum to the Clerk to Parliament, apparently directed to the Applicants dated the 7th January 2013, written "final reminder" at its heading. It noted that no response had been given to the Draft Report by the deadline given. It then extended the deadline to the 16th January 2013 initially, and later the same day to the 18th January 2013. This was by means of annexures "PTN 17" and "PTN 18" respectively.

[32] By means of a memorandum dated the 11th January 2013, but delivered to its recipient on the 15th January 2013, a day before the initial deadline, the Applicants acknowledged receipt of the memorandum dated the 7th January 2013 and asked for a two weeks extension of the deadline. This was by annexure "PTN 19".

[33] Promptly on the same day of receipt of the memorandum – the 15th January 2013 – the first Respondent responded by means of annexure PTN 20 and informed the Applicants through the Clerk to Parliament

that the requested extension was not being granted. It further reminded Applicants that the audit had been delayed from the 7th May 2012.

[34] The parties are agreed that subsequent to PTN 20, the Applicants sent a certain Mr. Celumusa Khoza, an Assistant Clerk to Parliament to go and ask for an extension of time for the filing of some alleged missing documents. They however do not agree on when he went there or even what he had with him. Whilst the Applicants say he went to meet the first Respondent on the 18th January 2013 carrying with him the missing documents and asking for them to be considered, the first Respondent denies that and contends that the said Mr. Khoza approached her on the 21st January 2013, well after the deadline imposed. This Respondent avers that the said Celumusa Khoza did not have any of the required documents with him and denies he ever pleaded to have such documents taken into account. Instead the said gentleman allegedly only asked for an extension of time according to the first Respondent.

[35] Given that these documents allegedly in the possession of Mr. Khoza are not particularized by the Applicants together with the fact that the Applicant's story is patently false when considering that the argument made in court was that they required to avail the documents they now claimed to be having after two weeks as they needed to look for them in their archives, I am of the view that the most probable version is that given by first Respondent. I have no doubt that if the documents were there as of the 18th January 2013, and they were refused the right to leave them with the first Respondent for consideration, the relief they are seeking from court would be a different one as they would be asking

for such documents to be considered, at least in the alternative. In any event during the hearing of the matter it became abundantly clear from the answers to the questions I asked, that the undisclosed or unparticularised documents were not yet available but were yet to be looked for in the archives, whatever they were. I also have no doubt that if such documents were there, they would have been annexed to the application, if anything as an indicator of *bona fides* on their part that all they needed was to have the said documents considered.

[36] It is otherwise common course that these proceedings, which were moved in court on the 01st February 2013, were so moved after two or so weeks of the refusal to extend the time as required had already expired. I had to enquire from counsel in court as to what these documents, for which an extension of two weeks was sought, were, and why they were not being particularized in the pleadings to dispel the possibility of the Applicants being viewed as buying time through using the alleged documents as a ruse.

[37] I must state that the version given by the Applicants in their papers as concerns the chronology of the events was not real when one juxta poses it against the documents, particularly availed correspondence between the parties. For instance the Applicants painted a picture of the audit having been imposed with opinions by the Attorney General being politically manipulated. When one considers all the correspondence annexed to the Respondent's Answering Affidavit it becomes clear that the allegations of a political manipulation are not being supported by the facts of the matter. I can safely say that in order to successfully

paint this picture, not all the documents and/or correspondence would be disclosed as only a few would be, to support a certain particular line. For instance the intervention of the third Respondent is made to look like it was politically inspired to put the Clerk to Parliament under duress when with all the information being disclosed it becomes clear that the third Respondent had to intervene to resolve the impasse there was as the authority in charge of Parliament. Furthermore the Applicants want to paint a picture that after their objecting to the Audit in May 2012, there was a lull until such time that the third Respondent intervened. The subsequent opinion by the Attorney General is made to look like a politically inspired document and it is not disclosed that the very counsel who had prepared the earlier opinion saying the Auditor General could not interfere, had not considered at all section 13 (3) of the Audit Act.

[38] In fact the same counsel had contradicted his earlier opinion after having specifically referred to section 13 (3) of the Audit Act No. 4 of 2005. It is a fact that in this latter opinion, the same counsel at the Attorney General's Chambers, who had prepared the earlier opinion acknowledged in the latter one, after considering section 13 (3) of the Audit Act that the Auditor General would be entitled to audit the affairs of the second Applicant if he was of the view same was in the public interest or where a complaint had been made to her.

[39] In my reading of the Applicant's papers, I formed the view that they sought to mute the fact that the Clerk to Parliament was not just an ordinary neutral officer but was by virtue of that office also the

secretary to the second Respondent, together with the fact that the communication with this officer on account of the affairs of the second Applicant after the 24th October 2012, was a result of an agreement reached that all documents sought from the second Applicant were to be through him or her.

[40] The other fact to note from the Applicants papers which tends to create a wrong picture is that in his Founding Affidavit the first Applicant did not disclose the fact that they had been given, through the Clerk to Parliament, the Management Report by the first Respondent on or about the 29th November 2012, in terms of which they were required to give explanations where they felt that same were necessary. The impression created in the Founding Affidavit is that the deadline of the 16th or 18th January 2013 per "PTN 17" and PTN 18" was the first deadline and that at the end of it the first Respondent refused unjustifiably to extend same for a mere two weeks.

[41] It took a response by the first Respondent in her Answering Affidavit, clarifying that the Applicants were actually given sufficient time to provide the information required if there was any, as they were served with the Management Report or Draft Report forming the basis of the queries, on the 29th November 2013. The Applicants then contended in their Replying Affidavit that, the Management Report was delivered on the second Respondent in December. During this period the members of Parliament were allegedly on recess. They only saw the Report on the first week of January 2013 subsequent to which they wrote and requested a two weeks extension of time.

[42] There are two difficulties generated by this information. Firstly this information is raised for the first time in the Replying Affidavit, which does not afford the other side an opportunity to react thereto. The position of the Law is now settled that all information or material the Applicant seeks to rely on ought to be disclosed in the Founding Affidavit. New matter is not allowed in a Replying Affidavit. The allegations in the paragraph preceding this one amount to new matter and ought to be struck out strictly speaking.

[43] The requirement that a party should disclose all pertinent information in the Founding Affidavit seems to me to be more compelling in a case like this one, where the proceedings are instituted under a certificate of urgency, with the Respondents being given limited time or no time at all to file a further affidavit in answer to the new material which even then can only be filed with the leave of court. To this extent I am bound not to attach any weight to the allegations that the Draft Report could not be dealt with in December 2012 because the executive of the second Applicant was on leave.

[44] The other difficulty presented by the disclosure of the new matter by means of the Replying Affidavit in this matter, is that there was no proof that indeed the Applicants received the Management Report in the first week of January 2013 or put differently that same was not brought to their attention earlier. This information could only have been given by the Clerk of Parliament as the person who received the Report from the first Respondent or by means of existing records.

[45] The question is on who the onus lies to prove that indeed the Report was brought to the attention of the Applicants during the first week of January 2013. The general principle of the Law is that he who alleges must prove, which in this instance would mean that the Applicants would bear the onus of proving this aspect of the matter. Strictly speaking this shortcoming would be attributable to the Applicants.

[46] During the hearing of the matter there was brought up an issue by Respondent's counsel Mr. Gama, who asked that the court strikes out certain averments in the Replying Affidavit filed by the Applicants on the basis that same was new matter raised by way of a Replying Affidavit. The Respondents' counsel was emphatic that such material, was prejudicial to the Respondents and the person referred thereto. It was contended that in terms of the law, no prejudicial new matter may be raised in a Replying Affidavit as all such matters ought to be contained in the Founding Affidavit to give the Respondent an opportunity to deal therewith by means of his Answering Affidavit. The verbatim averments complained of are stated as follows at paragraph 12.1 of the Replying Affidavit:-

> "12.1 *I am not privy to the facts that gave rise to the need to audit the second Applicant, but respectfully refer the Honourable Court to the Preliminary submissions concerning the first Respondent's jurisdiction to conduct an audit over the affairs of the second Applicant and the Senate Resolution. <u>What I can state for a fact, is that I was informed by the Prime Minister Dr. Barnabas Dlamini, that he had instructed the first Respondent to carry out an audit of</u>*

the second Applicant, pursuant to a resolution that had been passed by the House of Senate."

[47] Mr. Gama for the Respondents applied that the underlined aspect of the matter be struck out because it was new matter which, was prejudicial yet it was being introduced for the first time by means of a Replying Affidavit, depriving the affected party the opportunity to deal with it so as to ascertain the truthfulness or otherwise of it.

[48] Mr. Jele objected to the underlined excerpt from the paragraph of the Replying Affidavit concerned being struck out and averred that such information can be dealt with in two ways at this stage of the proceedings: firstly it could be struck out at the instance of the Respondents. This however would only be granted where such new matter is not in response to an issue raised in the Answering Affidavit. He contended that this was such a response. The second option is for the party affected thereby to file a further affidavit in response to the new matter with the leave of court. It was contended this latter approach was the one to like.

[49] I agree that Mr. Jeles submission on the options open to a party correctly state the legal position except on what should happen to the circumstances of this matter. The peculiar circumstances of the matter are such that the Replying Affidavit was filed only a day preceding the hearing of the matter, which invariably means that the option of filing a further affidavit was not there for the Respondent to exercise.

[50] On the other hand, it is a fact that the Founding Affidavit of the Applicants is loaded with allegations to the effect that the audit was politically motivated without the politician behind it being revealed for him to be afforded an opportunity to respond thereto. Clearly the mention of any particular person as the one responsible for politically motivating the audit when he cannot answer for himself would be unfair. Furthermore I was not shown any value that the words complained of were adding to the Applicants' case. Put differently striking them out would not in my view prejudice the Applicants' case yet not striking them out would prejudise the affected party as it would be taken for an undisputed fact.

[51] It is for the foregoing reasons that I would accede to the application to strike out from paragraph 12.1, the underlined portion as stated in paragraph 46 above.

[52] Having set out the facts and background to the matter, I am now called upon to decide the pertinent issues therein.

[53] When argument commenced in the matter Mr. Jele for the Applicants informed the court that the prayer regarding the interdict was sought only for purposes of maintaining the status quo or put differently, for ensuring that the Final Audit Report was not distributed to third parties pending finalization of the matter. Since an undertaking that ensured that such a report was not released to third parties had remained in place to that day; there was no longer an insistence on it and it was therefore no longer being pursued.

[54] It was clarified that as a result only two reliefs were now being pursued, they being prayer 3.2 and 3.3 of the Notice of Motion. These were respectively the prayers that sought a declaratory order to the effect that the Auditor General had no power to audit the affairs of the second Applicant and that as such the Final Audit Report prepared by the first Respondent was invalid and ought to be set aside and the alternative prayer thereto which sought to have the report (I assume the aim was to say the decision as embodied by the report) be reviewed corrected and set aside as well as the order for costs. I will henceforth confine myself to these prayers with which I will deal *ad seriatim*.

First Respondent has no power to audit the affairs of the applicants.

[55] As concerns the contention that the Auditor General has no power to audit the affairs of the Commonwealth Parliamentary Association - Swaziland Branch, it was argued on behalf of the Applicants that in Swaziland, the Auditor General can only audit the affairs of those entities mentioned in section 207 (3) of the Constitution of Swaziland. It was contended that otherwise corporate bodies established by law and with that law providing how they are to be audited, then they ought to be audited by the person or entity having the power to do so in terms of that law. This latter provision is from section 207 (4) of the Constitution of Swaziland.

[56] The thrust of the argument as regards section 207 (3) of the Constitution is that the second Applicant is not any of the organizations or entities

provided for in section 207 (3) for that section envisages public accounts of Swaziland and of all offices, courts and authorities of the Government of Swaziland. The contention was that second Applicant is none of these entities.

[57] It was argued further that even assuming that this court finds that first Respondent does have the power to audit the affairs of the second Applicant, then such an audit ought to be confined to the monies paid to the second Applicant by Government and not any other monies. Much as this contention was made, it was difficult in my view for counsel to clarify how this would be practically possible.

[58] It seems to me that one has to answer the question in light of the facts of the matter. The facts of the matter reveal that on the 3rd October 2012, the Applicants submitted themselves, particularly second Applicants affairs, to be audited by the first Respondent and also went on later to reach an agreement between the Applicants and the first Respondent, in terms of which the parties agreed to have the first Respondent audit the affairs of the second Applicant. This is borne out by the letter of the 3rd October 2012, annexure "PTN 4" to the Answering Affidavit as well as by means of the letter dated 30th October 2012, annexure "PTN 14", being the letter recording, among other things, the terms of the agreement reached in the entrance meeting held on the 24th October 2012.

[59] The question becomes, does the submission and agreement recorded in these letters have a bearing on the entitlement or otherwise of the first

Respondent to audit the affairs of the second Applicant. It seems to me, that the effect of the submission and agreement was to authorize the first Respondent to audit the second Applicant's affairs if the Constitution and the applicable statute did not do so when considering that it did not prohibit it either.

[60] The Applicant having cooperated and even provided all the necessary documents to the Auditor General who commenced auditing the affairs of the second Applicant as a result cannot be heard after the audit has been carried out to be saying that the Auditor General has no power to do so. Applicants are in law approbating and reprobating. In other words they are blowing hot and cold. A litigant is not allowed to do so in law. Once a party adopts a certain position, he is then required to stick to that position. In the matter at hand the Applicants cannot submit themselves and even agree, to cooperate with the audit and later turn around to reject it once it is embarked upon. In the case of Charles ***Mafika Ndzimandze vs Swaziland Revenue Authority, unreported case no. 1803/2012***, I had an opportunity to deal with the principle of election which has been shown to be similar to the principle of approbating and reprobating which a party to proceedings is not allowed to do. In the said matter I commented as follows at page 15 of the Judgment:-

> *"A party who elects a certain position is not allowed to turn around and adopt a contrary one. Put differently a party cannot approbate and reprobate at the same time…"*

[61] In ***Administrator Orange Free State vs Mokopeneli 1990 (3) SA 780 at 787 F-H***, the position was put as follows:-

> *"The legal doctrine here involved may perhaps best be described as that of election. But in a situation such as this the exact nomenclature is less important than a recognition of the fundamental principle that a contracting party who has once probated cannot thereafter reprobate. The position is elucidated by De Villiers JA in the Judgment of this court in* ***Hlatjwayo vs Mare and Deas 1912 AD 242****. The point in issue in that case was whether a litigant had by his conduct acquiesced in a judgment and had thereby lost the right to appeal against it."*

[62] Section 207 (3) of the Constitution does not prohibit the audit of any other entity by the Auditor General where such may be necessary or lawful to do. Section 13 (3) of the Audit Act No. 4 of 2005, as quoted above, empowers the Auditor General to audit and report on the accounts and financial statements of any institution in control of public funds, if he considers such an audit to be in the public interest or where a complaint has been made.

[63] It is not in dispute that the second Applicant, to whom Government pays subventions, is an institution in control of Public Funds. Furthermore, the first Respondent stated that he found it to be in the public interest to audit the affairs of the second Applicant having seen some irregular transfer of public funds into its accounts. This section therefore empowers the Auditor General in my view to audit and report on the affairs of the second Applicant in this matter.

[64] The effect of this in my view is that the declaratory order sought cannot be granted. It was argued that section 13 (3) does not apply in the matter at hand because it talks of a performance audit in terms of the Heading to the section as opposed to a Financial Audit. I cannot agree that we must confine ourselves to the Heading of this section and ignore its specific provisions. When considering that subsection, it is very clear that in its body it refers to the Auditor General as having the power to:-

> "*investigate, audit and report on the accounts and financial statements of any statutory body or any other institution in control of public funds*".

[65] The subsection concerned also extends the audit to a financial one as opposed only to a performance, one by virtue of its specific provisions, that it audits and reports on the accounts and financial statements of an institution in control of public funds.

[66] Having already concluded, at least for two reasons that the Auditor General is empowered to Audit the Affairs of the second Applicant if public funds went into it. I now comment on another ground which it seems would still entitle the first Respondent to Audit the Affairs of the second Applicant. I am not convinced that based on the composition of the second Applicant taken together with the other pertinent considerations it can realistically be said to be a private association. These are the considerations:-

(i) The CPA –S comprises members of Parliament only and is a branch of an International Organization called the Commonwealth Parliamentary Association (CPA –I) to which the country as opposed to the members affiliated. The International organization is formed of members of Parliaments of Commonwealth nations, of which Swaziland is a one.

(ii) As revealed by the first Respondent without it being disputed in terms of annexure "MK 3", the Government of Swaziland is the one that pays for maintaining the Swaziland Parliament Membership to the Global Commonwealth Parliamentary Association.

(iii) The Swaziland Government is shown at "MK 3"as having paid several subventions to the CPA –S over the years which todate amounts to millions of Emalangeni.

(iv) The CPA –S uses such national symbols as the National Court of Arms on its letter heads.

(v) Its secretary is an ex – officio member by virtue of his being employed by the Swaziland Government as the controlling officer or Clerk to Parliament.

Review of the decision embodied in the Report, or the findings of the Auditor General.

[67] The thrust of this prayer is that the Applicants were not given sufficient or reasonable time to provide answers to the Management Report. In fact they claim not to have been given a hearing at all because the Executive members and the Treasury of the second Applicant were not interviewed individually and verbally.

[68] I do not think there is merit on the assertion that the Applicants were not given a hearing because they were not heard individually. In so far as it is not being denied that as early as May 2012 the Applicants were informed of the Audit including what documents they had to avail and in view of the fact that after the draft report was produced, the Applicants were called upon to answer to the issues therein raised, I cannot agree that the Applicants had to be called individually and interviewed as such because all that was needed of them was to provide answers in the form of required vouchers and receipts to the issues raised. There is therefore no merit in this latter contention.

[69] On the contention that the Applicants were not given sufficient time to answer to the Management Report, I cannot agree thereto. Despite that the documents concerned were required in May 2012 for the audit the Report was issued and served on the Clerk to Parliament as agreed at the end of November 2012 for the answers to have been provided by the 31st December 2012. No sound explanation is being given why that deadline could not be adhered to and why the Report could not be responded to within the whole month of December 2012. This is more so when bearing in mind the fact that the Audit had commenced in May

2012. It makes it worse that the Applicants did not find it appropriate to even make the first Respondent know why the deadline could not be met including arranging for another one.

[70] I cannot accept the averments by the first Respondent that they only got hold of the Report on the first week of January. At paragraph 6.7 of his Replying Affidavit, the first Applicant avers that the Management Report was delivered on the Clerk to Parliament, the Secretary to the second Applicant, and the authority the Applicants mandated with receiving all documents in the matter on their behalf, sometime in December 2012. He says they could not attend thereto because Parliament was on recess and not that they did not know about it. This was not reasonable when considering that they did not bother to engage the first Respondent and explain that they were still on recess and that she extends the period for them. It was not proper in my view for them to simply ignore the deadlines fixed by the first Respondent, because they were on leave. In any event why should the affairs of the CPA –S be dependent on whether Parliament is on leave or not.

[71] I have already stated my views about the Applicants' failure to disclose all the necessary information in the Founding Affidavit and painting a misleading picture. Had all such information been disclosed, it would now be certain as to when exactly the Management Report was served on the Applicants through the second Respondent and, when it was brought to the attention of the Applicants as a matter of fact.

[72] I am therefore of the view that the Applicants have not discharged the onus resting on them to show that the time given them was insufficient or that it was unreasonable, when considering their ignoring the deadline fixed for the end of December 2012.

[73] On the contention that the first Respondent was unreasonable in refusing the Applicants the two weeks period they asked for, I am of the considered view the refusal of this specific period should not be viewed in isolation. Once it is so viewed, it becomes clear that the two weeks would not have been so requested had the Applicants utilized the period initially granted it in December 2012 to obtain the information they now needed two weeks to obtain and avail. It is still a mystery why that information could not have been availed since May 2012 if it is there and why it would have only been availed in the two weeks they sought an extension of the deadline by.

[74] In so far as the Applicants contend that they were not given a hearing, it must be noted that a hearing is about affording a party time to respond to issues raised. Where that has been done it can hardly avail a party to complain he was not given a hearing, if he did not make use of an opportunity given him but later tends to complain about not having been afforded an opportunity to be heard. I am convinced from the facts of the matter that the Applicants were availed an opportunity to be heard but could not utilize it.

[75] During the hearing of the matter I commented upon the possibility of my calling the Clerk to Parliament for him to explain when the

Management Report was availed the Applicants, particularly on whether or not it was true that they had only received it on the first week of January 2013. Having seen that the first Applicant actually addressed the issue at paragraph 6.7 of his Replying Affidavit by revealing that the report was received sometime in December 2012 by the Clerk to Parliament and that they however could not meet to deliberate on same because they were on recess as members of Parliament, I do not think any purpose would be served by calling the Clerk to Parliament to give viva-voce evidence clarify anything. With this information available, the only question is whether the Applicants were entitled to ignore the deadline imposed and then to demand their own afterwards. I have come to the conclusion they were not so entitled and that the Applicants' conduct in not responding to the Report promptly within the deadline given was unreasonable.

[76] During the hearing of the matter, counsel for the Respondents briefly raised an issue about the *locus standi* of the second Applicant to sue and to be sued in law because its Constitution did not provide for it to be sued. This argument was because of the practical approach taken of the matter and I did not understand Mr. Gama to be insisting on it. I took the view that this point was not a good one at all because the second Applicant was an institution that operates bank accounts and apparently concludes all sorts of transactions. In any event the first Respondent was itself auditing the affairs of this entity. I was certain that if it was not a legal person in the form of a corporate body, it was what has come to be known as a universitus. I therefore could not uphold this point.

[77] Having come to the conclusion I have on the issues before me, I make the following order:-

1. The Applicants application be and is hereby dismissed with costs.

Delivered in open court on this the …..day of March 2013.

N. J. HLOPHE

JUDGE