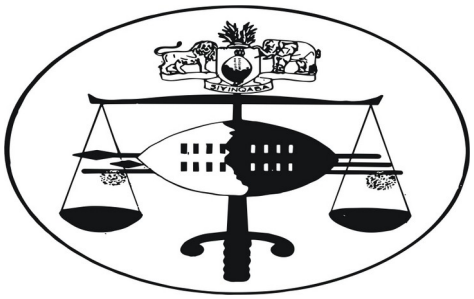

IN THE SUPREME COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 18/2007

In the matter between:

THE PRIME MINISTER OF SWAZILAND	**1ST APPELLANT**
DIRECTOR OF PUBLIC ENTERPRISE UNIT	**2ND APPELLANT**
PRINCIPAL SECRETARY, MINISTRY OF FINANCE	**3RD APPELLANT**
MINISTER OF FINANCE	**4TH APPELLANT**
ACCOUNT GENERAL SWAZILAND	**5TH APPELLANT**
THE ATTORNEY GENERAL	**6TH APPELLANT**

Vs

MPD MARKETING & SUPPLIES (PTY) LTD	**1ST RESPONDENT**
SUPREME EMERGENCY VEHICLES (PTY) LTD	**2ND RESPONDENT**
MPD PHARMACEUTICALS (PTY) LTD	**3RD RESPONDENT**
MASIMPHE INVESTMENTS (PTY) LTD	**4TH RESPONDENT**

CORAM **BANDA CJ**
BROWDE JA

STEYN JA
TEBBUTT JA
ZIETSMAN JA

HEARD ON 8TH NOVEMBER 2007

DELIVERED ON THE 15th NOVEMBER 2007

JUDGMENT

STEYN JA

[1] This appeal concerns the validity of a directive emanating from the Prime Minister, acting pursuant to a Cabinet resolution taken on Tuesday the 4th of April 2006, "blacklisting" the four respondents (the MPD Group of Companies) from supplying, among others, parastatals with immediate effect.

[2] The respondent sought and obtained the relief claimed in Notice of Motion proceedings to the following effect:

" 2. Declaring that the decision of the Cabinet of the Government of Swaziland and the action of the first respondent (the Prime Minister) in proclaiming such decision that all the companies in the MPD Group of Companies be "blacklisted" and prohibited from doing any business with the Government of Swaziland or any government agency or any parastatal body in Swaziland to be unlawful and invalid and of no force or effect.

3. *Declaring the applicants to be entitled to submit tenders in respect of any tenders called for by the Government of Swaziland, any government agency or any Swaziland parastatal, and that such tenders are to be considered on their merits under and in terms of the Stores Regulations in the case of tenders for*

procurement by the Government of Swaziland, and in the case parastatals or Municipal Councils such other regulations as may be applicable.

4. *Declaring the letter dated 10 April 2006 by the second respondent (a copy of which letter is annexure "X" to this notice of motion) to be unlawful, invalid and to be of no force or effect.*

5. *Directing the above-named third respondent (in her capacity as chairman of the Treasury Tender Board) and the above-named fifth respondent (in his capacity as chairman of the Central Tender Board):*

5.1 *to consider any and all tenders which any of the applicants have submitted to*

the above tender boards on their merits and in terms of the Stores Regulations; and

5.2 *to inform all controlling officers and heads of departments who have to evaluate and recommend on tenders in terms of the Stores Regulations to give due consideration to any and all tenders submitted by the applicants on their merits.*

6. *Subject to 7 below, directing that the costs of this application including the certified costs of counsel be paid by the first respondent.*

7. *In the event of any of the second to eighth respondents opposing this application, those respondents to pay all such costs as are*

occasioned by such opposition on such scale as is deemed appropriate, but to include the certified costs of counsel."

[3] In its judgment the High Court, per Mabuza J, held that *"there was no legal and rational basis for the exercise of power by the Prime Minister/Cabinet in taking the decision to blacklist the applicants"* (appellants before us). The appellants challenged this finding of the Court on a variety of grounds. In essence they contended that the directive was a lawful exercise of implied powers of the Executive as provided in the Swaziland Constitution and that the directive was a rational exercise of public power. They also advanced as a ground of appeal the assertion that, contrary to the court's finding, the directive did not bind the recipients to observe the embargo on doing business with the respondents.

[4] The facts of the matter are not in dispute. These are succinctly summarised by the High Court in its judgment and I set this summary out below.

> *"(1) The Applicants are a group of companies who trade under the name of MPD Group of companies and carry on business at King Sobhuza II Avenue, Mbabane. For the sake of brevity I shall refer to the MPD Group of Companies as the Applicants.*
>
> *The Applicants have set out their business as follows:*
>
> *Para 18.1The first Applicant (MPD Marketing and Supplies (Pty) Ltd carries on business as a trader, supplier and seller of equipment, materials and products of all kinds, which it sources from the*

manufacturers or from the duly appointed distributors thereof, as the case may be.

18.2 *A substantial part of the first applicant's business is the provision and supply to the Government of Swaziland or to parastatal bodies in Swaziland of equipment, materials and other products or of services pursuant to contracts awarded to it in response to tenders that have been submitted by it. Such tenders are submitted by it in response to calls for tenders by or on behalf of the Government of Swaziland or such parastatals.*

18.3 *The work that has to be done in order to submit a tender is frequently substantial. The object is to source products or*

services of sufficient and appropriate quality to meet the needs of the Government at a price that is competitive and is value for money. Representatives of the first applicant have to identify a suitable manufacturer or supplier of such products or services and have to make the relevant inquiries and conduct the relevant researches to be as sure as it is possible to be for all practical purposes that the manufacturer/supplier is reliable and its products will have the requisite quality. In the nature of things such manufacturer/supplier is more often than not a company or enterprise that is based outside of Swaziland. Negotiations have to be made with such companies or enterprises in order to establish the most favourable prices and terms of payment. There is also need to establish and take

steps aimed at ensuring that there will be adequate after sales service, and such steps are taken.

18.4 *Very frequently (if not invariably) the foregoing can best be achieved by establishing good and sound personal business relationship with the personnel of such companies or enterprises. To achieve this takes time, effort and skill. Also, there have been instances when the first applicant has recognized that, in order to be able to render a proper service in connection with the tenders it submits or wishes to submit to the government, it is desirable and sensible to employ people with specialist skills and knowledge. When deemed necessary the first Applicant has duly employed such persons.*

It is in the best interests of the Government of Swaziland and the parastatals and of the public of Swaziland for whom such goods, materials, equipment and/or services are obtained that I and the Representatives of the first applicant establish these things.

18.5 *The first applicant has been submitting such tenders for more than ten years and has done so with a substantial measure of success. The tenders that have been awarded to the applicants have all met the requirements of the Stores Regulations and the particular conditions of the tender concerned. The award of these tenders to the first applicant has been on their merits.*

18.6 *In consequence of the success achieved by the first applicant in having government tenders awarded to it for the supply of goods and/or materials and/or services to the government or parastatal bodies the situation has come about that the submission of tenders and the fulfilment of tenders awarded to it has become its major source of income. It is thus crucial to the first applicant's well-being if not, indeed, its continued viability that it be allowed to continue submitting such tenders and that its tenders be considered and evaluated on their merits in competition with such other tenders as may be submitted from time to time.*

18.7 *Accordingly the first applicant contends that it has a right to continue with such tendering business without any improper,*

irregular or unlawful obstacles or impediments being put in its way. Alternatively, the first applicant has a legitimate expectation to be allowed to continue to do so without any improper, irregular or unlawful obstacles or impediments being put in its way and that no obstacles or impediments such as the decision by the Cabinet to 'blacklist' the first respondent being given a fair and reasonable and proper opportunity to deal with any complaint that the Cabinet or any members thereof might believe that it has against the first respondent or the deponent Mr. Dlomo personally.

18.8 *The first applicant also contends that it is in the public interest that no unlawful or irregular obstacles or impediments be put in the way of the first applicant continuing*

to submit such tenders and their being fairly considered and evaluated in terms of the due process that governs the tendering process.

19. *What has been stated above about the first applicant also applies generally to the other applicants, the only material difference being that each of them tends to specialize in the supply of a particular product or a particular category of products.*

20. *The second applicant Supreme Emergency Vehicles (Pty) Ltd (SEV0) specialises in the supply of all kinds of vehicles (and spare parts and accessories), including military vehicles, most of which it supplies through the tender process to the Government of Swaziland. The second applicant has also been successfully tendering for Government*

contracts for more than ten years.

21. *The third applicant (MPD Pharmaceuticals (Pty) Ltd) is a relatively new company, and has recently submitted its first tender for the supply of certain pharmaceutical goods to the Department of Health. This is a substantial tender. In order better to equip itself to be able to submit a good tender on its merits the third applicant employed a qualified pharmacist.*

22. *The fourth applicant (Masimphe Investments (Pty) Ltd) has previously been awarded tenders and pursuant thereto has supplied groceries and the like to government departments and the seventh respondent (the Mbabane City Council) in terms of the prescribed tender process of the Mbabane City Council, and pursuant to the contracts*

awarded has duly supplied such groceries. It also supplies other government by tendering for those contracts in terms of the government tender procedure."

It is evident from this summary of the facts that the decision of the Cabinet/Prime Minister to " blacklist" the respondents was calculated to cause them immeasurable harm. Indeed, this was common cause. The issues that arise and have to be determined are whether:

1. the decision to "blacklist" the respondents was binding on those who were responsible to take decisions concerning the award of tenders or contracts; or was likely to be observed and implemented;
2. the decision was lawful and enforceable as against the

respondents.

[5] The appellants have sought to justify their decision to issue the directive because, so they contend, reasonable grounds existed for concluding that the respondents engaged in corrupt practices when they submitted tenders. The Cabinet had read various reports of several commissions of enquiry into the operations of Government agencies. Some of these commissions had found that the respondents were implicated in what was allegedly " improper and irregular conduct." The appellants do not contend that it has been established that the respondents have been convicted of any criminal offence such as fraud or corruption. Their actual assertion is that these reports "point to the fact that the applicants appear habitually to engage in irregular conduct."

[6] The decision of the Cabinet to "blacklist" the respondents was communicated by the Prime Minister

in a variety of modes. A statement was released to the Press, a television interview was broadcast, and - presumably at his behest - a directive was issued by the Ministry of Finance to all Chief Executives of category "A" Public Enterprises. This directive reads as follows:-

> *"* *MINISTRY OF FINANCE*
>
> *CF 80A*
> *10 April 2006*
> *To all Chief Executives of Category A Public Enterprises*
>
> *PEU CIRCULAR NO. 4/2006*
>
> *BLACKLISTING OF MPD GROUP OF COMPANIES*
>
> *I have been directed to inform you that on Tuesday April 4, 2006 Cabinet resolved to Blacklist MPD Group of Companies from supplying, among others parastatals with immediate effect. The resolution is contained in the Minutes of the above meeting of the above mentioned date (Minute CM23977).*
>
> *Victor Nxumalo*
> *Director,*
> *Public Enterprises Unit"*

[7] The respondents allege that this directive was acted on. Whilst the appellants challenge this averment, their

denial is couched in guarded terms. In this regard the Prime Minister's affidavit reads as follows:

> *"47.1 I admit that the decision was announced and made public on Friday 5 April 2006. I deny that officials in the public service have acted on it as if they are bound in law, or that it is in fact binding in law."*

The deponent goes on to say the following:-

> *"47.2 Each decision maker charged with the responsibility for making a decision in relation to the tendering for government contracts must exercise a discretion placed upon them by the law."*

He goes on – somewhat disingenuously – to depose as follows:-

> *"48. …until such time as the Applicants' deponent has cleared himself of the numerous questions that have arisen in relation to his conduct with government, it is unlikely that it will be viewed to be in the best interests of the economy, or the sustainability of the economic programs which the government is pursuing or for that matter, whether it would be in the public interest to continue to do business with the applicant companies. <u>However, in relation to each tender, it will be up to the decision maker to exercise the discretion vested in the tender board and consider the matters of public interest</u>*

conveyed by the Cabinet's direction." *(Emphasis added)*

In similar vein the Prime Minister also says that –

> *" 49.2 The legal position, so I am advised, is that the decision makers charged with taking decisions in relation to the acceptance or rejection of tenders must and will apply themselves in accordance with the law and the behests of the statute. When doing so it is submitted that it will not be inappropriate for the decision maker to have regard to the Cabinet direction when considering what is on the public interest. It is accordingly premature for the applicants to have approached the Court seeking relief. Instead, they ought to await the award or*

rejection of a specific tender before approaching a Court for relief".

[8] I deal below with the submissions of appellants' counsel that this directive was not binding on the decision makers to whom it was communicated and that they had a residual discretion to make their decisions as to with whom they were able to contract on behalf of the State.

[9] The Central Tender Board (The Board) was obviously a key entity in the business operations of the respondents. It should also be noted that in terms of the Stores Regulations issued pursuant to Section 26 of the Finance and Audit Act No. 18 of 1967, the Permanent Secretary Ministry of Finance – the department that originated the directive – is the Chairman of the Board. The Assistant Secretary Finance is a member of the Treasury Tender Board. These two Boards have been empowered to

consider and adjudicate upon “the purchase of Stores or the letting of a contract the cost of which is more than E5 000.00 for any one item”. The regulations specifically provide that any such transaction, as well as the sale of Government property, all contracts for works or services, including the employment of consultants as well as “letting of contracts for individual purposes.... shall require the authority of the appropriate Tender Board.”. It is clear from these regulations that the legislature has created a comprehensive regulatory framework and an executive infrastructure to control and regulate the process through which the Crown contracts with prospective contractors.

[10] It will be seen that the directive which conveyed the resolution of the Cabinet was sent to the Chief Executives of “Category ‘A’ Public Enterprises” . These include the Central Transport Administration and the Swaziland Electricity Board.

[11] In response to the reports in the press as well as the radio and television publicity given to the Cabinet resolution and before it became aware of the directive, the respondents' attorneys addressed a letter dated the 13th of April 2006 to the Prime Minister. The letter explained the business operations of the respondents, the role the Tender Boards play in their capacity to do business with the Crown, its agencies and the parastatals and how the Cabinet's resolve would detrimentally impact on their ability to contract with these entities. The letter also recorded that the respondents had taken legal counsel and that they had been advised that the Cabinet's decision was unlawful. The letter then proceeds to record the following:

> *"8. Quite apart from the law we would also point out*
>
> *that an important rationale underpinning the process of procurement by tender is that it envisages that the tendering process be*

conducted impartially with a view to the government and the public at large securing the best value for money. A consequence of a blanket ban on our client is that even though one or more of the tenders submitted by our clients might be the best value for money, they would be automatically excluded from the reckoning. This is clearly contrary to the public interest.

9. *Accordingly, on behalf of our clients, we hereby invite you and the cabinet of which in law you are the leader and chairman to reconsider your position and to announce publicly with all due publicity that that decision to blacklist Senator Dlomo and his companies is withdrawn with immediate effect. As the matter is of utmost commercial urgency from our clients' point of view (and probably also from the perspective of the government in respect of at least some of*

the pending tenders) we must call upon you to make such announcement by no later than Thursday 20th April 2006. On behalf of our client we are instructed to notify you further that should you decline or fail to reverse the said decision and to issue a public announcement to that effect by then, our instructions are to immediately proceed to prepare and launch an application out of the High Court for an order declaring such decision to be unlawful and for appropriate interdicts against the government, municipalities and parastatals from acting in accordance with that decision pending the final outcome of such court proceedings."

[12] There was no response to the letter. It is common cause that the Prime Minister publicly confirmed the decision to "blacklist" the respondents. In these circumstances they approached the Court to determine

the legality of the Cabinet resolution and whether the steps taken to implement it were lawful.

[13] In a carefully reasoned judgment the High Court, per Mabuza J, after a comprehensive review of the evidence and the law, in summary records the following finding:-

> *"In the event the Court finds that there was no legal*
> *and rational basis for the exercise of power by the Prime Minister/Cabinet in taking the decision to blacklist the applicants. If Mr. Dlomo has fallen foul*
> *of the law and has committed a crime, he should be*
> *charged and tried accordingly."*
> *(Mr. Dlomo is the Managing Director of the respondent companies.)*

The High Court upheld the contentions advanced by the

respondents, rejected those contended for by the appellants and granted the relief as prayed in the Notice of Motion.

[14] Before us counsel for the appellants contended that the Crown had the power to act as it did and that the exercise of such power was not only lawful but also rationally executed. He also submitted that the decision and the directives issued pursuant thereto did not bind the functionaries to whom these were directed. Neither were they bound to act in accordance with their terms. They were free to exercise an unfettered discretion in the performance and discharge of their obligations and were in no way obliged to adhere to the terms of the resolution or the directive.

[15] Counsel for the respondents submitted that the Constitution did not either directly or by necessary implication authorise the appellants to act as they did. It also did not exercise such power rationally or in a

manner which was administratively fair, inasmuch as, e.g. the appellants failed to afford the respondents an opportunity to be heard before taking the decision they did.

[16] Before analysing the respective submissions, I would record the following general comments.

16.1 Swaziland acquired independence on the 6th September, 1968. It did so under a Westminister style Constitution. This Constitution was abrogated by the 1973 Proclamation. Since then and until the enactment of the "Constitution of the Kingdom of Swaziland" (the Constitution) on July the 26th 2005, the country was governed via a succession of Decrees and Orders in Council. The source of the power and the validity of these instruments were often unclear and the consequent legal uncertainty created tensions and constitutional volatility. The constitutional

framework, such as it existed, was fertile soil for the arbitrary and authoritarian exercise of power. The rights of the individual to the protection of the law were in constant jeopardy. The constraints that the rule of law imposed on those who exercised power were often ignored. These inadequacies caused both internal and external disaffection.

16.2 It is against this historical backdrop that the Constitution has been enacted. That it recognized the need for a society governed by law is evident from the clear terms of the Preamble to the Constitution. The clauses that resonate in this context are the following:

1. **Whereas as a Nation it has always been our desire to achieve full freedom and independence under a constitution created by ourselves for ourselves in complete**

liberty.

2. **Whereas it has become necessary to review the various constitutional documents, decrees, laws, customs and practices so as to promote good governance, the rule of law, respect for our institutions and the progressive development of the Swazi society;**

3. **Whereas it is necessary to protect and promote the fundamental rights and freedoms of ALL in our Kingdom in terms of a constitution which binds the Legislature, the Executive, the Judiciary and the other Organs and Agencies of the Government.**

4. **Whereas all the branches of government are the Guardians of the Constitution, it is necessary that the Courts be the ultimate Interpreters of the Constitution;**

5. **Whereas as a Nation we desire to march forward progressively under our own**

constitution guaranteeing peace, order and good government, and the happiness and welfare of ALL our people;

16.3 This Constitution is the constitution of "the Kingdom of Swaziland" and is what is described in the Preamble as the product of " a search for a sustainable home-grown political order". Although there are many constitutional dispensations that contain provisions similar to those in the present enactment, its ambit and meaning must be determined only from its terms and its objectives. Care must be taken in its interpretation to ensure that its goals and its objectives are given full force and effect.

16.4 Counsel for the appellants urged us to examine the Constitution objectively and with reference to the specific issues before us. He submitted that we should not approach our task with an *a priori*

> view that, because we are apprehensive of a possible abuse of power, we will not imply powers which are necessary for effective governance. I have had due regard to this caution. Nevertheless this Court is mindful that the Constitution is not just another law. It is the product of negotiation. Compromises and accommodations have inevitably been made. Therefore it constitutes a sacred covenant. A court interpreting the Constitution will anxiously reflect on, and with great circumspection consider, whether any attempt to grant powers to functionaries, political or otherwise, have explicitly or by compelling and necessary implication been conferred.

[17] Our task in considering the issues before us has been eased considerably by the consensus as to the principles that have to be observed when determining the approach of a court in assessing the legality of the

exercise of power by authority. There was no dispute that:

17.1 The Kingdom of Swaziland is a Constitutional State. It has incorporated the doctrine of the rule of law by the enactment of the Constitution.

17.2 Such incorporation comprehends the principle of legality. It is central to the concept of a Constitutional State that the law-giver and the Executive "in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law." ***Fedsure Life Assurance v Greater Johannesburg TMC*** 1999(1) SA 374 (CC) 400 at page 399 – 400.

See also in this regard the *dictum* of the Canadian Supreme Court (cited by the South African Constitutional Court in Fedsure op.cit.) In the matter of a Reference by the Government in

Council Concerning certain Questions Relating to the Secession of Quebec from Canada where at p 72 of the, as then unreported, judgment the Court held that (cited at p. 399 - para 56 of ***Fedsure***):

> *"Simply put the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution."*
>
> It then points out that - "*the Canadian system of Government was transformed to a significant extent from a system of Parliamentary Supremacy to one of Constitutional Supremacy. The Constitution binds all governments both Federal and Provincial, including the executive branch." The Court then concludes as follows: "they (these entities) may not transgress its*

provisions; indeed, ***their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution and can come from no other source".*** *(emphasis added)*

See in this context also the judgment of the South African Constitutional Court in ***Pharmaceutical Manufacturers Association of South Africa and Another v President of the Republic of South Africa and Others*** *2000(2) SA 674(CC) at par 39. The Court also cites with approval the statement in* ***Boulle, Harris and Hoexter; Constitutional and Administrative Law: Basic Principles*** *(Juta, Cape Town 1989) at 98 to the effect that:*

"The basic justification for judicial review of administrative action originates in the

Constitution. In the constitutional state there are, by definition legal limits to power and the courts are bestowed with judicial authority, which incorporates the competence to determine the legality of various activities, including those of public authorities.

17.3 The only source of power exercised by the Prime Minister/Cabinet *in casu* had to be found in the Constitution. It was also common cause that there was no explicit provision in the Constitution which conferred such power on the Prime Minister/Cabinet, but that such power had, by necessary implication, to be inferred.

[18] The first question that has to be answered is, does the Constitution of the Kingdom of Swaziland 2005 confer the power on the Executive to issue a directive "blacklisting" the respondents? To this there is a sub-

set of questions that arise. These are the following:

(i) What was the nature and extent of the directive?

(ii) Did it bind the recipients, and if not, was it likely that, although not binding, the decision makers would act contrary to its terms.

(iii) It is only if we were to hold that the decision was either binding or unlikely to be ignored, that it becomes necessary to determine the principal issues of the legality of the directive, and if legal whether it was rationally exercised.

[19] The nature and extent of the directive and whether it was binding on the recipients.

The directive is set out above. It conveys to the recipients, in clear and unambiguous terms, that Cabinet has resolved to “blacklist” the respondents,

"from among others, parastatals." It also records that the resolution has become operative "with immediate effect". It is comprehensive in extent inasmuch as it applies to all the respondents and is directed at all Category "A" public enterprises "among others". It embargoes all parastatals from contracting with them. As far as the objective of the resolution is concerned it was clearly intended to preclude any of the recipient agencies to do business with the respondents. "Blacklist" is defined as follows by the Concise Oxford Dictionary:

> *" A list of people or groups regarded as unacceptable*
>
> *or untrustworthy".*

It was not contested that whatever its import, the Central and Treasury Tender Boards would, through its Chairmen have been cognisant of the directive. Even if they were not recipients, the wide publicity of the

announcement would have ensured that the entire State and Parastatal apparatus would have been aware of this decision.

I have no doubt, whether binding on recipients or not, that no decision maker would have acted contrary to this directive. Emanating as it does from the highest executive authority, the peremptory terms of the instruction demand compliance and invocation. The contention that the members of the Tender Boards would still have regarded themselves free to exercise their discretion and enter into contracts with the respondents despite the directive is without merit. Indeed it was intended to be binding and would have been rigorously observed.

[20] Before dealing with the legality of the directive and more particularly whether a power to act accordingly is to be implied from the terms of the Constitution, it is important to note that the directive is not a general

injunction directed at decision-makers. Thus, e.g. the resolution does not purport to convey a policy directive; e.g. that Cabinet has resolved that in the light of the constitutional directives set out in Chapter V, it issues a policy directive to guide decision-makers in the exercise of their discretion. Such a power has clearly been conferred on the Cabinet by the provisions of Section 69(3) of the Constitution which reads as follows:

> *"(3) The Cabinet shall formulate and implement the*
> *policy of the Government in line with any national development strategy or plan and perform such other*
> *functions as may be conferred by the Constitution or*
> *any other law."*

Bearing in mind the directive contained in Section 58 under the heading "Political Objectives" and specifically

the provisions of Section 58(5) of the Constitution, a general directive enjoining State agencies to take specified steps to combat corruption would have been an enforceable exercise of the Cabinet's power. This Section reads as follows:

> *"(5) All lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political or public offices".*

Thus an instruction could have been issued directing e.g. the Tender Boards in the exercise of their discretion to examine the activities of a tenderer with reference to its adherence to the principles of good corporate governance, including any evidence that such company or individual had conducted its affairs in a corrupt or otherwise irregular manner. No tenders should in such event be awarded to such applicants. Similarly Cabinet could issue a directive that the Tender Boards were, all

things being equal, to give preference to Swazi citizens. See the comments below in para [21]. Similarly, a directive could have been issued giving preference to those tenderers who have significant and effective participation by women. The directive *in casu* did none of these things. It directed the Tender Boards not to do business with individual companies. The question is therefore; did Cabinet have the power to do so?

[21] Counsel for the appellants identified the following possible sources from which Cabinet derived the power to act as it did.

21.1 The power to conclude contracts. This he submitted included the right to choose with whom to contract and the right to refuse to enter into contracts with particular contractors.

21.2 The power emanates from the capacity the Government has to formulate and implement government policy.

21.3 The power is an incident of the prerogative powers

of the King preserved under the Provisions of Section 276 of the Constitution.

I proceed to consider these sources below.

[22] The power to contract and with whom to do so

It is clear that the State (Crown) has the power to contract. It is recognized by law as having legal personality. The capacity to do so is an incident of its legal personality. It does so through such departments or other arms of government that are, by virtue of their focus area of operations, equipped to take informed decisions as to how and with whom to contract. In the normal course of events and with e.g. the exception of international treaties, the Cabinet would not involve itself in the day to day contractual activities of the State. *In casu* and in relation to the process of adjudicating upon any tenders, the legislature has in the Finance and Audit Act, 1967 and the Regulations promulgated thereunder created an elaborate process through which tenders are to be submitted, evaluated

and determined. In some of these regulations such provisions have also prescribed with whom the Boards may contract. Thus e.g. in legally defined circumstances, contracts may only be awarded to companies registered in Swaziland. (See par. 1404.1 of the regulations cited on page 58 thereof.) Why and in what circumstances the founding fathers would have found it necessary for compelling reasons to have intended the Cabinet to have the power to adjudicate and determine the merits of competing tenders is difficult to fathom. The proposition is only to be stated for it to be rejected.

[23] Is it necessary to imply the power for the purposes of formulating and implementing policy? For the same reasons as those set out in the preceding paragraph, this question must also be answered in the negative. The Constitution certainly contemplates and expects the Cabinet to determine policy and to ensure its implementation. However, in so far as implementation

is concerned it does this through the agencies empowered by legislative fiat or other authorisation. Mechanisms have been created to act as implementers. Such creatures would have the capacity and the relevant expertise to do so. The Prime Minister/Cabinet was clearly not *qua* Constitution empowered to perform the duties of a body that was legislatively sanctioned to assume the responsibility of e.g. adjudicating upon tenders or determining the suitability of particular contractors to deliver goods or services to the State.

[24] There is a further consideration that must be borne in mind. The implementation of policy, such as negotiating and entering into contracts with individual prospective contractors comprehends the exercise of administrative powers that most often require procedural fairness, such as e.g. the right to be heard. Such a right would certainly be implied in the event of a Tender Board or other Governmental agency deciding not to award a tender or a contract to a party because

it is alleged that such party is dishonest or is corrupt. The Cabinet does not have the capacity to ensure that the tenets of fair administrative action are observed in the process of adjudication. How could the Cabinet ever determine whether e.g. the respondents have complied with the injunction that they had to " clear themselves of the numerous questions that have arisen in relation to (their) conduct with Government". It should be noted that neither this condition nor the allegation that they were suspected of " irregular" practices, were ever put to the respondents by the Cabinet. No opportunity was given to them to respond to the allegations of commercial impropriety which were the foundation for the decision to ban them as prospective contractors or tenderers. They were in my view entitled to " a lawful, procedurally fair process, and where (their) rights were affected or threatened to an outcome which was justifiable in relation to the reasons provided for it." See ***Logbro Properties cc v Bedderson NO and others*** 2003(2) SA 460(A) para

7 and 25. (This is a decision dealing with the processes associated with the adjudication of tenders.)

[25] Is the power an incident of the prerogative powers of the King preserved under the provisions of Section 276 of the Constitution?.

This section is to be found in Chapter XIV and under the heading “Transitional Provisions”. It reads as follows:

> *“276. Subject to the provisions of Section 275 (a section dealing with the prerogative of mercy) –*
>
> a) *any right, prerogative, privilege or function which under the existing law vested in the King or other person or authority as is specified under this Constitution;*
>
> b) *Any right privilege, obligation, liability or function vested or subsisting against the Government by or under an existing law*

shall continue so to vest or subsist."

[26] The word prerogative is to be found in Section 78 and section 275 of the Constitution. The latter provision is a transitional one which ties in with Section 78 which regulates the exercise of the prerogative of mercy which is preserved in the framework enacted in the said section. In so far as Section 276 is concerned this provision is similarly contained in the chapter dealing with transitional arrangements. Chapter VI of the Constitution sets out in considerable detail the powers of the King in his capacity as Head of State and as Head of the Executive Authority. In the latter capacity the Constitution provides that "the executive authority of Swaziland vests in the King as Head of State and shall be exercised <u>in accordance with the provisions of this Constitution</u> (Sec. 64(1)). (Emphasis added). In Sec. 64(3) the Constitution provides that "Subject to the Provisions of the Constitution, the King may exercise the executive authority either directly or through the Cabinet or a Minister". Sub-section (4) then sets out

the authority conferred on the King as follows:

> *"(4) The King in his capacity as Head of State has authority, in accordance with this Constitution or any other law, among other things to –*
>
> a) *assent to and sign bills;*
>
> b) *summon and dissolve Parliament;*
>
> c) *receive foreign envoys and appoint diplomats;*
>
> d) *issue pardons, reprieves or commute sentences;*
>
> e) *declare a state of emergency;*
>
> f) *confer honours;*
>
> g) *establish any commission or vusela; and*
>
> h) *order a referendum*

[27] The citation emphasised as above makes it clear that there is no reservation of unspecified prerogative powers. Indeed the eight powers preserved in the section appear to be the recognized "Royal

Prerogatives" which are also recognized both in South African and English law. There is no room for the implication of unspecified Royal Prerogatives in these sections. The same applies to the reference to the transitional arrangements in Section 276 under the heading "Devolution of rights and liabilities". It is indeed unthinkable that such a provision could purport to preserve additional unspecified discretionary powers that previously may have vested in the King as head of the Executive or some other person or authority. Such an interpretation would conflict with the key objectives of the Constitution so resonantly expressed in the paragraphs of the Preamble set out above. Certainly, if this were the intention of the lawgiver, it would have done so in explicit terms, because it would have been a radical departure from the desire to move away from authoritarian and arbitrary rule to constitutionalism. Compare in this regard the decision in **The *President of the Republic of South Africa and another vs Hugo*** 1997(4) SA 1 (CC). In that case the

Constitutional Court in South Africa held that no residual prerogative powers were preserved in the Constitution and the only powers that vested in the President were those enacted by the Constitution or vested in him by legislation. With due recognition of the differences in the two constitutional enactments, I am of the view that the Swaziland Constitution similarly only retained the prerogative powers of the King conferred by the Constitution or legislation enacted in accordance with its terms. Of particular persuasive impact is the whole tenor, motivation and objective of the founding fathers to create a Constitutional dispensation that entrenches the Rule of Law, achieves "full freedom" in "complete liberty". See also the clause in the Preamble that recognizes the necessity "to protect and promote the fundamental rights and freedoms of all in our Kingdom in terms of a Constitution which binds the Legislature, the Executive, the Judiciary and the other organs and agencies of the Government." All these objectives would be frustrated

if unspecified and general prerogative powers were by implication held to have been preserved.

[28] The High Court also rejected the submission that such prerogative powers were preserved. The uncertainties and legal conundrums that such open-ended power arrangements could produce militate against their reintroduction in the Kingdom. The Kingdom has committed itself to design its own homegrown version of a lawful Constitutional state. According to Ngcobo J in the ***Affordable Medicines Trust Case*** 2005 (6) B.C.L.R. 529 (CC) the doctrine of legality: "… entails that both the legislative and the executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power." This Constitution does this for the Kingdom of Swaziland in clear and unequivocal terms.

[29] Counsel for the appellants stressed the need for the Court to support the efforts of the State to combat the evil of corruption and the impact it has on the fabric of Swazi society. This Court understands this and will support appropriate Government responses to combat corruption. It appreciates the threat that corruption poses to all communities – and especially to developing societies that seek to promote economic growth and the upliftment of the poor. However, in combating this evil the State must use the legitimate levers of power. There is no need to resort to unconstitutional methodologies to address corruption. The State has the resources of conventional legitimate power, such as criminal prosecutions and policy imperatives that bind implementers to address the incidence of corruption. Most importantly it can by rigorous example set the standards for civil society to follow. The State needs to appreciate that it too is not above the law. " With us every official from the Prime Minister down to a

constable or a collector of taxes, is under the same responsibility for every act done without legal justification as every other citizen." ***Dicey: The Introduction to the study of the law of the Constitution*** 10th ed. (MacMillan Press, London 1959) at 193; cited in **Fedsure** op.cit.

[30] For these reasons this Court is of the view that the exercise of power by the Cabinet/Prime Minister was unlawful. It follows that it is not necessary to decide whether it was irrational. However in this regard the appellants face what appears to me to be an insuperable obstacle, i.e. that it failed to give the respondents a hearing and that therefore the procedure they adopted was administratively unfair . It acted as both prosecutor and judge and imposed a sanction on the respondents without a hearing. See in this regard the judgment of Cameron J.A. in ***Logboro Properties*** cited above.

[31] Some remarks were addressed to us on the form the orders granted should take. It is our view that these concerns relate to semantics rather than substance and we see no need to address these.

[32] The appeal is dismissed with costs. Such costs are to include the certified costs of counsel.

_____
J.H. STEYN,

I agree
_____
R.A. BANDA

I agree
_____
J. BROWDE

I agree
_____
P.H. TEBBUTT

I agree
_____
N.W. ZIETSMAN

-