IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 12/08

In the matter between:

KHANYAKWEZWE ALPHEUS MHLANGA **1ST APPLICANT**

SWAZILAND POLICE UNION **2ND APPELLANT**

and

THE COMMISSIONER OF POLICE **1st RESPONDENT**

THE PRIME MINISTER **2nd RESPONDENT**

THE COMMISSIONER OF LABOUR **3rd RESPONDENT**

THE ATTORNEY-GENERAL **4th RESPONDENT**

AND

SWAZILAND CORRECTIONAL SERVICES UNION **APPELLANT**

Case No. 764/2007

and

THE COMMISSIONER OF CORRECTIONAL SERVICES **1st RESPONDENT**

THE MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS **2nd RESPONDENT**

THE COMMISSIONER OF LABOUR **3rd RESPONDENT**

THE ATTORNEY GENERAL **4th RESPONDENT**

THE MINISTER OF ENTERPRISE

AND EMPLOYMENT **5th RESPONDENT**

CORAM: TEBBUTT -J A
ZIETSMAN – JA

RAMODIBEDI – JA

FOXCROFT-JA
EBRAHIM – JA

FOR APPLICANTS: MR. T. MASEKO

FOR RESPONDENTS: MR. M. DLAMINI

JUDGMENT

ZIETSMAN JA

In an application numbered 341 of 2007 the first and second appellants, KHANYAKWEZWE ALPHEUS MHLANGA and the SWAZILAND POLICE UNION, sought, ***inter alia,*** an order declaring section 3 of the Industrial Relations Act No. 1 of 2000 (as amended) to be null and void and of no force or effect. The appellants' contention is that the said section is inconsistent with certain provisions contained in the Constitution of the Kingdom of Swaziland Act, No. 1 of 2005.

In an application numbered 764 of 2007 the applicant, the SWAZILAND CORRECTIONAL SERVICES UNION, sought, ***inter alia,*** an order declaring section 18 of Prisons Act No. 40 of 1964 to be null and void and of no force or effect. In this

application also the appellant's contention is that the said section is inconsistent with provisions contained in the Constitution.

In view of the fact that the same points arose for decision in both applications the two applications were consolidated. The matter was heard by three judges sitting together in the High Court at Mbabane who, in a majority judgment, dismissed the applications. The applicants have appealed to this Court against the order dismissing their applications.

In the judgment of the court ***a quo*** reference was also made to regulation 19 of the Police Regulations made under the Police Act number 29 of 1957, the court holding that by necessary implication the order sought by the applicants would include an order declaring the said regulation also to be null and void and of no force or effect.

Part IX of the Industrial Relations Act No. 1 of 2000 is headed Freedom of Association and the Right to Organise. Section 98 (3) of the Act provides that employees may take part in the formation of unions, and this includes the right to strike. Section 3 of the Act, however, provides as follows.

> 3. This Act shall apply to employment by or under the Government in the same way and to the same extent as if the Government were a private person but shall not apply to -

(a) Any person serving the Umbutfo Swaziland Defence Force established by the Umbutfo Defence Force Order, 1977;

(b) The Royal Swaziland Police Force;

(c) His Majesty's Correctional Services established by Prison Act No. 40 of 1964.

The effect of the proviso to section 3 is to exclude the appellants from the benefits given to other workers in terms of the Act.

Section 18 of the Prisons Act number 40 of 1964 provides:

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

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

(3) This section shall not be deemed to prohibit prison officers becoming members of a prison officers staff

association approved of by the Minister by notice published in the Gazette.

Regulation 19 of the Police Regulations made under the Police Act No. 29 of 1957 reads as follows:

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

The objects envisioned by the appellants are the formation of a police trade union and the formation of a correctional services trade union. They accept the fact that section 3 of the Industrial Relations Act and section 18 of the Prisons Act in specific terms prohibit the formation of such unions. For this reason they seek orders declaring the said sections to be null and void and of no force or effect. The submission, made on their behalf by Mr. Maseko, is that the said sections are in conflict with the terms of the Constitution and must therefore be struck down. The sections of the Constitution relied upon

by Mr. Maseko are sections 2 (1), 24, 25 and 32 (2). These sections read as follows:

2. (1) This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

24. (1) A person has a right of freedom of expression and opinion.

(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say -

(a) freedom to hold opinions without interference;

(b) freedom to receive ideas and information without interference;

(c) freedom to communicate ideas and information without interference (whether the communication be to
the public generally or to any person or class of persons); and

(d) freedom from interference with the correspondence
of that person.

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

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

(d) that is reasonably required for the purpose of -

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts; or

(iv) regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication, or

(c) that imposes reasonable restrictions upon public officers,

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

25. (1) A person has the right to freedom of peaceful assembly and association.

A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and

association, that is to say, the right to assemble peacefully and associate freely with other persons for the promotion or protection of the interests of that person.

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

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

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

(g) that imposes reasonable restrictions upon public officers,

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

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

(h) for the registration of trade unions, employers organisations, companies, partnerships or co-operative societies and other associations including provision relating to the procedure for registration, prescribing qualifications for registration and authorising refusal of registration on the grounds that the prescribed qualifications are not fulfilled; or

(i) for prohibiting or restricting the performance of any

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

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

32. (1) A person has the right to practise a profession and to carry on any lawful occupation, trade or business.

(2) A worker has a right to -

(a) freely form, join or not to join a trade union for the promotion and protection of the economic interests of that worker; and

(b) collective bargaining and representation.

As can be seen, section 24 which deals with the freedom of expression contains, in subsection (3), a provision that nothing contained in any law shall be held to be in contravention of section 24 to the extent that the law makes provision that is reasonably required in the interests of defence, public safety, public order, public morality or public health. Section 25, which deals with freedom of assembly and association, has a similar provision in subsection (3) of section 25.

The case made out by the appellants is that they are discriminated against and find themselves in a disadvantaged

position by reason of the fact that they cannot form trade unions and they therefore have no bargaining power and no means to enforce improvements in their salaries and working conditions.

Subsections 24 (3) and 25(3) refer to provisions that are "reasonably required" in the interests, for example, of defence. If those were the only sections relied upon by the respondents the question would arise whether the provisions sought by the appellants to be struck down are reasonably required for their alleged purposes.

There is, however, a further section contained in the Constitution and it is this section upon which the respondents base their case. This is section 39. The relevant subsections of section 39 read as follows:

> 39 (2) Nothing contained in section 20, 24 or 25 shall be construed as precluding the inclusion in the terms and conditions of service of public officers of reasonable requirements as to the communication or association with other persons or as to the movement or residence of those officers.
>
> (3) In relation to a person who is a member of a disciplined force of Swaziland, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 15, 17 or 18.

(6) In this Chapter, unless the context otherwise requires -

"disciplinary law" means law regulating the discipline of any disciplined force;

"disciplined force" means -

(a) an air, military or naval force;

(b) the Swaziland Royal Police Service;

(c) the Swaziland Correctional Services.

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

Subsection 39 (2) refers to "reasonable requirements". If that section is relied upon once again the question of the reasonableness of the relevant provisions sought to be struck down would have to be considered. The papers do indicate dissatisfaction on the part of the appellants regarding their pay and working conditions, and frustration on their part due to their lack of bargaining power. This led Mabuza J, who gave the dissenting judgment in the court ***a quo,*** to the conclusion that the laws in question were unreasonable and needed to be declared null and void.

The main difficulty faced by the appellants is the wording of subsection 39 (3) of the Constitution. This subsection provides that in relation to a person who is a member of a disciplined force nothing contained in the disciplinary law of that force

shall be held to be inconsistent with the other provisions contained in the same Chapter. These other provisions include sections 24, 25 and 32. The question of reasonableness does not arise in the interpretation of this subsection. We are admittedly dealing here with members of disciplined forces and it is common cause that the laws the appellants seek to be struck down are in fact disciplinary laws of these forces.

Mr. Maseko accepts the fact that it is a cardinal rule of the interpretation of any statute, including a Constitution, that meaning must be given to every section contained in the statute. It is only when it is impossible to reconcile different sections in the statute that a question of striking down a section can arise.

The basis to Mr. Maseko's argument is that the main object of the 2005 Constitution is to promote and protect the fundamental rights and freedoms of all of the people in this Kingdom. This is set out in the Preamble to the Constitution where, ***inter alia,*** the following is stated:

> "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."

The Constitution in sections 24, 25 and 32, guarantees rights and freedoms to all people in Swaziland. The heading to section 39, however, is "Saving Clauses and Interpretations"

and this section, as stated in the judgment of the court ***a quo,*** prescribes boundaries and limits within which the rights and freedoms set out earlier in the Chapter are to apply. It is correct, as submitted by Mr. Maseko, that the Constitution must be read as a whole. It follows that meaning must be given to section 39. What is clear, however, is that exceptions contained in a Constitution which guarantees fundamental rights and freedoms must be given a strict and narrow, rather than a broad, construction. In the case of **Rwanyarare & Others v Attorney - General (2004) AHRLR 279** the Constitutional Court of Uganda stated the following:

> "The Constitution is to be looked at as a whole. It has to be read as an integrated whole with no one particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument .... The Constitution should be given a generous and purposive construction especially the part which protects the entrenched fundamental rights and freedoms ... Where human rights provisions conflict with other provisions of the Constitution, human rights provisions take precedence and interpretation should favour enjoyment of the human rights and freedoms."

In the case of **United Democratic Movement v President of the Republic of South Africa 2003 (1) S.A. 495** trie Constitutional Court in South Africa stated the following:

> "A Court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision

> of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions and give effect to all of them."

Mr. Maseko, quoting authorities in support of his submission, has submitted that a Constitution must not be allowed to be a lifeless museum piece. It is a living document which must be allowed to grow and develop to meet the just demands of an ever developing society. A stultification of the Constitution must be prevented. However, the courts cannot give an interpretation to a Constitution which will do violence to the language of the Constitution.

We were referred to international conventions, to pronouncements by the International Labour Organisation, to international law and to decisions dealing with the interpretation of provisions contained in the Constitutions of other countries. The implementation of fundamental human rights and freedoms in a democratic country such as Swaziland has, correctly, been emphasised. While the courts in this country can have regard to these pronouncements this must be done with circumspection because of the different contexts within which other Constitutions were drafted and the different social structures existing in other countries. See in this connection the South African case of **Park-Ross and Another v Director: Office For Serious Economic Offences 1995 (2) S.A. 148 (C).**

What is important is the wording of our own Constitution. A proper interpretation must be given to the language as it appears in that document. A broad, generous and liberal interpretation must be given to the sections pronouncing human rights and freedoms, and any section which limits such rights and freedoms must be given a strict and narrow interpretation. See e.g. the Botswana case of **Attorney-General v Dow 1992 BLR 119 (CA)** at paragraph 25. What the courts cannot do, however, is to rewrite the Constitution. In the case of **S.V. Zuma 8**B **Others 1995 (2) S.A. 642 (CC)** Kentridge A.J, whose judgment was concurred in by all of the other judges of the Court, stated it as follows, at page 653 A - B.

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

The crucial section of the Constitution to be interpreted in this case is section 39 (3). This section is contained in the same Chapter as sections 24, 25 and 32. It provides that in relation to a person who is a member of a disciplined force nothing contained in the disciplinary law of that force shall be held to be inconsistent with or in contravention of the other sections mentioned above. It in specific terms excludes members of the disciplinary forces from receiving the benefits set out in

the other sections if such benefits are taken away from them by the disciplinary laws applicable to them. There can be no question of section 39 being in direct conflict with sections 24, 25 and 32. It refers to these sections and stipulates an exception thereto.

The next question to be determined is whether a narrow interpretation of section 39 could result in a decision that section 39 does not prevent the Court from declaring section 3 of the Industrial Relations Act, section 18 of the Prisons Act and Regulation 19 of the Police Regulations to be null and void. Clearly this cannot be the case. Section 39 of the Constitution makes reference to, and recognises, the disciplinary laws of the disciplined forces. There can be no question of any intention that these disciplinary laws should be declared to be unconstitutional.

During the course of argument reference was made to the South African Constitutional Court case of **South African National Defence Union v Minister of Defence 1999 (4) S.A. 469 (CC).** The question which arose in that case was whether it was constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions. Section 126 B (1) of the Defence Act provided:

> "a member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour

> Relations Act 28 of 1956: Provided that this provision shall not preclude any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister."

Subsection (2) of section 126 B prohibited a member of the South African Defence Force who was subject to the Military Discipline Code from striking or performing any act of public protest.

The Constitutional Court declared section 126 B (1), and that part of section 126 B (2) that prohibited members from performing any act of public protest, to be unconstitutional. The part of section 126 B (2) which prohibited such members from striking was, however, found not to be unconstitutional.

This South African case is distinguishable from the present case in that the South African Constitution does not have the equivalent of the Swaziland Constitution's section 39. This section refers to the disciplinary laws of the disciplined forces of Swaziland and provides that nothing contained therein shall be held to be inconsistent with the other provisions of the Constitution referred to above.

My conclusion is that the court ***a quo*** was correct in the majority judgment in coming to the conclusion that the applications should be dismissed. In that court no order was made as to costs and it is conceded that if this appeal should fail a similar result should apply to the costs of the appeal.

At the conclusion of the judgment in the court ***a quo*** the following is stated:

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

Such a suggestion could perhaps be considered.

The result of this appeal, however, is that the appeal is dismissed. No order is made in respect of costs.

N.W. ZIETSMAN

JUDGE OF APPEAL

I agree

P.H. TEBBUTT
JUDGE OF APPEAL

I agree

I agree

M. M. RAMODIBEDI
JUDGE OF APPEAL

I agree

A.M. EBRAHIM
JUDGE OF APPEAL

Dated at Mbabane this 23rd day May 2008