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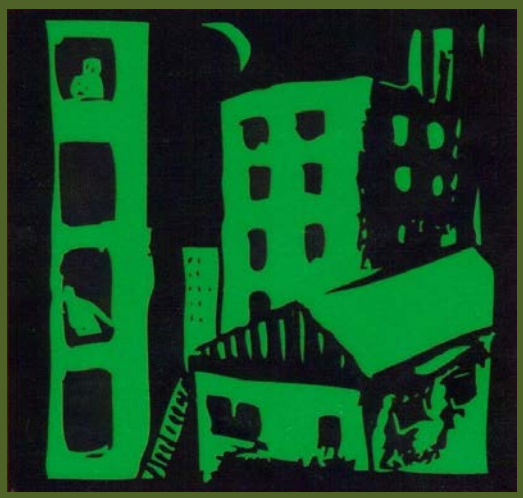

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The (Mis)application of the Limitation Analysis in *Maseko and others v Prime Minister of Swaziland and others*

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1 INTRODUCTION

On 16 September 2016, the High Court of Swaziland delivered judgment in a case involving the interpretation of the limitation clause in the Swaziland Constitution. This was in the case of *Maseko and others v Prime Minister of Swaziland and others* (*Maseko*),[1] in which certain sections of the Sedition and Subversive Activities Act 46 of 1938 (Sedition Act) as well as the Suppression of Terrorism Act 3 of 2008 (STA) were declared unconstitutional. It should be noted that there is a general reluctance within the judiciary to enquire into or rule upon the constitutionality of

[1] [2016] SZHC 180.

impugned legislation, and quite often constitutional challenges fail at the preliminary stage of determining *locus standi*. The Court's response to the legal challenge in *Maseko* is thus very pertinent to constitutional development in that this was one of the very few instances in which a Swaziland court applied the limitation analysis to declare legislation unconstitutional, and did not shelter behind a common law inspired conceptualisation of standing. The only other time this was done was to declare the common law marital power of the husband invalid on account of its clash with the equality clause in the Constitution in the case of *Sihlongonyane v Sihlongonyane* (*Sihlongonyane*).[2] However, even in *Sihlongonyane*, a proper limitation analysis could not be undertaken since the Swaziland Constitution does not have a general limitation clause. The Court was merely guided by the equality clause in sections 20 and 28 which regulate the rights and freedoms of women. It is worth noting that in the Swaziland Bill of Rights litigation context, there is a strong inclination to cling to common law principles, even when dealing with constitutional litigation. For instance, standing is still viewed from the angle of the common law when in fact it is now regulated by section 35 of the 2005 Constitution in so far as constitutional litigation goes. To demonstrate this: in *Sihlongonyane*, there was an unsuccessful attempt to have the case thrown out on the basis that the female applicant did not have standing due to the marital power of the husband. The Court had to first deal with that challenge before determining the constitutionality or otherwise of the common law marital power of the husband.

In *Maseko*, however, the Court was divided on whether the applicants had standing or not. Whilst the majority judgment accepted that they did have standing, the dissenting judge held otherwise. What makes the majority judgment in *Maseko* even more interesting is the fact that the impugned pieces of legislation were utilised for political purposes, namely to, suppress dissenting voices. In the light of an established pattern of political clampdown on both dissenting voices and the judiciary, such a bold and progressive move is indeed commendable. The case marked the first time that the Swaziland courts acknowledged that the Constitution is a living document and that as such they had a duty to interpret the Bill of Rights in accordance with international standards, influenced by the universality of fundamental rights.[3]

2 BACKGROUND TO THE LITIGATION

On 18 June 2009, the applicant, Mr Thulani Maseko (a lawyer and a human rights activist), filed an application in which he sought to have the Court declare the entire Sedition Act null and void for its inconsistency with sections 1, 2 and 24 of the Swaziland Constitution. In the alternative, he sought to impugn specific sections of the Act, namely, sections 3, 4 and 5, in that the said sections are wide, overbroad and contrary to sections 1, 2 and 24 of the Constitution. Section 2 of the Swaziland Constitution asserts the supremacy of the Constitution, while section 1 provides that

[2] [2013] SZHC 144.

[3] At para 41.

Swaziland is a unitary, sovereign and democratic Kingdom, but does not proffer a definition of the term "democracy". The Head of State has, however, attempted to give guidance on what the particular form of democracy that Swaziland practises entails. Speaking at the UN General Assembly's 68th Session in 2013, King Mswati III stated that Swaziland operates what he terms a "monarchical democracy". In other words, the monarchy is at the centre of Swaziland's form of democracy, which is a "marriage between the monarchy and the ballot box". It combines the monarchy and the popular will. The ballot box is regarded as the will of the people, which provides advice and counsel to the King and serves to ensure transparency and accountability.[4]

Maseko's application was followed by a series of other similarly worded applications, which the Court directed should be consolidated with the *Maseko* matter. The other matters sought a similar remedy and attacked both the Sedition Act as well as certain provisions of the STA. The other three applicants were also political activists and, like Maseko, had been in frequent collision with the State for their political opinions and their association with individuals who held similar dissenting political views. These are: Mario Masuku, a member and president of the banned political party, People's United Democratic Movement (PUDEMO); Maxwell Dlamini, a student activist and member of PUDEMO; and Mlungisi Makhanya, a political activist and Secretary-General of PUDEMO. Over and above the attack on the Sedition Act, Masuku sought to challenge certain provisions of the STA as unconstitutional, whilst Makhanya attacked the STA only. The other basis for the challenge to the Sedition Act was that it violated the applicants' freedom of association and assembly contained in section 25 of the Constitution.

The respondents in the matter were the Prime Minister of Swaziland in his official capacity as head of the Executive (a delegated function which constitutionally vests in the King),[5] the Minister for Justice and Constitutional Affairs, and the Director of Public Prosecutions. The Attorney-General was also sued in his nominal capacity as the legal advisor to all government departments.

The pusillanimous behaviour of the Swazi judiciary in relation to standing and Bill of Rights litigation in general could be explained by the failure to embrace what can be called "transformative constitutionalism", favouring instead liberal or formal constitutionalism. Transformative constitutionalism embraces the idea of the Constitution as a living document, whose interpretation results in an organic reform of society and its institutions, with the people at the centre of that transformative process. There are many reasons why the Swazi judiciary could fail to embrace transformative constitutionalism. It could genuinely be the result of a bench that had no idea of how to proceed with determining the limitation of a right. It could also be the fact that the Swaziland judiciary faced immense pressure from the executive branch over previous years, which in 2002 saw judges of the then Court of Appeal resign en masse following

[4] United Nations, 'Swaziland', General Assembly of the United Nations 68th Session (25 September 2013) available at https://gadebate.un.org/en/68/swaziland (accessed 14 February 2017).

[5] The Prime Minister is appointed by the King as provided by s 67(1) of the Constitution of Swaziland.

the Prime Minister's interference in their work.[6] It could also be a result of interference from within, which characterised the state of the judiciary during the tenure of former Chief Justice Michael Ramodibedi, who controversially referred to himself as "*Makulu baas*" (an apartheid era term used to refer to an autocratic White male in a position of power). During Ramodibedi's tenure, judges did not have the independence to carry out their duties, and risked being fired for delivering unfavourable judgments. Instructive in this regard is the case of Justice Thomas Masuku,[7] whom Ramodibedi had fired after he wrote metaphorically in his judgment in *Aaron Maseko v The Commissioner of Police* that it is "incomprehensible that His Majesty could conceivably speak with a forked tongue".[8] Ramodibedi hastily convened a tribunal in which he sat as a complainant, a prosecutor, a witness and a judge, and found Masuku guilty. This opened the way for impeachment, and Judge Masuku was later fired.

Ramodibedi went on to issue practice directives to all judges and registrars of courts, not to entertain matters in which the King was cited.[9] Given this edict, it is highly probable that judges might have engaged in self-censorship, especially in dealing with constitutional challenges, which are largely viewed as an attack on the King himself. What makes this possibility even more plausible is that with the departure of Ramodibedi after facing corruption charges in 2015, the judiciary seems to have regained boldness to not only admit such matters, but to also strike down offending provisions that have been used to preserve "monarchical democracy". It is notable that the progressive majority judgment in *Maseko* departs from the position adopted by the Swaziland courts, which not so long ago endorsed the faulty notion that the King can do no wrong.[10] This was in the case involving the Law Society of Swaziland in which the exercise of public power by the King to appoint judges was questioned.[11] The bench, which consisted of three acting judges, dismissed the matter citing the immunity of the King under both the Constitution and customary law.

Turning to *Maseko*, it is worth noting that Mamba J, when delivering the majority judgment, was alive to the way in which the judgment would be received by the political authority in Swaziland. Hence the learned judge alluded to the fact that the judgment should not be seen as being contrary to the "Swazi way of life".[12] The learned judge

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[6] Maseko T "The drafting of the Constitution of Swaziland, 2005" (2008) 8(2) *African Human Rights Law Journal* 312, 328. This happened after the Court of Appeal delivered two judgments, the first of which declared that the King lacked authority to make law by decree; whilst the second one committed the Commissioner of Police for contempt of court. The Swaziland Government acting through the Prime Minister issued a statement that it would not comply with judgments of the Court of Appeal. The resignation en masse of the judges left Swaziland without a Court of Appeal for over two years.

[7] Dube A & Nhlabatsi S "The King can do no wrong: The impact of *The Law Society of Swaziland v Simelane NO and Others* on constitutionalism" (2016) 16 *African Journal of Human Rights Law* 273.

[8] *Aaron Maseko v Commissioner of Police and another* [2011] SZHC 66.

[9] Dube A "Does SADC provide a remedy for environmental rights violations in weak legal regimes? A case study of iron ore mining in Swaziland" (2013) 3 *SADC Law Journal* 270.

[10] Dube A & Nhlabatsi S (2016) 278.

[11] *Law Society of Swaziland NO v Simelane and others* [2014] SZHC 179.

[12] Para 41.

seemed to be aware of certain segments within Swazi society (especially within traditional structures) which regard fundamental rights as "unSwazi" and against customary law. He emphasized that the values and aspirations that informed his reasoning are not foreign but are contained in the very same Constitution. He went on to state that his judgment was an attempt to reaffirm the universality of human rights. Mamba J also invoked section 2(2) of the Constitution, which places a positive duty on everyone to uphold and defend the Constitution. This was a very progressive, if not revolutionary, judgment. The judge invoked his resolute, firm and unshakeable belief in traditional institutions, justice, democracy and human rights.

Some of the values the judge alluded to are contained in the preamble of the Constitution. It is now settled that the preamble is critical in assisting the Court to interpret fundamental rights.[13] It is as much an important source of law as are the operative provisions of a constitution, even though it does not contain any positive norms. Preambles often outline a society's fundamental goals.[14] These may be universal objectives, such as the advancement of justice, equality, democracy and human rights, as well as economic goals.[15] In essence, it contains the supreme goals of any nation.

The preamble to the Constitution stipulates, amongst others: “Whereas it is necessary to blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social, economic and cultural development of our Nation."

The preamble further provides that the Constitution was the culmination of a review of various laws, decrees, customs and practices with a view to promoting good governance, the rule of law, respect for institutions, and the progressive development of Swaziland society. This encapsulates the notion of transformative constitutionalism. It resonates with Karl Klare’s idea of transformative constitutionalism which he dubs "a long term project of constitutional enactment, interpretation, and enforcement committed to … transforming a country’s political and social institutions and power relationship in a democratic, participatory, and egalitarian direction".[16]

This preambular provision takes into consideration the fact that there are traditional values that pre-dated the Constitution, and that they are very critical to the existence of an open and democratic society. These could include values, such as *ubuntu,* which can be traced back to the teachings of the African sage, Khem.[17] This value is aptly

[13] Dube A & Nhlabatsi S "On amorphous terms, terrorism and a feeble judiciary: analysing the dissenting judgment in *Maseko v Prime Minister of Swaziland and others*" (2017) 12(1) *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinary* 157, 171 – 172.

[14] For instance, in *S v Makwanyane* [1995] ZACC 3 the concept of *ubuntu* appeared in the postamble of the South African Interim Constitution. In para 237, the Constitutional Court indicated that despite that reality, the concept permeated the entire constitution, and went on to use *ubuntu* to interpret the rights in the Bill of Rights.

[15] Orgad L "The preamble in constitutional interpretation" (2010) 8(4) *International Journal of Constitution Law* 717.

[16] Klare K "Legal culture and transformative constitutionalism" (1998) *South African Journal of Human Rights* 146, 157.

[17] Dube & Nhlabatsi (2016) 275.

captured in the African idiom *umuntu ngumuntu ngabantu* (isiZulu, isiNdebele, isiXhosa), *motho ke motho ka batho* (seSotho and seTswana). This philosophy basically dictates that everyone must be given his due on account of common humanity. This is a horizontal relationship that regulates inter-human relations between individuals.

The notion of *ubuntu* (or *botho* in seSotho) also extended to relations between the governor and the governed. In pre-colonial Africa, the government or the State was personified in the king or queen. However, absolutism was frowned upon and regulated by the African philosophy *inkosi yinkosi ngabantu* (isiZulu, isiNdebele, isiXhosa), *inkhosi yinkhosi ngebantfu* (siSwati) *kgosi ke kgosi ka batho* (seTswana), and *morena ke morena ka batho* (seSotho).[18] The legitimacy of a government, and by necessary extension, of the king, flowed from his ability to treat the people under his leadership with *ubuntu*. This is a vertical relationship which regulates the interactions between the State and the individual. It provides checks and balances for the exercise of public power even in so-called monarchical democracy. In *S v Makwanyane* (*Makwanyane*),[19] it was said that although the notion of *ubuntu* appears for the first time in the postamble of the South African Constitution, it permeates the Constitution generally, and more importantly the Bill of Rights. The concept was held by the Court to embody humanness, social justice and fairness. This is because treatment that is cruel, inhumane or degrading is bereft of *ubuntu*.[20] Hence, authoritarianism would go against both the philosophy of *ubuntu* and *inkosi yinkosi ngabantu*. In essence, authoritarianism would violate both the horizontal and the vertical relationships.

It is therefore inconceivable that an expression of dissatisfaction with the manner in which the King of Swaziland and his government conduct public affairs would be regarded as treasonous; and that the laws sanctioning the punishment of such conduct could possibly pass constitutional muster.

3 THE ISSUE OF STANDING

Before the Court dealt with the core of the constitutional challenge in *Maseko*, the litigants first had to satisfy it that they had standing to pursue the matter. As stated above, standing in the Swaziland context has been used by the courts in the past to jettison constitutional matters. This was achieved by narrowly construing what standing entails.[21] However, in this particular case, each of the applicants had been charged with the crime of contravening provisions of the two respective Acts. Each

[18] Dube & Nhlabatsi (2016) 275.

[19] [1995] ZACC 3 para 237.

[20] At para 225.

[21] *Sithole N.O. and others v The Prime Minister of the Kingdom of Swaziland and others* [2008] SZSC 22. *In casu*, the Supreme Court confirmed a decision of the High Court that held that political parties and organised labour organisations had no legal capacity to challenge the constitutional validity of the constitution making process. The Court came to the conclusion that the appellants had no locus standi to challenge the Constitution as at the time of its drafting the 1973 King's Proclamation was operative as a *grundnorm* in Swaziland. This is the same Proclamation that introduced a ban on political parties, which ban subsists up to today.

applicant was therefore challenging the validity of either of the laws in the application before the Court. The Court did not dwell much on this issue since the respondents did not object to the applicants' claim that they had locus standi to institute the proceedings.[22]

Although the Court did not elaborate on how it came to its conclusion that the applicants did have standing, such standing flows from section 35 of the Swaziland Constitution. It provides:

> "Where a person alleges that any of the foregoing provisions of this Chapter *has been, is being, or is likely to be*, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

From the above, it is clear that the following three classes of persons can approach the High Court for redress in the event of a violation of a right in the Bill of Rights:

(i) A person acting in their own interest;
(ii) A person acting on behalf of a group of which that person is a member; or
(iii) A person acting on behalf of another who is detained.

4 THE MAIN ISSUE BEFORE THE COURT

All the applicants in the case contended that the provisions of the two impugned pieces of legislation violated their respective rights enshrined in sections 24 and 25 of the Constitution.[23] This effectively made their application a constitutional matter, falling within the jurisdictional ambit of the High Court. Section 151 of the Constitution clothes the High Court with unlimited original jurisdiction in both criminal and civil matters, as well as jurisdiction to enforce fundamental rights and "to hear and determine any matter of a constitutional nature". The Constitution is silent on what a "constitutional matter" is, and the Court did not elaborate on this point in coming to its conclusion that the applicants' matter was a constitutional one.[24]

Constitutional matters are those that involve the interpretation, protection or enforcement of the Constitution. In other words, they have to do with the direct application of the Bill of Rights.[25] These are matters that involve a constitutional challenge to law or conduct, based on an unjustified infringement of a fundamental right. The applicants mainly contended that the actions that formed the bedrock of the charges they faced under the two Acts were done in furtherance of their fundamental rights contained in the Bill of Rights. They relied on freedom of expression as well as that of association, or such other related rights, to claim that the infringement of their

[22] At para 6.

[23] At para 8.

[24] At para 8.

[25] Du Plessis M, Penfold G, & Brickhill J *Constitutional Litigation* (Cape Town: Juta 2013) 19.

rights ran counter to these fundamental entitlements. This was therefore a direct application of the Bill of Rights and as such the matter was a constitutional one.

It should be noted that constitutional matters are not confined to the direct application of the Bill of Rights. There exists another form of constitutional matter, which can be referred to as an indirect application of the Bill of Rights. This may arise by virtue of sections 35(3) and (4) of the Constitution.[26] These sections give a discretion to a trial court, acting *mero motu* during the interpretation of any law, to refer any matter to the High Court for constitutional determination. Where a constitutional question is raised during trial by a party to the proceedings, the trial court is bound to refer the matter to the High Court for adjudication. Subsection (3) provides:

> "If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of this Chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court unless, in the judgment of that person, which shall be final, the raising of the question is merely frivolous or vexatious."

In such cases, the Bill of Rights does not apply directly in that it is not invoked by the parties as the basis of their legal challenge. Rather, it arises by way of a question during non-constitutional proceedings, either because the presiding officer invokes the constitutional question, or because a party to the proceedings does so. The Bill of Rights then applies to that matter indirectly. This is another form of a constitutional matter sanctioned by the Swaziland Constitution. Such referral has the effect of staying the initial proceedings until the constitutional question is determined.[27] It is worth noting that the referral in *Sihlongonyane* was made because the judge did not want to determine the matter alone. He therefore referred it to a full bench of the High Court. The section 35 provision on referrals governs constitutional matters which emanate from subordinate courts, such as Magistrates Courts, and not the High Court.

This is different from the position in South Africa, in that Swaziland's section 35(3) allows for indirect application of the Bill of Rights in proceedings in "any court", including Magistrates' Courts, labour courts and traditional courts. In the South African context, Magistrates' Courts cannot pronounce on the validity of any law or conduct.[28] Section 110(2) of the South African Magistrates Courts Act 32 of 1994 stipulates that when a claim of invalidity is made in regard to a law or conduct due to it being in conflict with the Constitution, the magistrate must continue and decide the matter on the assumption that the law or conduct in question is valid. Any aggrieved party is free to pursue the question in the High Court. The South African position mirrors the one favoured by the dissenting judge in his opinion in *Maseko*, as will be discussed below.

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[26] Section 35(4) provides:

> "Where any question is referred to the High Court in pursuance of subsection (3) the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, it that decision is subject to an appeal to the Supreme Court, in accordance with the decision of the Supreme Court."

[27] *Sihlongonyane* para 12.

[28] De Vos P & Freedman W (eds) *South African Constitutional Law in Context* (Cape Town: Oxford University Press Southern Africa 2014) 224.

5 LIMITATION OF RIGHTS IN THE SWAZILAND CONSTITUTION

As highlighted above, the Swaziland Constitution does not contain a general limitation clause but employs internal limitations contained within specific provisions.[29] In most instances, the internal limitation clauses are a relic of the colonial era, when fundamental rights were made subservient to considerations of defence, public order, public safety and public morality. The two rights invoked by the applicants, namely, freedom of expression and freedom of association, are also subject to these internal limitations.

Section 24 of the Constitution provides: "A person has a right of freedom of expression and opinion". This includes the freedom to hold, receive, and impart information and ideas without interference. However, these freedoms are subject to an arbitrary limitation as indicated above. Section 24(3) provides:

> "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 that is reasonably required in the interests of defence, public safety, public order, public morality or public health."

The section goes on to list other instances where interference with one's freedom of expression will not be held to be inconsistent with the constitutional protection. These include instances where the interference is required for the purpose of (i) protecting the rights of others; (ii) preventing disclosure of information received in confidence; (iii) maintaining the authority and independence of the courts; and (iv) regulating the operation of telephony and other technological and communication channels.

The limitation analysis is a two-stage process. First, there must exist a limitation or violation of a right contained in the Bill of Rights. Once that is established, the next question should be: Is there a law sanctioning the violation of the right? In other words, was the conduct complained of done under the authority of any law? If the answer is no, the enquiry ends there, for a limitation that does not flow from any law cannot be justified under the Swaziland Constitution. If the answer is yes, the court can now move on to the next question, where it seeks to establish the purpose of the limitation.

Here the court is guided by the main reason for which the law was passed. It must therefore investigate whether the law limiting the right was passed to serve any of the purposes listed in sections 24(3) and 25(3) of the Constitution. These include public

[29] See section 36 of the South African Constitution which provides:

> 1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
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> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

safety, public morality, public health, the interest of defence, the rights and reputations of others, and protecting confidential information. If the law is not found to be advancing any of those purposes, the enquiry ends there. A limitation cannot be found to be legitimate if it does not serve any purpose, that is, any of the purposes listed in sections 24(3) and 25(3). If the limitation is found to be connected to the listed purposes, then the limitation will be deemed a legitimate one.

However, the court must still determine if this legitimate limitation can be justified in a democratic society. This is the second stage. The inquiry in respect of the sections 24 and 25 internal limitation requires the court to determine if that provision stems from a law that is reasonably justifiable in a democratic society. The Constitution requires that the limiting measure be a reasonable one. An otherwise legitimate limitation may still fail the test when it is found not to be rationally connected to any of the purposes, as seen from the perspective of a democratic society.

In the context of *Maseko*, the applicants were accused of uttering certain words which were regarded by the State as seditious, exhibiting an intention to cause disaffection amongst the population as well as create feelings of ill-will against the King of Swaziland. Some of the words uttered include "*Viva PUDEMO Viva*", "*Phansi ngeTinkhundla Phansi*" (translated "Down with the *Tinkhundla* system of government, Down – *Tinkhundla* is the bedrock of the "monarchical democracy" that sees the King at the apex of the political framework, and criminalises political opposition and political parties). These statements were regarded as potentially dangerous in that they would cause, amongst other things, "hatred and contempt towards His Majesty the King, his heirs or successors, or the Government of Swaziland".[30]

In dealing with a constitutional claim based on the above, the question in relation to freedom of expression would be: "Whether a democratic society would reasonably justify the suppression of dissenting voices by a political superior?" Even if a particular law served the purpose of protecting public order and public morality (a very amorphous term) as set out in section 24(3), to the extent that it would not be regarded as reasonable in an open and democratic society,[31] such law would fail the constitutionality test.

Hence in paragraph 19, the majority judgment in *Maseko* decried the fact that nowhere in its affidavit did the respondent state why the limitation was necessary. Neither was its purpose stated. All that counsel for the State did was to tell the Court that the limitation or restriction was reasonably required in the interests of certain public purposes. The list included the purposes listed in section 24(3). Needless to say, the Court found this submission inadequate for the limitation analysis.

[30] Section 3(1)(a) of the Sedition Act.

[31] The limitation clause in sections 24 and 25 makes reference to "a democratic society", whilst the preamble regards Swaziland as "an open and democratic society". Hence the use of the two interchangeably throughout this article.

The Court, relying on Australian jurisprudence,[32] proceeded to introduce the two-stage approach to Swaziland's limitation analysis. It opined that two questions ought to be posed before the validity of the impugned provision can be determined. First, does the law effectively burden (or limit) a particular right? Secondly, if the law does indeed burden that right, is the law appropriate and adapted to serve a legitimate end? If the answer to the first question is in the affirmative, and that to the second one is in the negative, the law cannot be valid.

This effectively means that for an impugned provision to pass constitutional muster under the section 24 internal limitation, it must pass two tests. First, the provision must be one that is required in the interests of public safety, morality, defence etc. Alternatively, the provision must be necessary to protect the rights of others, the integrity of the courts, or confidential information, or to regulate communications channels. Once that is established, the second leg of the enquiry relates to the reasonableness of the provision in a democratic society.

For a court to effectively analyse a limiting measure it is imperative for the party alleging that the measure is justifiable to present the court with evidence in support of such assertion. This, as the Court stated in paragraph 19, must demonstrate the mischief that the limiting measure sought to curb or remedy. Only then can the reasonableness of the limiting measure be assessed.

Section 25 of the Swaziland Constitution provides for freedom of assembly and association, and stipulates:

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

Section 25 is limited in much the same way as section 24, by reference to the internal limitation. However, it must be noted that section 25 has an additional internal limitation, which was designed to restrain the enjoyment of the freedom of assembly and association by and through juristic persons. Section 25(4) provides:

> "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 –
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> (a) for the registration of trade unions, employers organisations, companies … and other associations including provisions 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
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> (b) for prohibiting or restricting the performance of any function or the carrying on of any business by any association as is mentioned in paragraph (a) which is not registered."

It is our argument that section 25(4) was influenced by elements of "monarchical democracy", which have become deeply entrenched over the years. From 1973 to 2006 when the current constitution came into force, the King ruled by virtue of a royal

[32] *Lange v Australian Broadcasting Corporation* 145 ALR 96 (1997).

decree, the King's Proclamation to the Nation of 12 April 1973.[33] This decree was the supreme law, and conferred upon the King all judicial,[34] legislative and executive powers.[35] This is the same royal decree that banned all political parties, meaning that entities, such as PUDEMO, exist illegally to this day.

The import of section 25(4) is that no natural person can attempt to or successfully register a political party in Swaziland. In essence it allows the State to make laws prohibiting the registration of certain organisations; and laws prohibiting the carrying out of any activities by juristic persons. The constitutional provision acts as an internal limitation in the sense that the rights of both juristic persons (for example, a political party) and natural persons (who could be members of a political party) to freely assembly and associate can be limited by legislation as and when the government decides. Such law shall not be held to be inconsistent with the Constitution. The problem is that section 25(4) does not contain the proportionality test which requires the law or the limiting measure to be assessed for its reasonableness in an open and democratic society. In the absence of a general limitation clause, this is a very unfortunate situation.

The situation may not be too gloomy, given the growing rights centred jurisprudence coming out of the Swaziland courts. In any future challenge to such limiting laws the court could likely embark on a limitation analysis that takes into account the values that underlie the Swaziland Constitution. Further, the existence of legal precedent that stipulates the procedure for determining if a limiting measure is justifiable means that there is now precedent on which the court could rely to interpret any right in the Bill of Rights. The courts have already invoked several authorities from the South African jurisdiction to support their conclusion.[36] Further, they have placed

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[33] Through this royal decree, the then King, Sobhuza II, unilaterally abrogated the Independence Constitution, which did not have any clauses regulating its repeal, save for provisions regulating its amendment. King Sobhuza II announced the repeal and at the same time proclaimed:

> "I further declare that, to ensure the continued maintenance of peace, order and good government, my Armed Forces in conjunction with the Swaziland Royal Police have been posted to all strategic places and have taken charge of all government places and all public services."

In para 11 of the Proclamation, the King decreed:

> "All political parties and similar bodies that cultivate and bring about disturbances and ill-feelings within the Nations are hereby dissolved and prohibited."

[34] In para 3 of the Proclamation, the King decreed:

> "NOW THEREFORE I, SOBHUZA II, King of Swaziland, hereby declare that, in collaboration with my Cabinet Ministers and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all Legislative, Executive and Judicial power is vested in myself."

[35] Dube & Nhlabatsi (2016) 267.

[36] See the following list of cases that the Court relied upon to adopt a limitation analysis based on the South African version: *Gardener v Whitaker* 1995 (2) SA 672 (E); *S v Zuma* 1995 (2) SA CC; *Makwanyane*; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and others* 2005 (SA) 280 (CC); and *Bernstein v Bester NO* 1996 (2) SA 751.

reliance on Canadian jurisprudence to develop the limitation formula for Swaziland. For example, in *The King v Swaziland Independent Publishers* (*Swaziland Independent Publishers*),[37] the Court cited with approval the Canadian approach in *Queen v Oakes*.[38] It seems from the emerging jurisprudence that even in the absence of clear internal limitations, the Swaziland High Court is developing an overarching general limitation clause.

6 THE MISAPPLICATION OF THE LIMITATION CLAUSE IN THE DISSENTING JUDGMENT

Despite the progressive and generous interpretation of the Constitution that informed the majority judgment, the dissenting judgment of Hlophe J is a cause for concern. It should be noted from the outset that the Hlophe judgment seems to indicate a preconceived position on the part of the judge, that the applicants had no case at all. This was the first instance of misapplication of the limitation clause. Hlophe J believed that at the time the Court heard the application, no rights had been affected or threatened, and as such the applicants had no case.[39]

Hlophe J based his reasoning on a misunderstanding of the law, in particular section 35 of the Constitution which regulates standing in the Swaziland context. The operative words in section 35 are that for an applicant to have standing, he must allege that any of his rights "has been, is being, or is likely to be" contravened. In the judge's opinion, this can only happen after conviction. It is hard to reconcile this with the notion of transformative constitutionalism, where State institutions should be used to ensure fundamental rights and not to clamp down on dissenting political voices. It is our argument that as soon as the applicants were charged, several of their rights automatically fell within the category of rights which were either threatened or violated. These include freedom of movement as they were incarcerated as a result of the charges preferred against them. Further, their freedoms of expression, association and assembly were threatened by this law. The fact that when they moved their constitutional application all four applicants were out on bail lends credence to this argument.

The second misapplication involved the creation of new jurisprudence *in vacuo*, much against established principles of constitutional litigation. Judge Hlophe did this when he held that the onus to prove that a limitation is not justifiable lies on the party alleging it, in other words, the applicant.[40] This is not the position in Swaziland, as the High Court has already established otherwise. In *Swaziland Independent Publishers*,[41] the Court stated that the onus is on the party seeking to rely on the limitation, that is the

[37] [2013] SZHC 88.

[38] (1987) LRC (Crim).

[39] At para 20 of the dissenting judgment.

[40] At para 46 of the dissenting judgment.

[41] At paras 92 and 94.

respondent (State). This is similar to the position in South Africa, and the Swaziland courts have relied on South African cases that underscore that legal position. Judge Hlophe decided to create new law that is not supported by any jurisprudence. He insisted that the onus lies on the applicant, and he erroneously relied on *Swaziland Independent Publishers*. This is very concerning given that it poses a real risk that the public may lose confidence in the judiciary if judges will disregard the law as it stands and create their own rules which are not supported by any legal force.

7 CONCLUSION

The latest judgments to come from the Swaziland High Court, especially on constitutional issues, give hope that perhaps, after decades of royal supremacy, constitutional supremacy will finally be established. It seems from the few progressive judgments that have been handed down that a semblance of judicial independence is finally returning to the halls of justice. The reliance on the Constitution as a living document in the judgment of Mamba J indicates that transformative constitutionalism is now at the centre of judicial reasoning. There are still concerns though, given judgments, such as Hlophe J's dissent in this case. His reasoning is still aligned with pre-constitutional thinking, where any entity or individual that claimed rights that pitted them against "monarchical democracy" would not have a remedy before the Swaziland courts. Such a pre-constitutional stance tended to dispense with reason, and was motivated by emotions of loyalty to royalty instead of the independence and impartiality that ought to form the basis of the work of judges. This can be seen in Hlophe J's disregard for existing jurisprudence on the limitation analysis. It is hoped that this newly-found momentum on the part of judges does not abate due to political pressure and intimidation.