IN THE HIGH COURT OF SWAZILAND

Held at Mbabane — Case No.2180/2009

In the matters between:

THULANI MASEKO & OTHERS — **Applicant**

And

MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS AND ANOTHER — **1st Respondent**

THE ATTORNEY GENERAL — **2nd Respondent**

Together with — **Case No.782/14**

MAXWELL MANCOBA THANDUKUKHANYA DLAMINI AND OTHERS — **Applicants**

And

THE PRIME MINISTER OF SWAZILAND AND OTHERS — **Respondent**

And also with — **Case No. 96/2014**

MLUNGISI MAKHANYA & OTHERS — **Applicant**

And

THE PRIME MINISTER OF SWAZILAND AND OTHERS **Respondent**

As well as with **Case No. 1703/14**

MARIO THEMBEKA MASUKU AND ANOTHER **Applicant**

And

THE PRIME MINISTER OF SWAZILAND AND OTHERS **Respondent**

Neutral citation: *Thulani Maseko vs Minister of Justice and Constitutional Affairs & Attorney General; Maxwell Manqoba Thandukukhanya Dlamini vs The Prime Minister of Swaziland and others; Mlungisi Makhanya & Others vs The Prime Minister of Swaziland& Others Mario T. Masuku & Another vs The Prime Minister of Swaziland & Others (2180/90;7782/14;956/14;1703/14 [2016] SZHC 181*

(16 September 2016)

Coram: Annandale J, Mamba J and Hlophe J

Date Heard: 08 & 09 September 2015 and 08 & 09 February 2016

Date Handed Down: 16 September 2016

Summary

Constitutional Law – Constitutionality of certain specified sections of the Sedition And Subversive Activities Act of 1938 as well as certain of those of the Suppression of Terrorism Act of 2003 – Whether the impugned sections are unconstitutional – Impugned sections allegedly overbroad and vague with the result they allegedly infringe on certain rights guaranteed in the Bill of Rights – Whether sections are overbroad vague or even infringe upon the guaranteed rights in the Bill of Rights – Court expresses difficulty of determining constitutionality of sections in the abstract as no facts are placed before it from which it could decide the constitutionality or otherwise of the impugned sections – Court of the view sections neither overbroad, too wide nor unconstitutional – Application dismissed – Each party to bear its costs.

JUDGMENT

HLOPHE J.

I have read the Judgment of my Honourable brother Justice Mamba and I respectfully disagree with it. My reasons for the position I have adopted are set out fully in this judgment.

Introduction

[1] Four applications were instituted at different intervals by several applicants who either acted individually or jointly with others. There were sought almost identical orders, the thrust of which was the declaration of unconstitutionality of certain provisions of the Sedition and

Subversive Activities Act 46 of 1938 (The Sedition Act) and The Suppression of Terrorism Act No. 3 of 2008 (The Terrorism Act).

[2] As regards the Sedition Act, the impugned Sections are section 3(1), 4(1), 5(1) and 5(2). With regards the Terrorism Act the impugned sections are sections 2(1), 2(2)(f), 2(2)(g), 2(2)(h), 2(2)(j), 2(2)(k) and 2(2)(L). This is particularly below the part where the term "terrorist act" is defined. The others in this section of the Terrorism Act are paragraphs (a) and (b) of the definition of the term "terrorist group" as well as Sections 11(i) (a) and (b) together with Sections 28 and 29(4) of the same Act.

Background To The Applications.

[3] It is not in dispute that the Applicant or Applicants in each matter were charged with either violating the Sedition Act only (in Case No. 2180/2009); the Terrorism Act only (in Case No.96/2014); and both the Sedition and Subversive Activities Act and the Suppression of Terrorism Act (the Sedition Act and Terrorism Act respectively in brief) (in Case No's 782/2014 and 1703/2014). Where the Applicants were charged with violating either the Sedition Act or the Terrorism Act, the sections allegedly violated in each such case were either the same or were a part of those referred to above. Owing to their shared similarities the applications were consolidated and heard as one.

[4] This happened after some of the criminal matters involving the Applicants were allocated hearing dates. In fact applications were made and granted to the effect that the criminal trials of the affected accused persons (now Applicants) be deferred pending the outcome of the constitutional challenge to the sections said to have been violated.

[5] The reliefs sought in all the applications were almost identical. Their thrust was to have the impugned sections of the concerned Acts declared unconstitutional and therefore invalid. They were allegedly unconstitutional because they allegedly infringed either the right to freedom of expression or that to Freedom of Association. It was the understanding that if the said sections were declared invalid, then the criminal charges would automatically fall away and also that the converse was to be true. The extreme remedy sought was that set out in case No. 2180/2009 where the declaration as unconstitutional of the entire Act, the Sedition and Subversive Activities Act 46 of 1938 was sought. Of course there was sought as well the alternative remedy to the effect that certain specified sections of the same Act be declared unconstitutional if the main order sought was not being granted.

[6] The impugned sections allegedly infringed the rights concerned because they were allegedly either too wide, vague or overbroad and allegedly

made it difficult if not impossible for the citizens to know what the true nature of the offence was or when an offence was allegedly committed.

Factual Background

[7] The details on what happened leading to the criminal charges being preferred against the accused persons is as summarized herein below.

A. The Applicants' case under Case No. 2180/2009

According to the Applicant in Case No. 2180/09, he was charged with two counts for having publicly stated at the funeral of one MJ Dlamini, who had allegedly died during a failed bombing of the Lozitha Brigde, that the said bridge was one day going to be named after the said deceased. He says he was then charged with having contravened Section 5(1) as read with section 5(2) of the Sedition and Subversive Activities Act. In this sense he was accused of having uttered the concerned words with a subversive intention as defined in section 5(2) of the Act.

The Applicant disputes that what he allegedly said at the funeral in question had the effect of expressing a subversive intent. He then challenged the charges in question by means of the current application.

[8] *Section 5(1) provides as follows:*

Subversive Activities

"5(1) A person who does or attempts to do or makes any preparation to do an act with a subversive intention or who utters any words with a subversive intention shall be guilty of an offence and liable, on conviction, to imprisonment for a term not exceeding twenty years without the option of a fine.

5(2) For the purposes of this section, "subversive" means –

(a) Supporting, propagating or advocating any act or thing prejudicial to –

(i) Public order

(ii) The security of Swaziland; or

(iii) The administration of justice

Provided that this Act shall not extend to anything or act done in good faith with intent only to point out errors or defects in the government or constitution of Swaziland as by law established or in legislation or in the administration of justice with a view to remedying such errors or defects;

(b) Inciting to violence or other disorder or crime, or counseling defiance of or disobedience to any law or lawful authority;

(c) *Intended or likely to support or assist or benefit in or in relation to such acts or intended acts as are hereinafter described, persons who act, intend to act or have acted in a manner prejudicial to public order, the security of Swaziland or the administration of justice, or who incite or intended to incite to violence or other disorder or crime, or who counsel ,intend to counsel or have counseled defiance or disobedience to any law or lawful authority;*

(d) *Indicating, expressly or by implication, any connection, association or affiliation with or support for an unlawful society;*

(e) *Intended or likely to promote feelings of hatred or enemity between different races or communities in Swaziland. Provided that this paragraph shall not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enemity between races or communities.....*

(f) *Intended or likely to bring into hatred or contempt or to excite disaffection against any public officer or any class of public officers in the execution of his or their duties , or any of His Majesty's armed forces, or any officer or other member of such a force in the execution of his duties:*

Provided that this paragraph shall not extend to comments or criticisms made in good faith and with a view to remedying or correcting errors, defects or misconduct on the part of such public officer, force or officer or other member thereof and without attempting to bring into hatred or contempt or to excite disaffection against such a person or force;

(g) Intended or likely to seduce from his allegiance or duty any public officer or any officer or other member of any of His Majesty's armed forces. (Amended L.4/1967.)

B. The Applicant's case under Case No. 782/2014

[9] In the case of the Applicants under Case No. 782/2014, it is stated that they were arrested on the 19th April 2013 at Msunduza Township in Mbabane. They were charged with two counts of having allegedly contravened Sections 4 (a) and (e) of the Sedition Act. This they had respectively done by allegedly attempting, making preparations to and conspiring with others to, bring about hatred and dissatisfaction against the Swaziland Government and the Administration of justice as well as by allegedly displaying a huge banner inscribed with some alleged seditious publication without a lawful excuse.

[10] Claiming that they were only charged for participating in a demonstration and displaying a certain banner, the Applicants denied that by so doing they committed criminal offences. Contending that participating in a rally is a healthy feature of a democratic life, they instituted these proceedings claiming that the legislation under which they were charged - the Sedition Act - was unconstitutional. It must however be clarified that the charge sheet does not confirm that they were charged for merely taking part in a demonstration. It alleges that they shouted certain slogans which are not disclosed per the charge sheet. No doubt the *ipsisima verba* of these words would have been provided had same been sought given that this was a criminal matter where further particulars could be sought and possibly granted in an appropriate case.

[11] Section 4(a) of the Sedition Act provides as follows:

> **"Any person who does or attempts to do or makes any preparation to do or conspires with any person to do any act with a seditious intention is guilty of an offence".**

Section 4 (e) on the other hand provides as follows:

> **"Any person who without lawful excuse has in his possession any seditious publication is guilty of an offence".**

It is imperative at this point that I also restate fully what Section 3 (1) (a) to (e) of the Sedition Act says given that for anyone to be liable under Section 4 (a) – (e) of the Sedition Act, it should be shown that the conduct of such a person should have been done with a seditious act. Section 3 (1) (a) – (e) therefore provides as follows verbatim:-

"Seditious Intention

3. (1) A seditious intention is an intention to –

(a) bring into hatred or contempt or to excite disaffection against the person of His Majesty the King, His heirs or Successors, or the Government of Swaziland as by law established; or

(b) excite His Majesty's subjects or inhabitants of Swaziland to attempt to procure the alteration, otherwise than by lawful means, of any matter in Swaziland as by law established; or

(c) bring into hatred or contempt or to excite disaffection against the administration of justice in Swaziland; or

(d) raise discontent or disaffection amongst His Majesty's subjects or the inhabitants of Swaziland; or

(e) promote feelings of ill-will and hostility between different classes of the population of Swaziland."

[12] It is worthy of note that neither the charge sheet nor the summary of evidence spells out what the Applicants did in violating the section concerned in count 1 of the indictment. It appears that, it was a display of the banner and the uttering or shouting of certain alleged slogans that resulted in the charges.

C. The Applicant's case under Case No. 96/2014

[13] The Applicants under case Number 96/2014 are charged with Contravening the Provisions of the Suppression of Terrorism Act No. 3 of 2008 and the Sedition and Subversive Activities Act No. 46 of 1938. They are in fact facing two counts under each one of the above two Acts. As regards the Terrorism Act, it is alleged in the first count thereof that they were guilty of Contravening Section 11 (1) (a) of the Act. It is alleged that on the 22nd and 23rd April 2015 and in Mbabane, particularly along Mahlokohla Street, High Court main gate and Mbabane Bus Rank, whilst acting in furtherance of a common purpose, they unlawfully solicited support for and/or gave support to a terrorist entity, namely the

Peoples United Democratic Movement (PUDEMO) (a proscribed entity) in the commission of terrorist acts, in particular the chanting of some alleged slogans. As they did so they are alleged to have been wearing white T-shirts written PUDEMO which reflected some alleged Terrorist demands at the back while they also wore red and black PUDEMO berets.

[14] In the second count they allegedly Contravened Section 11 (1) (b) of the Terrorism Act, by allegedly unlawfully soliciting support for or giving support to a proscribed entity called PUDEMO in the commission of a terrorist act by chanting alleged terrorist slogans whilst wearing white PUDEMO T-shirts which reflected some alleged terrorist demands at the back. They are also said to have worn some red and black PUDEMO berets.

[15] It is worthy of note that whereas sections 11(1)(a) and 11(1) (b) do talk of soliciting support for or giving support to a terrorist organization or soliciting support or giving support to the commission of a terrorist act respectively, it says nothing about what the giving of this support to the entity entails nor does it spell out what the giving of support to the commission of a terrorist act entails. In their own words, the Applicants

seem to appreciate that such cannot entail the mere wearing of T –Shirts or PUDEMO berets in each instance. The concerned sections themselves say nothing about the wearing of PUDEMO T- Shirts or PUDEMO berets nor does it say anything about the per se shouting of political slogans. The fact remains that whether the Applicant's or the accused's conduct in each given setting amounts to the support contemplated, such will be left for the decision of the courts in each particular case. That one has for instance been charged with a ridiculous charge does not make the Act supposedly relied upon unconstitutional, particularly where the court could possibly find that the conduct in question does not even violate the section concerned. As such whether a conduct complained of amounted to the conduct complained of, would be a question of fact as deciphered from the evidence led taken together with the applicable law on the subject as enunciated in previous judgments of our courts or the courts in other jurisdictions. This determination should no doubt happen in the court where the criminal trial takes place, which is not this one as is currently constituted as a Constitutional Court. In this way this court will avoid dealing with what has been described as an abstract challenge.

[16] The virtue in doing so is in that the long established principle in constitutional litigation will be upheld. This principle decrees that if a

matter is capeable of a decision or determination on any other ground than a constitutional one, the latter ground has to be avoided. In ***Qwelane v Minister of Justice and Constitutional Affairs and others 2015 (2) SA 493(GJ) at Para 10;*** this principle was expressed as follows:-

> ***"In the circumstances of this case the requirement of convenience falls to be considered <u>in the light of the general rule of practice laid down by the constitutional court that, where possible, cases should be decided without reaching a constitutional issue.</u> Counsel for the Applicant contended that the constitutional challenge should be heard first, for the reason that, if successful, it may render the remaining issues moot. The contention flouts the rule of practice I have referred to and must for this reason fail..."***

See as well the Supreme Court Judgment in ***Jerry Nhlapho & 24 Others vs Lucky Howe N. O. Civil Appeal Case No 37/2007*** and that of ***Daniel Didabantu Khumalo vs The Attorney General Civil Appeal Case No. 31/2010.***

[17] Concerning the first count under the Sedition and Subversive Activities Act, (the Sedition Act), which is otherwise count 3, the Applicants as

accused persons were charged with Contravening Sections 4 (a) , (b), (c) and (e) of the Sedition Act. This they allegedly did by attempting to or making preparation to, or conspiring with other people to bring into hatred or contempt or excite disaffection against the administration of justice in Swaziland or by promoting the feelings of ill-will and hostility between different classes of the population of Swaziland. They allegedly did all this whilst wearing white PUDEMO T-shirts which bore some alleged terrorist demands at the back and as they allegedly shouted alleged terrorist slogans.

[18] In count four the Applicants were charged with Contravening Section 5 (1) as read with Section 5 (2) (a) (i), (ii) and (iii), (b), (c) (d), (e) and (f) of the Sedition Act. It is alleged that on the date mentioned in the above counts, the Applicants, acting in furtherance of a common purpose, unlawfully supported, propagated or advocated an act prejudicial to public order, the security of Swaziland or the administration of justice, as well as inciting to violence or other disorder or other criminal acts thereby allegedly indicating their association or affiliation with or support for an unlawful act aimed at bringing hatred or disaffection against a public officer or public officers in execution of their duties. It is alleged further that they did this by chanting terrorist slogans and wearing T-

shirts written PUDEMO bearing some alleged terrorist slogans at the back.

[19] The Applicants denied having chanted any slogans as alleged. They stated further that even if they had chanted such slogans, that would have been in the course of exercising their right to freedom of expression and freedom of association as guaranteed by the Constitution of Swaziland. The Act, they continued, had infringed their rights aforesaid including that to dignity and privacy. It was alleged that some provisions of the Act were unnecessarily derogating from human rights because they were allegedly couched in a wide vague and overbroad manner. They claimed that this allowed for arbitrariness on the part of the law enforcing agencies. It was because of these contentions that the application was instituted.

[20] It is worthy of mention that although the charge talks of the Applicants having chanted terrorist slogans, the sections in question did not say that those particular chants amounted to terrorist slogans. It therefore remains open to the criminal trial court seized with the matter to determine whether, as a matter of law, the conduct complained of does constitute a

terrorist act or put differently, whether the slogans concerned do amount to terrorist slogans. It merits mention that from what the applicants themselves say about the correctness or otherwise of the charges with regards the conduct referred to in those sections amounting to terrorist slogans, there is a strong likelihood no court can realistically say such slogans amounted to terrorist slogans which would make it unnecessary and therefore prematurely for this court to have decided the constitutionality of the said slogans at this point.

[21] It was for this reason that the Respondents contended that the Applicants seek to have the sections concerned decided in abstract. It was argued with reference to the case of ***Savoi v National Director of Public Prosecutions 2014 (5) SA 317 (CC)*** that a party who makes an abstract challenge does so at his own peril. The principle was expressed as follows at paragraph 13 of the Savoi Judgment.

> ***"...The Applicants plainly have a standing to bring this challenge. This does not, however, make it irrelevant that this challenge is brought in the abstract. Courts generally treat abstract challenges with disfavor and rightly so. Will hearsay, similar fact or evidence of previous convictions be led at the Applicant's trial? At this stage we simply do not***

know. Abstract challenges ask courts to peer into the future, and in doing so they stretch the meaning of judicial competence. For that reason the applicants in this case bear a heavy burden (being) that of showing that the provisions they seek to impugn are constitutionally unsound merely on their face. The analysis that follows demonstrates just how heavy that burden is..."

[22] Similar sentiments were expressed in the following manner in ***Qwelane v Minister of Justice and Constitutional Affairs and Others 2015 (2) SA 493(GJ) at paragraph 10.***

> ***"...Constitutional challenges in the abstract are to be avoided...in view of the far-reaching implications attaching to constitutional decisions, the precise facts to which the constitutional challenge is to be applied must be established".***

D. The Applicant's case under Case No. 1703/2014

[23] The Applicants in Case No. 1703/2014 were charged with violating both the Terrorism Act and the Sedition Act. They alleged that under the

Terrorism Act they were charged with having solicited for or given support to a terrorist entity, namely Pudemo. They allegedly did that by chanting what were referred to as terrorist slogans namely "viva Pudemo viva"; "Phansi ngeTinkhundla Phansi" (Interpreted to mean loosely "Forward Pudemo Forward"; and "Away with Tinkhundla (Political system) away". By so doing they claimed to have been charged with violating Section 11 (1) (b) of the Terrorism Act.

[24] The Section in question provides as follows:-

> ***"A person who knowingly, and in any manner solicits support or gives support to, the commission of a terrorist act commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding 15 years".***

[25] A "terrorist act" is defined as follows:-

> ***"Terrorist act means –***
>
> ***(1) an act or omission which constitutes an offence under this Act or within the scope of a counter terrorism convention" or***
>
> ***(2) an act or threat of action which:-***

(a) causes –

(i) the death of a person

(ii) the overthrow, by force or violence, of the lawful Government; or

(iii) by force or violence, the public or a member of the public to be in fear of death or bodily injury;

(b) involves serious bodily harm to a person;

(c) involves serious damage to property;

(d) endangers the life of a person;

(e) creates a serious risk to the health or safety of the public or a section of the public;

(f) involves the use of firearms or explosives;

(g) involves releasing into the environment or any part of the environment or distributing or exposing the public or any part of the public to-

(i) any dangerous, hazardous, radioactive or harmful substance;

(ii) any toxic chemical;

(iii) any microbial or other biological agent or toxin;

(h) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;

(i) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;

(j) involves prejudice to national security or public safety;

and is intended, or by its nature and context, may reasonably be regarded as being intended to-

(k) intimidate the public or a section of the public; or

(l) Compel the Government, a government or an international organization to do, or refrain from doing, any act.

[26] Of significance in the above excerpt from the Terrorism Act, is that no single act or offence on its own as mentioned in Section 2 (2) (a) – 2 (2)(j) would ever amount to a terrorist act if taken alone. For it to have such an effect it should be read together with the sub paragraph or prelude to paragraphs (k) and (L) together with these latter paragraphs themselves. The prelude or sub paragraph referred to reads as follows:-

"and is intended or by its nature and context, may reasonably be regarded as being intended to" (followed by paragraphs (K) and (L)).

It is clear the prelude to subparagraphs (K) and (L) and these sub-paragraphs themselves are limitations on when conduct mentioned in Sections 2(2) (a) – (j) would amount to a 'terrorist act'. By way of example, a Pudemo T- Shirt worn in instances where, even if it is intended to achieve any of the prohibited types of conducts from Section 2(2)(a) – 2(2)(j) without being intended to intimidate the public or a section of it and is also not intended to compel the Government or an international organization to do a certain act, can never in my view amount to an offence in terms of the Terrorism Act, given what is stated in the statute that the conduct described in Section 2 (2) (a) – (j) of the Act above does not become an offence if it was not intended to result in the conduct mentioned in Section 2 (2) (k) and 2 (2) (L) of the Act.

[27] The Applicants contend that the Sections they are charged with contravening are unconstitutional in so far as they allegedly infringe on their rights to freedom of expression and freedom of association. It is

difficult how the sections interfere with such rights particularly in a setting where such rights are not absolute in terms of the Constitution and also where they have not yet been found by a court of law to have indeed violated the said section. Again this is where the determination of the matter in the abstract becomes dangerous.

[28] In count 2 the Applicants (then accused) were allegedly charged with Contravening Section 4 (a) (b), (c) and (e) as read with Section 3 (1), (c) and (e) of the Sedition Act. It was contended that they had, whilst at Salesian Sport Grounds in Manzini, attempted to do or conspired with others to do an act with a Seditious intention which was allegedly to bring into hatred or to excite disaffection against the administration of justice in Swaziland and to promote the feelings of ill-will and hostility between the different classes of people in Swaziland. This they allegedly did by chanting the following slogans said to amount to terrorist slogans namely **viva pudemo viva; Phansi ngeTinkhundla Phansi (Interpreted to mean loosely Forward PUDEMO Forward, and Down or Away with Tinkhundla (system) away.**

[29] The sections of the Sedition and Subversion Activities Act 46 of 1938 – Section 4 (a), (b), (c), (e) with which the Applicants are charged provide as follows:-

> **"Any person who –**
>
> **4. (a) does or attempts to do or makes any preparations to do, or conspires with any person to do, any act with a seditious intention;**
>
> **(b) utters any seditious words**
>
> **(c) prints, publishes, sells offers for sale, distributes or produces any seditious publication or ...**
>
> **(d)...**
>
> **(e) without lawful excuse has in his possession any seditious publication shall be guilty of an offence..."**

[30] Section 3 defines what a seditious intention is. Its verbatim provision has been captured above at paragraph 11, which obviates the need to recapture it herein.

[31] The Applicants were also charged with violating section 5 (1) as read with sections 5 (2) (a), (b), (c), (d) (e) and (f) of the Sedition Act. They allegedly unlawfully supported or propagated an act prejudicial to public order or security or to the administration of justice or one intended to excite disaffection against a public officer in the execution of his duties. This they allegedly did by chanting the slogans *"viva Pudemo viva" and "Phansi ngetinkhundla Phansi".*

The verbatim provisions of section 5 (1) and 5 (2) of the Sedition and Subversive Activities Act, of 1938 are as set out earlier herein above.

[32] Disputing that they committed the said offences, the Applicants contended that some of the impugned sections were inconsistent with their rights as protected by the constitution particularly that of freedom of expression and that of freedom of association. The alleged inconsistency arose from the sections complained of being allegedly either too wide or vague or overboard. By so being they allegedly infringed the principle of legality which required certainty in legislative provisions. It was a further contention that some of the impugned provisions of the concerned Acts were in conflict with the right to administrative justice as contained in Section 33 of the Constitution. These contentions formed the basis of this application.

[33] It is worthy of note here that the sections complained of do not for instance say that it is an offence for the specific slogans to be uttered so that if they are uttered, the person who uttered them can realistically complain of an infringement of his rights by the Sections concerned. The starting point should be a determination whether such words as uttered do amount to the offences alleged. Whether this is so is a matter of the evidence taken together with the applicable law. If they do not violate the sections of the legislation in question, then the issue of them infringing on the Rights concerned may not even arise.

E. Nature of The Reliefs Sought

[34] It is noteworthy that in all the applications, the contentions by the applicants have the same theme which is that the impugned sections in the two different statutes are inconsistent with the constitution because they allegedly infringe upon the rights to freedom of expression and freedom of association. This is because they are allegedly vague and overboard. In that sense it was argued, they violated the principle of legality which required that statutes be certain. Some are allegedly unconstitutional because they allegedly do not observe the right to administrative justice as is required by the Constitution.

Whether The Impugned Sections are Unconstitutional

[35] The challenge that this court has in the determination of this matter is the fact that the Applicants require it to determine their rights in vacou or in abstract as indicated above. I say so because no material whatsoever is placed before this court to enable it determine whether in fact there would in law be any basis for the criminal charges they are faced with. In other words whether the offences they are charged with are sustainable or not. They want to say simply because they were charged with the alleged offences, it was the pieces of Legislation complained of that provided they be charged with the specific offences or put differently, that simply because they were so charged then they were already guilty because of the Legislation under which they are charged. I believe that this is too broad an assertion to make and is neither justified nor is it correct. As indicated above, the position is settled that courts approach abstract challenges with disfavour as was stated ***Savoi v The National Director of Public Prosecutions 2014(5) SA*** 317 (CC). In ***S v Mamabolo (E-TV and Others Intervening) 2001 (3) SA 409 (CC),*** the following was stated to underscore the danger of determining matters in abstract:-

> **"It is also important not to get bogged down in sterile semantic debate about the difference between, and relative merits of, tests in the abstract. Ultimately, whether the test is worded in**

this way or that, the real question is whether the trier of fact has been satisfied, with the requisite preponderance depending on the nature of the case...that the publication of the offending statement brought about a particular result".

[36] The reality is that whether or not one is guilty of the offence with which he is charged, is a matter for the evidence availed in proof of the charges. It may as well be that when the trial commenced and the evidence was led, there was no case proved against the accused persons which should lead to their acquittal. Such a result would bring an end to the matter without having had to determine the constitutional question. The legal position is, as stated above, settled that it is not advisable for a court to decide a constitutional question where a matter could be decided on other grounds. See in this regard the ***Savoi v National Director of Public Prosecutions (Supra) case.*** It is otherwise true that it does not follow that by one simply being charged under these legislations, such a person would then be convicted and that his rights will be infringed. It always depends on whether the charges are proved against him.

[37] Only where one has been convicted, can be claim that the section in question infringes his right depending on how the Constitutional Court will decide the matter. In ***R v Shongwe, Mphandlana and Others 1987 – 1995 (4) SLR 184***, the accused persons who were charged with contravening Section 4 (e) of the Sedition and Subversive Activities Act it being alleged they unlawfully possessed seditious publication bearing among the words, "away with the King" and others which read, "Referendum or we bomb Swaziland", were acquitted after it could not be proved that the words, on a matured reading, did evince an intention to incite violence which is an ingredient of a charge under the Sedition and Subversive Activities Act. Where a person charged under this Act was acquitted, he obviously cannot talk of his aforesaid rights having been infringed in my view.

[38] In the Applicants' own submissions, a contention was made to the effect that the liability of an accused under the Sedition Act was dependent on whether the alleged seditious Act was supported by any evidence to incite violence or disorder as a mere slogan, not even an invective, can justify a conviction. I agree this expresses the correct legal position. It follows therefore that it would be stretching things too far to say that simply because one has been charged with having uttered vacuous statements

which do not prove a seditious intention as contemplated in law and (as) interpreted in numerous judgments of this court and the courts from foreign jurisdictions he can have a statute declared unconstitutionally when it did not infringe on any of his rights.

[39] The meaning of Sedition was expressed in the following words in ***R v Count (1947) 64 LQR 203***, which in my view is apposite herein.

> **"Sedition has always had implicit in the words, public order, tumult, insurrections or matters of that kind".**

[40] ***In Magistrate Bulawayo v Kabungo 1938 AD 304***, the then South African Appellate Division of the Supreme Court found that the word disaffection as used in the definition of Seditious intention meant: "discontent or dissatisfaction tending to or accompanied by the use of force, tumult riot, insurrection or breach of the peace".

[41] This meaning of sedition was confirmed in **Rex vs Sullivan (11 Cox 44)** where the objects of Sedition generally in English Law were said to be:-

"to induce discontent and insurrection, and to stir up opposition to the government, and bring the administration of Justice into contempt; and

the very tendency of sedition is to incite the people to insurrection and rebellion".

[42] It may be necessary for me to point out at this stage that it could be argued that some of the applicants have been charged with bringing the administration of justice into contempt and that this may not entail proving what one ordinarily proves in sedition. However, it is fair to acknowledge that where such allegations are made, they have to pass the test that they were not meant to point out errors or defects in the administration of justice with a view to correct or remedy such errors or defects as the case may be. Again the trial court will be able to tell from the evidence presented whether or not that is the case.

[43] The point being made is that if the conduct as a result of which the accused persons have been charged would not meet the foregoing objects of sedition in the administration of justice, then the statute under which they are charged does not become unconstitutional because it does not provide that one has to prove these objects to be convicted. If it does not do this, it obviously cannot be said to be infringing the rights to freedom of association or expression. No one even in a democratic

society would be entitled to incite insurrection and rebellion or put differently would be allowed to express discontent or dissatisfaction through the use of force, tumult, riot, insurrection or breach of peace. In my view, in so far as the Sedition and Subversive Activities Act is meant to achieve this, its objective in that sense would be legitimate and can therefore not be said to be unconstitutional.

[44] It is otherwise settled that in Swaziland although unique in many ways from other National Constitutions, the Constitution is the Supreme law such that any law which is inconsistent with it, is to the extent of such inconsistency null and void. There can be no doubt that this is the basis for the Applicants to have brought these proceedings where they seek declaratory orders of unconstitutionality of certain sections of the Sedition and Subversive Activities Act as taken together with those of the Suppression of Terrorism Act 2008. For purposes of this matter the inconsistency is allegedly in that the impugned sections of the Legislations being challenged infringe upon Sections 24 and 25 of the Constitution which are respectively the rights to freedom of expression and that of association.

[45] Whether or not the pieces of legislation complained of do infringe the right to freedom of expression or that to freedom of association as respectively expressed in sections 24 and 25 of the Constitution of this Kingdom one needs to consider the fact that it has already been found, in several matters before this court and the Supreme Court, that these rights are, in the context of Swaziland, not absolute. Dealing with the right to freedom of expression in ***The King vs Swaziland Independent Publishers and Another, Case No. 53/2010 this court per MCB Maphalala J*** (as he then was) had the following to say at paragraph 97:-

> **"The right to freedom of expression and opinion is important in our society in advancing the democratic ideals enshrined in the Bill of rights; the right allows society to form and express varying opinions constructively with a view to achieve open and accountable governance. However, the right has to be exercised and enjoyed within the confines and parameters of the constitution; the enjoyment of these rights like with all the other rights should not interfere with the rights of others".**

[46] At paragraph 91 of the same Judgment – that is ***The King vs Swaziland Independent Publishers (PTY) LTD and Another Case No. 53/2010 or [2013] SZCH 88 at paragraph 91*** – the High Court said the following with regards the limitation of the Right to freedom of expression:

> **"It is apparent from Section 24 that the right to freedom of expression and opinion is not absolute; it is subject to various limitations as reflected in section 24 (3). It is apparent from this section of the Constitution that the right to freedom of expression and opinion is subject to the limit that it will be sustained unless it is <u>shown not to be reasonably justifiable in a democratic society</u>. Section 24 (3) (b) (iii) specifically limits the right in order to maintain the authority and independence of the courts; this is achieved in terms of the Law of Contempt of Court".**

[47] It was submitted on behalf of the respondents that in Swaziland, the rights to freedom of association should be viewed from the angle that they are not absolute. They are curtailed by existing laws in the sense of the Sedition and Subversive Activities Act and the Suppression of Terrorism Act. They are also limited by the fact that they do not trammel over other rights such as the rights to dignity, reputation, public order and public

safety to mention but a few. It is a fact therefore that in enjoying these rights, one should not infringe those of others such as those that protect other peoples dignity, reputation and pubic order to mention a few.

[48] It was argued further that unlike in the other countries referred to by the applicant, the duty was, in Swaziland, placed on the Applicant to show that the law limiting the rights to freedom of expression and association was not reasonably justified in a democratic society. This means that the duty to prove that the limitation contained in Section 24 (3) and 25 (3) does not avail lies with the person who contends it is.

[49] I agree with the contention by the Respondents and confirm that nothing has been placed before this court to indicate why the Act was not reasonable and justifiable in a democratic society. I further agree as was stated in ***Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) at paragraph 38*** thereof, that in fact the problem is not caused by the Legislation, but instead by the overly wide interpretation afforded the rights to freedom of expression and association by the Applicants which unfortunately is not correct.

[50] It was argued as well that the impugned provisions of the concerned Acts were unconstitutional because they were vague and overbroad. It was argued this was against the Principle of legality which required that legislations should be clear so as to enable the people to know before hand what was really required of them. It was contended that the vagueness could be seen from such words or phrases as "disaffection" "discontent" and "exciting of ill-feelings"

[51] The Respondents on the other hand argued that there was no vagueness in the impugned sections. It was for instance clear that what the sections required was, even if not expressed in a language that was perfectly lucid, was a language whose meaning could be understood. It was argued that as for the Sedition Act, it was aimed at ensuring public order and in particular that the rule of law was upheld. It thus curtailed defiance to Law just as it curtailed disorder. It was submitted by the Respondents that the language of a statute need not be certain but it sufficed if it could be clearly understood. The court was referred to the case of ***Affordable Medicines Trust And Others v Minister of Health And Others 2006 (3) SA 247 (CC) at paragraph 108,*** where the position was put in the following words:-

"The doctrine of Vagueness is founded on the Rule of Law, which...is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly".

[52] On the other hand as regards the Terrorism Act, it was argued for the Applicants that its sections were vague which could be seen in among other aspects of the matter from the meaning attached to the definition of the term "terrorist act" in subsection (1) of the Definition Section of the Act. It was contended that its vagueness became more obvious in instances where the court had to consider the provisions of subsection (1) which provided that all offences under the Act amounted to terrorist acts. It was argued by the Respondents that although it sounded too wide, if one looks closer at what these other offences are, outside those mentioned in Section 2(2)(a) – (j) of the Act. One would notice they are not so wide or vague nor overboard. It was argued that the offences in question were

only those covered under section 5 of the Terrorism Act, which were under normal circumstances those offences which were by their nature said to be inchoate or incomplete as they are merely meant to cover the situations of those who assist in the completion of the main offences the statute was meant to cover. These are the offences such as the common law aiding or abetting or assisting in the commission of the main offences.

[53] I agree with the contention by the Respondents that to find that the Act is by any means too wide, vague and overboard, such would in my view be a result of a wide interpretation attributed thereto. This would be one that fails to take into account the purpose of the act which is to overcome terrorism. I agree further that terrorism is a new phenomenon which cannot be successfully prevented through the normal laws and approaches. I must however hasten to add that of course a simple act cannot amount to a terrorist act where for instance it is not intended, or by its nature and context, may not be said to be intended to intimidate the public or a section of it or to compel the Government or an international organization to do or refrain from doing an act.

[54] I have no doubt that this is the test for instance that the crown would have to meet in the case of the T- Shirts as worn by the Applicants in case 96/2014 if they are to be convicted of supporting a terrorist organization. I have no doubt this is a limitation to the instances set out in section 2(2)(a) – (j) as read together with paragraphs (k) – (L) of the Suppression of Terrorism Act. I have no hesitation a criminal court would deal with the matter from this angle to determine whether or not the conduct complained of amounts to violation of the Act. It therefore does not in my view call for the annulment of the entire Act as proposed by the Applicants. I do not think that a serious Act made to curb terrorism can justifiably be struck down simply because it happened to be wrongly applied in a situation where it should not. I cannot express this better than draw by analogy from the words of the South African Constitutional Court in ***Savoi v National Director of Public Prosecutions Supra,*** at paragraph 17, where the following was said to underscore the significance of Legislation that deals with complicated crimes:-

> **"It is the diversity of criminal activity, situated in complex organizational structures, occurring over time, where the lines of authority are deliberately obscured, that renders legislation in the Nature of POCA a necessity. The concept of a "pattern**

of racketeering activity" is thus tailored to meet the multifarious ways in which organized crime manifests itself".

[55] There was also the contention that Sections 11(1)(a) and (b) of the Terrorism Act should be declared invalid because it talked of supporting a terrorist group or giving support to the commission of a terrorist act. The cause of complaint in this regard is difficult to understand. This is because these sections in my view are self-regulatory in so far as they require the person accused therein to have done what he is accused of having done not only knowing that he was giving such support to a particular organization but as well of the fact that the precise nature of the terrorist act was known to him. I therefore do not think that the particular section can realistically be taken to be limiting the enjoyment of any rights as it does not apply to one who unknowingly supports such an entity.

[56] It was further argued that Sections 28 and 29 (4) of the Terrorism Act were unconstitutional because they violated the right to Administrative Justice. This they allegedly did because they empowered the Attorney-General and the relevant Minister to declare certain organizations terrorist

groups or specified entities without them having been heard. There are in my view challenges on the part of the Applicants in this contention. Firstly I do not think it lies with them as individuals to challenge the declaration of the organization in question as such.

[57] The section does put in place a mechanism to challenge such a decision by the entity itself. Whether or not the mechanism contained in the Section concerned for challenging such a decision is sufficient, can only in my view be taken as an issue by the affected organization itself. It seems to me it will only be at that stage that the court will decide whether or not the manner in which the process of declaring an entity as a specified one was appropriate or not. This of course will be decided taking into account the nature of the mischief being addressed. Otherwise for those Applicants who complain of being charged with allegedly supporting a specified entity, it shall be borne in mind that the support envisaged by the Act is that of supporting an act by the organization aimed at intimidating the public or a section of it or compelling the Government to perform a certain act. Further the person so charged must be knowing that the entity concerned is involved in terrorist Act including knowledge of the terrorist acts themselves. Whether or not that is so is a question of evidence, which we are not privy to and therefore that it

would be dangerous and premature for this court to comment further on this aspect of the matter.

[58] It is otherwise unclear how the designation of the entity referred to as a specified one in terms of the Act adversely affects its innocent members if it can be shown they knew nothing about any terrorist activity. In fact if it were to happen that they are prejudised by such a classification it is encumbent on each such person to present his grievances to court for an appropriate remedy. Otherwise it would be up to the specified entity in my view to challenge its being specified including the propriety of the procedure followed. It is perhaps then that the minister concerned will have to place the appropriate information if any before court justifying his or her decision.

[59] It merits mention that the Applicants' counsels also raised an argument during the hearing of the matter to the effect that this court should find that simply because in its pleadings, the Respondents had impliedly admitted that the impugned sections were limiting the rights to freedom of expression and association without explaining how that was reasonable and acceptable in a democratic society, then this lack of justification for

the limitation should justify this court in declaring the concerned sections unconstitutional.

[60] I am of the view that such would be too simple an approach to an issue that is complicated and perhaps requires serious consideration. It seems to me that sufficient material contending that the sections were not necessarily infringing the said rights had been placed before court, requiring that the matter be dealt with in its entirety. Besides, the parties were not common cause that it was in fact the Respondent's duty to show that the limitation was justifiable. In fact the Respondent contended, whilst referring to the relevant sections of the Constitution that the duty to prove there was no justification for the limitation lied with the Applicants. I agree with these contentions by the Respondent's Counsel as that is how Section 24(3) is in my view couched.

[61] Consequently, I have come to the conclusion that a case has not been made for the reliefs sought. Accordingly I make the following order:-

1. The Applicants' applications be and are hereby dismissed.
2. This having been a constitutional challenge, each party is to pay its own costs.

N. J. HLOPHE
JUDGE - HIGH COURT