THE HIGH COURT OF SWAZILAND

CIV. TR.1822/01

LAWYERS FOR HUMAN RIGHTS (SWD) 1st Applicant

HUMAN RIGHTS ASSOCIATION OF SWAZILAND 2nd Applicant

And

THE ATTORNEY-GENERAL 1st Respondent

THE MINISTER FOR JUSTICE AND
CONSTITUTIONAL AFFAIRS 2nd Respondent

CORAM: MAPHALALA J.; MASUKU J.; ANNANDALE J.

For the Applicants: Mr M. Dlamini

For the Respondents: Mr. L.R. Mamba

JUDGEMENT
30/08/01

Masuku J.

This is an application brought under a Certificate of Urgen y for relief in the following terms:

1. Waiving the time limits and the forms of service prescr ɔed by the Rules of Court and hearing the matter urgently.

2. Declaring that:-

   (a) the retiring (*sic)* age of Judges of the High Cou of Swaziland is seventy-five (75) years, and

   (b) those judges who are now over the age of 65 ren ain in office until they reach the age of 75 years.

3. Costs of this application.

The Founding Affidavit is deposed to by one Mr. Manen Thwala on behalf of the 1st Applicant, whilst Dr. Joshua B. Mzizi filed a Supporting . .ffidavit on behalf of the 2nd Respondent. As will appear from the Notice of Motion a ɔove, the Applicants seek a declaratory Order regarding the retirement age for Judg s of the High Court. It is apparent that the question to be determined relates to the etirement age of Judges, of which the Judges sitting to hear this matter form part, althou gh the latter i.e. the members forming the Full Bench panel have not reached the retirin age, whether 65 or 75. We secured the agreement of Counsel on both sides that we c uld preside over this matter, notwithstanding any interest that we may perceivably have i the *lis* before Court.

Facts giving rise to application

The facts which give rise to these proceedings may briefly e summarised as follows: In 1968, the Independence Constitution (hereinafter referred) as "the Constitution") was

promulgated and it thus became the *Grundnorm* of Swaziland. Section 99 (1) of the Constitution provided *inter alia*, regarding the retirement of Judges:

> *"Subject to the provisions of this Chapter, a person holding the office of a judge of the High Court shall vacate that office on attaining the retiring age."*

Section 99(5), on the other hand, provides as follows:

> *"For the purposes of subsection (1), the retiring age shall be the age of sixty-two years or such other age as may be prescribed by an Act of Parliament:*
>
> *Provided that-*
>
> *(a) a provision of an Act of Parliament, to the extent that it alters the age at which judges shall vacate their offices, shall not have the effect in relation to a judge after his appointment unless he consents to its having effect;*
>
> *(b) the King, acting in accordance with the advice of the Judicial Service Commission, may permit a judge who attains the age prescribed by or under this subsection to continue in office for such fixed period as may be agreed between the King and that judge, and in relation to that person the provisions of this Constitution shall have effect as if he would attain the retiring age on the expiration of the fixed term so agreed."*

Parliament, in exercise of the powers conferred upon it by the provisions of Section 99 (5) of the Constitution stipulated the retiring age to be sixty-five. This was contained in Act No. 36 of 1970, which was an amendment of the provisions of Section 3 of the High Court Act, No. 20 1954. The heading of this Section is *"Retiring age of Judges"*. By Act No. 9 of 1973, promulgated on the 24th January 1973, Parliament again amended Section 3 of The High Court Act by increasing the retiring age from sixty-five to seventy-five.

)n the 12th April 1973, the Kir issued the Proclamation to the Nation (hereinafter eferred to "as the Proclamation") nd in which he assumed all executive, legislative and udicial powers. This Proclama)n repealed the Constitution with certain savings. Among the provisions saved was hapter IX of the Constitution, which made provisions elating to the Judicature and to w ch the Sections cited above, regarding the retiring age f Judges are contained. On the 2 nd June, 2001, the King issued Decree No. 2 of 2001 nd Section 14, headed " Retirem t of judges", provides as follows:

> *"Section 99 of the Cons ution as reinstated by King's Proclamation to the Nation is amended in sub ction (5) by replacing the words 'sixty two' with the words 'sixty five'".*

From the provisions of Decree No 2, it is clear that there is a conflict in the retiring age as prescribed by Parliament, namely seventy-five and that provided for in Decree No. 2, which is sixty-five. It is in this co nection that the Applicants herein sought a declaratory Order, in terms of which the C urt would pronounce on the correct retiring age for purposes of certainty. It is worth mentioning that Decree No.2 was short lived as it was repealed some thirty-two days l er by Decree No. 3 of 2001. Amongst the Sections repealed by Decree No. 3 was Se tion 14 cited immediately above. The question for the Court to determine therefor was which of the two ages above is the retiring age for Judges of the High Court.

Applicants' Case

In their papers, the Applicants a ege that they are associations which in terms of the provisions of their respective c nstitutions assist in the maintenance of the highest udicial standards by ensuring th there is an independent Judiciary and further promote human rights, including the qu tion of security of tenure and the independence of Judges. They contend in their pa ers that the age of retirement for High Court Judges is 75 in terms of the provisions of A t No. 9/1973. They further allege that the provisions of

Decre No. 2 of 2001, cited above, which stated the retirement age to be 65, did not affect alter the position stipulated by Act No. 9/1973.

In su ort of the urgency alleged, the Applicants aver that the prevailing uncertainty regard g the retirement age is generally disruptive and not conducive to the proper functi ing of the Court. They allege further that the Judges who have reached the age of 65 ha a penumbra of doubt regarding their right to continue occupying their positions on the ench. It is further alleged that from newspaper reports, (copies of which are not annex) the Respondents, who contend that the retirement age is 65, have evinced a clear i ention to have the Judges who are 65 or above retired, or to arrange for having their s y on the Bench extended, presumably in terms of the provisions of Section 99 (5) (b) of e Constitution.

Resp dents' Case

The F spondents, who opposed the application, filed a Notice to raise points *in limine*, which ecause no affidavits were filed falls to be regarded as a Notice in terms of the provis ns of Rule 6 (12) ©, i.e. a Notice to raise points of law only. The points of law raised y the Respondents are the following:

1. T Applicants do not have *locus standi* to claim the relief, which they seek.

2. T matter is not urgent.

3. T re is no case for the citation and joinder of the First Respondent.

Argu ents by Counsel

At th commencement of the matter, the Applicants' counsel advised the Court that he was thdrawing the application for relief under Prayer 2 (b) of the Notice of Motion. This as a wise and laudable step. I say this because it is doubtful whether this Court

would have had the power to grant th relief in the terms sought, and if so, whether the Court would have been in position tc enforce that Order, if the same would for some reason not be adhered to. It is impor:ant for Counsel to always keep the doctrine of effectiveness in the forefront of their : inds when drafting papers on the basis of which the Court will be moved to grant relief

Mr. Mamba for the Respondents argue i that the Applicants do not have the *loci standi in judicio* for the following reasons:

(a) each one of the Applicants does not qualify to be regarded as a *universitas* and therefor, neither can sue or be sue l in its own name, notwithstanding the provisions of Rule 14 of the Rules of Court. This, Mr. Mamba argued was apparent from the Applicants' respective constitutio ns. Reference to the relevant provisions of the constitutions shall be made later in this judgement.

(b) each one of the Applicants is not empowered by its constitution to institute proceedings of the nature that they have brought before Court i.e. they both acted *ultra vires* their constitutions in lau nching the application before Court.

It was further submitted on the Respo ndents' behalf that neither of the Applicants has a "direct and substantial" or "peculiar" interest in the relief sought and which interest could be prejudicially affected by any decis on of the Court on the merits. Put differently, the Applicants cannot show on their papers or at all, that they can be inhibited in accomplishing the objects set out in their respective constitutions unless the Court grants the relief that they have prayed for. Mr. Mamba, in this connection, argued that the Applicants are busybodies in affairs th at do not concern them and should for that reason be discouraged by the Court from thi conduct by dismissing the application with costs on the punitive scale.

In support of the point relating to urge ncy, the Court drew to Mr. Mamba's attention that in view of the fact that when the m atter was to be heard for the very first time, the

Applicants *mero motu* applied for the matter to be postponed *sine die* and the Respondents did not attend Court, if they so wished, as required by the Notice of Motion. The matter was then set down some two weeks later. In view of the foregoing, the Court was of the view that the matter had progressed beyond the stage where the Respondents would be allowed to raise the question of urgency as any difficulty that they may have had with filing the papers was ameliorated by the postponement of the matter *sine die*. It does however behove me to mention even at this stage that the application is fatally deficient regarding allegations in support of urgency, as required by the mandatory provisions of Rule 6 (25) (a) and (b).

In this regard, this Court has issued a plethora of instructive judgements including **Humphrey H. Henwood v Maloma Colliery and Another Case No. 1623/94; Ben M. Zwane v The Deputy Prime Minster and Another Case No. 624/2000; H.P. Enterprises (Pty) Limited v Nedbank Swaziland Limited.** Mr. Mamba then directed his attack on the question of urgency solely for purposes of deciding the question of costs. He argued that by their actions in bringing the matter to Court in the manner and form in which they did, the Applicants were guilty of abuse of the Court process, necessitating the Court to mark its disapproval of their conduct by mulcting them with punitive costs.

The last argument for the Respondents was that the Attorney-General had not been properly cited in the papers in that he had been cited in his capacity as the Legal Advisor both to the King and the Government. No legal Advisor can be cited in Court papers in such capacity, so the argument ran. On the merits, the Respondents argued that the Proclamation, in saving Chapter IX of the Constitution, did not take into account the amendments effected to the High Court Act and that for purposes of properly construing the question before Court, Section 99 (5) must be examined in its pure form i.e. before the amendments were effected to it by Parliament in 1970 and 1973, respectively. The Applicants argued otherwise both regarding the points *in limine* and on the merits.

I now find it apposite to consider the issues b ɔre Court and onouncing thereon, commencing with the issue of *locus standi*. It is m view and that o ıe Court that should the Applicants fail in establishing their *loci stand n judicio*, then ıt will mark the end of the matter and will obviate the need to pro ɔunce upon the ıther issues arising, including the merits of the application.

The Applicants' *Loci standi in judicio*

Huber, in his writings describes *locus standi in ju cio* in the follov ıg language:

> *"In the case of both plaintiff and defenda it is necessary t ıt they should have a* ***locus standi in judicio****, that is, a capacity appear before e law, such as is not possessed by all those who are not the own men, like hildren under seven years, and insane persons, who cannot a ear anyway, ev ı when supported by their tutors."*

Andrew Beck, in his article entitled, "*Locus sta di in judicio* or *Ibi Ius Ibi Redium*", 1983 Vol.100, SALJ, page 278, argues that the ıcept of *locus s ndi in judicio* can be viewed in two different senses and it is in both se ses that the con pt will be considered in this matter, as will appear below.

(a) Does each of the Applicants qualify to be r arded as a *uni rsitas* with power to sue and to be sued in its own name?

In MORRISON V STANDARD BUILDING S CIETY 1932 A) 229 at 238, Wessels J.A. propounded the applicable principles in the llowing langua :-

> *"In order to determine whether an asso tion of individu s is a corporate body which can sue in its own name, the Cou has to consider ıe nature and objects of the association as well as its constitut , and if these sl v that it possesses the*

characteristics of a corporation or a ***universitas*** *then it can sue in its own name.... A building society is not a partnership in any shape or form. One member of a building society is not the agent of the others and his acts cannot bind his fellow members. Nor can a member of such a society be held liable for the debts of the society. The society exists as such quite apart from the individuals who compose it, for these may change from day to day. It has perpetual succession and it is capable of owning property apart from its members."*

In order to come to a conclusion on whether the Applicants have *loci standi* in this matter, it is clear from the authority cited immediately above that we have to have regard to the constitutions of the Applicants.

In **MOLETLEGI AND ANOTHER v PRESIDENT OF BOPHUTHATSWANA AND OTHERS 1989 (3) SA 119 B,** the principles governing this issue were adumbrated with absolute clarity by Friedman J. as the following:-

(a) For a voluntary association of persons to have locus standi in judicio, it must be a corporate body of the nature of a universitas personarum.

(b) That the two chief characteristics of a universitas upon which its locus standi depends are:-

(i) perpetual succession in the sense that the organization has a continued existence or identity despite changes in its membership.

(ii) the capacity of acquiring rights and incurring obligations independently of its members, most importantly, the capacity to own property i.e. landed property.

© That in order to determine whether a voluntary association is a ***universitas*** *it is necessary to look in the first instance at its constitution.*

(d)If it is not possible to so determine by reference to the constitution either from its express terms or by way of implication, regard must be had to the nature of and objects of the association.

I will, in view of the foregoing instructive decisions refer to the Applicants' constitutions in order to determine whether they have *locus standi.* I must however state that from a cursory glance at the Applicants' constitutions, it is abundantly clear that both possess perpetual succession and Mr Mamba did not argue otherwise. For that reason, no more needs be said regarding perpetual succession. It is clear that both Applicants have a continued existence in that the constitutions make provision for election of office bearers.

Regarding the issue of acquiring landed property apart from its members, I propose to deal with the 1st Applicant first. Article 2 of the 1st Applicant's constitution provides as follows:-

" *Lawyers for Human Rights (Swaziland) (LHR(S)) shall be a juristic person having perpetual succession and being capable of acquiring and disposing of rights (including the right to movable and immovable property) and to borrow money and to encumber movable and immovable property for the purpose of fulfilling the aims and objectives of LHR (S), of incurring obligations and of entering into legal transactions and of suing and being sued in its own name."*

From the provisions of this article, it is clear that the Association has capacity to acquire movable and immovable property. The question which begs an answer but which answer is not provided in the above clause is this: can LHR (S) acquire and dispose rights in relation to both movable and immovable property separately from its members?

Article 9.2 of the constitution appears to provide the answer. It provides as follows:-

"Trustees shall have vested in them all funds and real personal estate whatsoever

belonging to LHR (S) for the use and benefit of LHR (S). Upon the death or removal of such trustee from office, the funds and real personal estate so vested in him shall vest in the succeeding trustee without any conveyance or assignment being necessary."

"real estate", which occurs in the above article has been defined by William C Burton, 'Legal Thesaurus', Regular Edition, 1980, in the following language;-

"acreage, block, chattels real, domain, estate fee, freehold, ground, hereditament, land, landed estate, lot, parcel, plot, property, real property, realty."

From the foregoing definition, it is clear that real estate relates to landed property. From the provisions of clause 9.2, it is therefore clear that funds and landed property of LHR(S) vest, not in LHR(S) as an association, but in its trustees, who upon death or removal from office relinquish that property so vested in them, not to LHR(S) but to the succeeding trustees. In this sense, it is clear that LHR(S) is not capable of acquiring and alienating property independently of its members but it is the trustees that are capable of doing so.

Article 12.1.2, deals with dissolution of LHR(S) and provides the following:-

"If a resolution is duly passed, or if for any reason the organization ceases to exist, its assets, after payment of its debts, shall devolve upon such charitable, or educational or ecclesiastical institutions of a public character in Swaziland as themselves have similar aims, or if there is no such institution then to an institution whose aims are not inconsistent with those of the organization, and which are exempt from donation tax, as the NEC may decide, and if no such decision has been made then such body or bodies falling within the aforegoing provisions as may be agreed to by a majority of the members of the Law Society of Swaziland."

Whilst conceding the unequivocal effects of article 9.2, M Dlamini argue hat article 12.1.2 suggest that as the property does not belong to the ıstees as at dis lution, the said property can be distributed to other like organizatio . I do not ag: : with the interpretation contended for by Mr Dlamini. The wordin of article 9.2. clear and unambiguous, namely; it vests funds and property of LH S) in the trust s. Article 12.1.2 is a generic one dealing with dissolution and in ınsonance with he maxim *"generalia specialibus non derogant"*, the provisions of a icle 9.2 supers e those of article 12.1.2 regarding the identity of the person in whom ıe property ves during the life of LHR (S). At its dissolution, it may be that the trust s, who would ı :n have no successors, would be called upon to relinquish the propert and have the sa e assigned to the body or association to whom by resolution, the pr erty would be pointed to devolve. I am constrained, in view of the above conclusion o hold that the Applicant does not qualify to be regarded as a *universitas personarum* It accordingly c es not have *locus standi* in that sense.

Turning to the 2nd Applicant's constitution, it makes no c ar provision fc acquisition and alienation of property. No provision is made regardin the identity of e person in whom such property shall vest. It cannot be said in view c such glaring d iciencies in its constitution that the 2nd Applicant is capable of acquirin and disposing c its property independently of the members who form it. All that pro sion is made f relating to property acquired is in article XIX (3) which records tha the income an(oroperty of HUMARAS, wherever derived shall be applied solely tow: ds the promotic of the aims and objectives of the association. This does not addr s the issue an(I am again constrained to hold that the 2nd Applicant fails to meet a the rigours of *universitas personarum* recorded above. I find for this reason that it does not hav *ocus standi in judicio*.

In **BANTU CALLIES FOOTBALL CLUB v MOTLH MME AND O IERS 1978 (4) SA 486 (T)** at **489 C**, King J. stated as follows:-

"The rights and powers of a voluntary association e limited by th erms

of its charter or constitution. The constitution defines whether an association is or is not a universitas and confines its activities to what is expressly or impliedly contained therein."

Having considered relevant provisions of the respective constitutions of the Applicants, I come to the view that both Applicants do not qualify to be regarded as *universitas personarum.*

Should I have erred in my conclusions above appertaining to HUMARAS, I am constrained by the *dictum* in the **MOLETLEGI** case (supra) to have regard to the nature and objects of the association as enshrined in its constitution. Article IV provides the aims and objectives of HUMARAS as follows:-

"(1) to promote and protect human rights through out Swaziland and support similar efforts elsewhere;

(2) to work alongside and co-operate with those organizations which seek to bring about an end to racial segregation and other forms of discrimination, be it in Swaziland or elsewhere.

(3) to give attention to the protection and welfare of under-privileged members of society such as women, children, the handicapped etc.

(4) to promote public awareness of human rights through research; documentation; dissemination of information through the media, workshop, seminar, newsletter etc.

(5) to co-operate and affiliate with national, regional, and international organizations with similar objectives."

A constitution spells out the p wers of any association. Any action falling outside the powers set out in the constitu on falls to be declared *ultra vires.* From HUMARAS' aims and objectives, it is cle to my mind that the authors of the constitution never envisaged HUMARAS movin n application of this nature, no matter how well-meaning and noble the motivation was. For this reason, it does appear to me that in moving this application, HUMARAS acte *ultra vires* its constitution. I may as well add that this observation applies within equ force to LHR(S), as its constitution also does not give it power to move proceedings of ie nature presently being adjudicated upon.

Reverting to HUMARAS, the is a further difficulty in that it is not apparent that the moving of this application w s sanctioned by the Executive Committee. I say this because no resolution has bee nnexed by the Deponent and whereby he was authorized to take the action that he did I find, in view of the foregoing, that HUMARAS acted *ultra vires* its constitution i noving this application and its application falls to be dismissed therefor.

(b) Do the Applicants ave a direct legal interest in the relief sought?

The general rule is that a pers n who claims relief from a Court in respect of any matter must establish that he has di ct interest in the matter in order to acquire the necessary *locus standi* to seek relief. T is statement of law has received comment generously as will appear below.

In **DALRYMPLE AND OT ERS v COLONIAL TREASURER 1910 TS 372 at 390,** Wessels J. stated thus: -

> *"The person who sue: ust have an interest in the subject-matter of the suit and that interest must be a irect interest...Courts of law...are not constituted for the discussion of academ questions and they require the litigant to have not only an interest, but also a interest that is not too remote."*

With the disappearance of the *actio popularis,* it is now incumbent on an applicant to show some direct interest in the subject matter of the litigation or some special grievance to himself.

In **GELDENHUYS AND NEETHLING v BEUTHIN 1918 AD 426,** Innes C.J. stated as follows:-

> *"After all, courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."*

A 'direct and substantial interest' was defined by Corbett C.J. with absolute clarity and devastating candour in **UNITED WATCH & DIAMOND CO. (PTY) LTD AND OTHERS vs DISA HOTELS 1972 (4) (SA)** quoting with approval the view expressed in **HENRI VILJOEN (PTY) LTD v AWERBUCH BROS 1953(2) SA 151 (O).** It was defined as: -

> *"...An interest in the right which is the subject matter of the litigation and...not merely a financial interest which is only an indirect interest in such litigation... This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions...and it is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgement of the Court."*

In similar vein, Wessels C.J. stated as follows in **ROODEPOORT - MARAISBURG TOWN COUNCIL v EASTERN PROPERTIES (PROP) LTD 1933 AD 87 at 101: -**

> *"...any person can bring an action to vindicate a right which he possesses... whatever that right may be and whether he suffers special damage or not, provided that he can show that he has a direct interest in the matter not*

merely the interest which all citizens have."

The *raison d'etre* for this special test was expressed in the following language by Lord Scarman in **INLAND REVENUE COMMISSIONERS v NATIONAL FEDERATION OF SELF-EMPLOYED AND SMALL BUSINESSES LTD (1981) 2 WLR 722 AT 749 B:-**

"It enables the Court to prevent abuse by busybodies, cranks and other mischief makers."

The question for determination at this juncture is the class to which the Applicants belong, namely, whether they are persons with a direct and substantial interest in the order sought or starry eyed busy bodies, cranks or mischief makers.

In the drafting of their papers, the Applicants did not give much thought to the question of *locus standi* although it was apparent at the outset that any Respondent in such matter would raise it. The only allegation in the LHR(S) affidavit is paragraph 6, which is couched as follows:-

"In terms of the 1st Applicant's constitution, the 1st Applicant's aims and objects are ***inter alia****, to assist in the maintenance of the highest judicial standards in Swaziland by ensuring that there is an independent judiciary. In this connection the security of tenure of judges to their retiring age is essential. The Applicants in common with all Swazi citizens have a vital interest in opposing the premature removal of judges and maintaining the constitutional guarantees of the judges' security of tenure."*

Regarding HUMARAS, the following appears at paragraph 5 of the Supporting Affidavit:-

"It is verified and confirmed that the second Applicant, in its aims and objectives

seek to e ure the respect and protection of fundamental rig s, freedoms and civil be es throughout the Kingdom of Swaziland.

5.1. t is rther confirmed that it is in the best interest of the dministration oj ust and promotion of human rights that a declarato order be made re ird the retiring age for judges."

Admittedly he omulgation of any legislation that would seek to have the effect of impinging on e independence of the Judiciary or destabilizing e security of tenure of Judges o he igh Court is a matter of concern to every citizen in iis country. This is so because he he independence of the Judiciary is not assured where there is no serenity sur oun ng the tenure of Judges, a legitimate fear may ise that any matter involving t e ci zens, particularly against the State, some other fluential person or body of per ons institution may not be decided impartially. The is also concern, as submitted r th Applicants, that any uncertainty in the retiri age of Judges is "generally sru ve and not conducive to the proper functioning o the Court". All the above are, a I h e said, legitimate concerns but that is not the issu The issue is, have the Applica ts b n able to demonstrate an interest that is not only i note but that which also ranks ov the interests of all citizens in so far as the pro r administration of justice and ie s urity of tenure of members of the Judiciary is con med?

Mr Dlamin refe ed us to the case of **VERIAVA AND OTHERS PRESIDENT, S.A. MEDICAI AN DENTAL COUNCIL AND OTHERS 1985** SA 293(T). This was a cas in ving the death of Bantu Steve Biko and in nich allegations of professiona mis nduct could be sustained against members of the espondent who had attended to Mr ko before he died. Notwithstanding the legislativ power to investigate the allegati ns ther and if necessary, to institute disciplinary pr eedings against the erring doct s, t Medical and Dental Council did not do so. The pplicants, who were medical do ors id therefore falling under the jurisdiction of the R pondent, brought an application o s aside the Respondents' resolution not to take fur r action against the

doctors concerned. The question of the Applicants' *locus standi* arose. Boshoff J.P. had this to say at page 15 D-G:-

> *"The question of the locus standi of a person to approach the Court about a grievance, generally speaking, depends on the nature of the interest he has in the matter in respect of which he has a grievance. In legal terms, it depends on the nature of the right he has which he wishes to have enforced by the Court. If he wished to found this right on a breach of statute, the right which he seeks to enforce, or the inquiry in respect of which he claims damages or against which he desires protection, will depend upon the nature of the litigation. The right must above all be available to him personally and the injury must be sustained or apprehended by himself. Where it appears from the reading of an enactment itself or from that plus a regard to surrounding circumstances that the legislature has prohibited the doing of an act in the interest of any person or class of persons, the intervention of the Court can be sought by any such person to enforce the prohibition without proof of special damage."*

The Court found that the Applicants had established their *locus standi* because the Respondent was the *custos morum* of the medical profession and was expected to attend to all matters which may have the effect of impacting negatively on the profession. Because of complaints of improper or disgraceful conduct against the practitioners concerned, the legislation was for the benefit of all members of the profession, including the applicants. They therefore had a direct interest in requiring the Respondent to exercise its power in terms of the relevant legislation.

In **CABINET OF THE TRANSITIONAL GOVERNMENT FOR THE TERRITORY OF S.W.A. v EINS 1988 (3) SA 369 (A) at 390,** Rabie C.J. was of the view that in the VAN RIAVA case (*supra*), that the Applicants had *locus standi* on grounds inapplicable to the matter before him

The closing words of Boshoff J.P. quoted above, should not be construed out of context. They should be read in appreciation of the facts of that case and are not in my view of general and across the board application. In the circumstances of that case, the Applicants did not have themselves, to show any special damage sustained as a result of the Respondents refusing to exercise their statutory powers. Because of the refusal to exercise those powers, clearly the entire medical profession, including the Applicants stood to be discredited. hence the choice of words by the learned Judge President.

My view in this case is that both Applicants, noble, laudable, praiseworthy and ideal as their intentions may have been, have failed to show that they have a special interest over and above that which all citizens in this country have at stake. Testimony to this fact is to be found in paragraph 6 of the Founding Affidavit (quoted above), particularly where the Deponent stated that "...The Applicants in common with all Swazi citizens have a vital interest in opposing the premature removal of judges..."

The strict criteria set out earlier in this judgement have not been met. The Applicants have failed to show that they have "not only an interest but also an interest that is not too remote". - **DALRYMPLE CASE** (*supra*). They have also not shown that they have " a legal interest in the subject matter of the action which could be prejudicially affected by the judgement of the Court". – **UNITED WATCH & DIAMOND COMPANY** (*supra*).

In this regard, I wish to quote with approval the comments of Laskin C.J. in a Canadian case, quoted by Rabie C.J. in EINS' case above at page 392 E-G. The applicable principles could not be put better:-

> *"I start with the proposition that, as a general rule, it is not open to a person simply because he is a citizen and a tax payer or is either the one or the other, to invoke the jurisdiction of a competent Court to obtain a ruling on the interpretation or application of legislation, or on its validity, when that person is not either directly affected by the legislation or is not threatened by sanctions for an alleged violation of the legislation. Mere distaste has never been a*

ground upon which to seek the assistan of a Court. Unless the legislation itself provides for a challenge to its mea ng or application or validity by any citizen or taxpayer the prevailing p cy is that a challenge must show s me special interest in the operation of the l islation beyond the general interes that is common to all members of a rele nt society."

As held above, the Applicants have failed this st. Their concern is understandable but concern alone is not enough. The Applicants h e to show that they are directly affected thereby. This matter that could be pursued a vibrant Law Society or the Judges themselves.

We were referred to a judgement of the Appe Court of Lesotho in **LAW SOCIETY OF LESOTHO v THE PRIME MINISTER** In that case, a Counsel in the Attorney-General's Chambers had been appointed as a dge of the High Court and the question was whether the independence of the judiciary as not compromised by the appointment, particularly in view of the provisions of the H an Rights Act, 1983 of that country. It does not appear to me that the question of the *us standi* of the Law Society of Lesotho was ever raised or pronounced upon by the Co t. In any event, it does appear to me that the Law Society, in view of it legislated pc tion, stands in a privileged position to challenge issues such as the present compare to both Applicants, particularly having regard to their aims and objects as recorded their respective constitutions. For the above reason, the Lesotho case is clearly distir iishable.

In view of the conclusions I have reached the question of *locus standi*, I find it unnecessary to pronounce on the other legal ues raised by the Respondents. I would propose that the application be dismissed.

Costs

The general rule is that the unsuccessful party sho' ld bear the costs and this rule will be observed *in casu.* The Respondents have how ver applied for costs on the punitive scale on the grounds that the Applicants brought a h pel ss case, as it were, before Court.

In **PAGE v ABSA BANK LTD t/a VOLK' KA BANK AND ANOTHER 2000 (2) SA 661 (ELD) at 667 B-D,** Leach J. conside ed t e circumstances in which costs ought to be granted on the punitive scale. He stated s fo lows: -

> *"In the ordinary course of events, a pc ty l tigates at the risk of being called upon to pay the costs of the opponent which gen rally are granted on the scale between party and party. However, s' ould a claim or defence be found to be vexatious, frivolous, totally without su stan.ce or hopeless from the onset (this list is not exhaustive) the Court i. call ed upon to make a value judgement on whether the unsuccessful litigant shou d be ar the burden of costs on the scale as between attorney and client."*

Harms J.A. in **AA ALLOY FOUNDRY (PT Y) L TD v TITACO PROJECTS (PTY) LTD 2001 (1) SA 639 (SCA) at 648,** wa ned against the Court using hindsight in assessing the conduct of a party in considerii g an order for punitive costs. This word of caution has been adhered to.

I am of the view that there is nothing in th Applicants' conduct that tends to suggest elements of frivolity, vexatiousness or the it' ns l sted in the **PAGE** case above. For that reason, to grant an Order for costs on the pu tive scale is unwarranted. I also do not find it proper to grant the costs *de bonis propri* as equested by Mr Mamba. Costs be and are hereby granted against the Applicants jc ntly and severally, the one paying the other to be absolved and it is so ordered.

In sum the application is dismissed with costs o ı the ordinary scale.

T.S. MASUKU
JUDGE

I agree

S.B. MAPHALALA
JUDGE

I agree

J.P. ANNANDALE
JUDGE