

Recent developments

The King can do no wrong: The impact of *The Law Society of Swaziland v Simelane NO & Others* on constitutionalism

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Summary

*In mid-2014, the High Court of Swaziland issued a controversial judgment in which it dismissed an application challenging the powers of the King to appoint judges. This was the case of *The Law Society of Swaziland v Simelane NO & Others*, which has far-reaching consequences for constitutionalism and the rule of law in Swaziland. The main finding of the Court was that the lawsuit was frivolous because the applicants knew that the King enjoyed immunity from all legal suits for everything under the sun which he does or omits to do. In finding that the King's actions could be challenged as the King was considered to be unerring, the Court further relied on an archaic customary idiom, umlomo longacali manga (the mouth that does not lie). The net effect of this is that any exercise of public power by the King, or anyone acting on behalf of the King, cannot be challenged as unconstitutional. This article traces the origins of the*

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judicial problems currently afflicting Swaziland, and demonstrates that, to a large extent, the judiciary has been suffering from inside, rather than external forces, before making recommendations on how to remedy this unfortunate situation.

Key words: *Swazi King; constitutionalism; rule of law; immunity; judicial independence*

1 Introduction

On 1 August 2014, the High Court of Swaziland delivered judgment in the case of *The Law Society of Swaziland v Simelane NO & Others*¹ (*Simelane* judgment), dealing with the powers of the King to appoint judges and members of the Judicial Service Commission (JSC). The case was delivered almost 10 years after the Swaziland Constitution, which ended over 33 years of rule by royal decree, was adopted. This case is significant for constitutionalism in the context of Swaziland in three respects. First, the matter marked the first time in a post-constitutional Swaziland that a challenge was brought before the courts in relation to the appointment of judges, and the powers of the King in that regard. Second, the case added to the growing jurisprudence emanating from Swaziland courts on the immutable powers of the King and *iNgwenyama*. Third, this also marked the first time the customary protection offered to the *iNgwenyama* under the traditional idiom *umlomo longacali manga*² was judicially endorsed and incorporated into the constitutional jurisprudence of Swaziland.³ It also marked the first time the idiom was equated to immunity and applied to the King in his executive capacity. Needless to say, the judgment will have far-reaching consequences for the rule of law, access to courts, the limitation of governmental power and the principle of legality. The article, therefore, analyses the factors that influenced the reasoning of the Court in the *Simelane* judgment, as well as the impact thereof on constitutionalism in Swaziland in respect of the aforementioned key factors.

1 [2014] SZHC 179 (*Simelane* judgment).

2 See Constitutional Review Commission Final Report on the Submissions and Progress Report on the Project for the Recording and Codification of Swazi Law and Custom (undated) 135. The Commission stated: 'Pronouncements by the King become Swazi law when they are made known to the nation, especially at *Esibayeni* or Royal Cattle Byre. The King is referred to as *umlomo longacali manga* ("the mouth that never lies").'

3 See the High Commission of Swaziland 'History' <http://www.swazihighcom.co.za> (accessed 14 April 2015), where the traditional idiom is defined as a philosophical reference to 'the mouth that tells no lie'. The Zulu have a similar idiom, *umlom ongathethi manga*. Nzimande asserts that this reference emanates from the fact that all public announcements by the Zulu King were previously decided by the King-in-Council, hence his utterances could not be faulted because they emanated from the people. See T Nzimande *The legacy of Prince Mangosuthu Buthelezi: In the struggle for liberation in South Africa* (2011) 159.

2 Swaziland's constitutionalism in context: Very young and very fragile

It is impossible to fully comprehend the impact of the recent judgment on constitutionalism in Swaziland without a proper appreciation of key developments, both political and legal, in the past four decades. Like most African states, Swaziland operated under traditional leadership with a King and chiefs who served under the King. When Britain took over the administration of the country, they superimposed a Western system of governance on the country which saw the King subordinate to the Queen of England and his status reduced to that of 'paramount chief'. For Swaziland, the British assumed the role of protector, labelling the country a British protectorate between the years 1903 and 1968. The period between 1963 and 1967 allowed for limited self-rule,⁴ during which political power was contested by various political formations, including a royal political party called the *Imbokodvo* National Movement (INM); the Ngwane National Liberatory Congress (NNLC); the Swaziland Progressive Party (SPP); the Swaziland Democratic Party (SDP); the Swaziland Independent Front (SIF); and the United Swaziland Association (USA), among others.⁵ As was common at the time amongst all decolonisation processes in Africa, when Swaziland gained independence from the British in 1968, it inherited a constitution crafted and handed down by the British, based on a Western model of governance.⁶

Barely five years after independence, the reality of the unsuitability of this British Constitution was already setting in. In the 1972 parliamentary elections the NNLC won three seats, making it the official opposition, much to the ire of the King whose INM party still commanded a majority.⁷ To quell the growing popularity of the NNLC,⁸ the government of Swaziland decided to deport one NNLC candidate, Thomas Bhekindlela Ngwenya, to Barberton in the Mpumalanga province of South Africa, claiming that he was not a Swazi national.⁹ In 1973, the then King, Sobhuza II, unilaterally abrogated the independence Constitution and replaced it with a royal decree in April 1973,¹⁰ which became the supreme law of the land.¹¹

4 South African History Online 'Swaziland' <http://www.sahistory.org.za/places/Swaziland> (accessed 14 April 2015). See also JE Jessup *An encyclopaedic dictionary of conflict and conflict resolution, 1945-1996* (1998) 706.

5 JSM Matsebula *A history of Swaziland* (1988) 236-241.

6 Constitution of Swaziland Act 50 of 1968.

7 M Unwin & RE Grant *Swaziland* (2012) 60.

8 Institute for Security Studies 'Swaziland – History and politics' <http://www.issafrica.org/af/profiles/Swaziland/Politics.html> (accessed 15 April 2015).

9 Ngwenya, as parliamentary candidate of the NNLC, defeated the INM candidate. After Ngwenya had satisfied a court that he had indeed been born within Swaziland, the hearing of citizenship cases was transferred from the courts to a hastily-created tribunal, and he was again deported. After the tribunal was itself declared illegal, the Independence Constitution was suspended and parliament

This decree was enacted at the same time King Sobhuza II dissolved parliament,¹² and this saw the country operate without a parliament from 1973 to 1978.¹³ King Sobhuza II died in 1982 and was succeeded by his son, King Mswati III, who ascended to the throne on 25 April 1986 after a short period of regency.

The year after his enthronement, King Mswati III reaffirmed the unhealthy political and constitutional set-up introduced by his father in 1973. Through an amendment to the King's Proclamation, the new King decreed as follows:¹⁴

I hereby reaffirm that in terms of Swazi law and custom, the King holds the supreme power in the Kingdom of Swaziland and as such all executive, legislative and judicial powers vest in the King who may from time to time by decree delegate certain powers and functions as he may deem fit.

Interestingly, the pronouncement of the Court in the *Simelane* judgment is similar to both the above decree and the

handed all power over to the King. See L Vail *The creation of tribalism in Southern Africa* (1989) 308. See also the following sources: <http://publishing.cdlib.org/ucpressebooks/view?docId=ft158004rs;chunk.id=d0e7943;doc.view=print> (accessed 15 April 2015); the cases of *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister* 1970-76 SLR (HC) 88 119 and *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR 123 (HC).

- 10 CM Fombad 'The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?' (2007) 23 *South African Journal on Human Rights* 95.
- 11 See the King's Proclamation to the Nation of 12 April 1973.
- 12 King's Proclamation (n 11 above), which provides: 'TO ALL MY SUBJECTS – CITIZENS OF SWAZILAND. 1 WHEREAS the House of Assembly and the Senate have passed the resolutions which have just been read to us. 2 AND WHEREAS I have given grave consideration to the extremely serious situation which has now arisen in our country and have come to the following conclusions: (a) that the Constitution has indeed failed to provide the machinery for good government and for the maintenance of peace and order; (b) that the Constitution is indeed the cause of growing unrest, insecurity, dissatisfaction with the state of affairs in our country and an impediment to free and progressive development in all spheres of life; ... 3 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 and shall, for the meantime, be exercised in collaboration with a Council constituted by my Cabinet Ministers. 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. I further declare that I, in collaboration with my Cabinet Ministers, hereby decree that: A The Constitution of the Kingdom of Swaziland which commenced on the 6th September, 1968, is hereby repealed; B All laws with the exception of the Constitution hereby repealed, shall continue to operate with full force and effect and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this and ensuing decrees.'
- 13 There was a return to a parliamentary system in 1978 through the Establishment of the Parliament of Swaziland Order 23 of 1978, but the King still retained all judicial, executive and legislative powers. The order made provision for the exercise of executive and legislative powers, where the King, advised by a cabinet of Ministers, enjoyed executive powers.
- 14 See the King's Proclamation (Amendment Decree) 1 of 1987.

recommendations of Prince Mangaliso Dlamini's Constitutional Review Committee,¹⁵ which averred:¹⁶

Pronouncements by the King become Swazi law when they are made known to the nation, especially at Esibayeni or Royal Cattle Byre. The King is referred to as *umlomo longacali manga* ('the mouth that never lies'). That is before any pronouncement or proclamation, the King will have consulted and will have been advised.

However, it is our argument that this arrangement is inconsistent with the tenets of constitutionalism and the rule of law, two key components which underlie the notion of democratic governance that Swaziland professes to espouse. It is further antithetical to customary law itself, as will be seen below.

The years 1973 to 2005 were characterised by endless royal excesses, as any law or conduct that was inconsistent with King's Proclamation was rendered null and void.¹⁷ During this era, the immunity of the King was largely accepted, as there was no constitution in place. Further, this immunity drew its strength from the 1973 King's Proclamation, which already had been judicially endorsed as having established a *grundnorm*.¹⁸

When the current Constitution was adopted in 2005, there was hope that a new constitutional era had dawned and that there would be a shift from the rule by law and a return to the rule of law.¹⁹ There were further hopes that royal excesses would now be subject to judicial determination and fundamental rights finally would be respected and protected. It is of great concern that almost a decade after the adoption of the current Constitution, constitutional litigation is still not as vibrant as anticipated. This in part may be attributed to a lack of a culture of strategic litigation or public interest litigation on the part of Swaziland civil society, a rigid curriculum in the academy

15 Appointed by the King in terms of Decree 2 of 1996.

16 Report of the Constitutional Review Committee (2001) 135.

17 See para 14(1) of the King's Proclamation to the Nation of 12 April 1973 (Amendment Decree 1 of 1982).

18 See *Sithole NO & Others v The Prime Minister of the Kingdom of Swaziland & Others* [2008] SZSC 22, <http://www.swazilii.org/sz/judgment/supreme-court/2008/22> (accessed 14 April 2015). In this case, the Supreme Court confirmed a decision of the High Court that political parties and organised labour organisations had no legal capacity to challenge the constitutional validity of the constitution-making process (being Civil Case 2792/2006, <http://www.swazilii.org/sz/judgment/high-court/2007/196>, a judgment handed down by Banda CJ sitting with SB Maphalala and MD Mamba JJ). 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.

19 This is despite an assertion in the Preamble to the effect that the Swaziland Constitution was adopted because it was necessary to protect and promote the fundamental rights and freedoms of everyone in the country, through a constitution which binds the legislature, the executive, the judiciary and the other organs and agencies of the Swaziland government. See the Preamble of the Swaziland Constitution of 2005.

that does not allow its products to think innovatively,²⁰ as well as a growing sense of apathy and disillusionment with the entire legal and political system in Swaziland.²¹ It can also be attributed to the lack of a Swazi-centric constitutional jurisprudence,²² or even the perceived lack of independence of the judiciary and its reluctance to enforce and protect the fundamental rights and basic freedoms in chapter III of the Constitution.

3 Essence of the legal challenge

The challenge to the King's appointment of Simelane as a judge came in the face of an ongoing judicial crisis which arose from what largely was perceived as interference in the work of the judiciary by both the executive and the head of the judiciary. It is quite interesting to note that the challenge was spearheaded by the Law Society of Swaziland (LSS), which historically had been characterised by a lackadaisical attitude. Perhaps this latent litigious inclination may be attributed to the judicial crisis, which will be discussed below. It is worth mentioning, though, that a similar challenge by the LSS before the adoption of the current Constitution had also been unsuccessful. In 2003, the LSS challenged the appointment of three judges. The matter was filed in the High Court as *Law Society of Swaziland v Swaziland Government & Five Others*,²³ in which the LSS called upon the government to show cause why the appointment of Justices Nkambule and Shabangu as judges of the High Court and the appointment of Judge Annandale as the Acting Chief Justice could not be declared void. The applications were never finalised because there were no judges to rule on them, with government having frustrated the appointment of an outside judge or judges.²⁴

20 The fact that Swaziland's only university which offers legal training, the University of Swaziland, only began offering human rights as a module a few years ago, coupled with the long-standing dominance of common law thinking, could explain the lack of capacity and innovation amongst Swaziland legal practitioners to launch constitutional challenges against seemingly unconstitutional actions of public officials, including the King and the JSC.

21 The judicial crisis, discussed below, which gripped the country in 2010/2011, helped cement negative perceptions amongst the public, in general, and the legal fraternity, in particular, about the state of judicial independence and the effectiveness of the judiciary in Swaziland.

22 While South African jurisprudence from the pre-1994 era found easy application in Swaziland's legal studies and litigation, the landscape has shifted dramatically after both countries adopted constitutions which differ markedly in respect of the nature and form of rights protected, and the extent to which certain public functions are regulated.

23 Case 743/2003.

24 TR Maseko 'The drafting of the Swaziland Constitution, 2005' (2008) 8 *African Human Rights Law Journal* 331.

Section 159 of the Constitution establishes the JSC and vests it with the power, *inter alia*, to advise the King in the exercise of his power to appoint judges of the High Court of Swaziland.²⁵ The LSS applied to the Court for a declaration that the appointment of Justice Mpendulo Simelane as a judge of the High Court of Swaziland be declared unconstitutional, invalid and of no force and effect and be set aside. The grounds upon which such relief was sought were the following: (i) that Simelane does not meet the criteria prescribed in section 154(1)(b)(i) of the Constitution;²⁶ and (ii) that the process of his appointment did not comply with section 173(4) of the Constitution.²⁷

The LSS argued that section 154(1)(b) of the Constitution was peremptory in that it prescribes that a person shall not be appointed as a judge of the High Court unless, *inter alia*, he has been a legal practitioner, barrister or advocate of not less than ten years' practice in Swaziland or any part of the Commonwealth or the Republic of Ireland. They further argued that Simelane had not satisfied that requirement.

The Court dismissed the application by the LSS on the basis that, in terms of section 153(1) of the Swaziland Constitution,²⁸ the appointment of the Chief Justice and the other justices of the superior courts was the exclusive preserve and prerogative of His Majesty the King, on the advice of the JSC.²⁹

25 Sec 160(1)(a) provides: 'Subject to any other powers or general functions conferred on a service commission in terms of this Constitution, the Judicial Service Commission shall, among other things, perform the following functions: (a) advise the King in the exercise of the power to appoint persons to hold or act in any office specified in this Constitution which includes power to exercise disciplinary control over those persons and to remove those persons from office.'

26 The provision stipulates that a person shall not be appointed as a justice of a superior court unless that person is a person of high moral character and integrity and in the case of an appointment to (b) the High Court, (i) that person is or has been a legal practitioner, barrister or advocate of not less than ten years' practice in Swaziland or any part of the Commonwealth or the Republic of Ireland.

27 Sec 173(4) of the Swaziland Constitution states: 'In making the recommendations to the King for the appointment of a member of a service commission, the line Minister shall proceed in a competitive, transparent and open manner on the basis of suitable qualifications, competence and relevant experience and the Minister shall endeavour to recommend a person who can effectively discharge the responsibilities of that office.'

28 Act 1 of 2005.

29 Even though the provision makes reference to the King receiving advice from the JSC, he is not constitutionally bound to follow such advice. Sec 65(4) states that '[w]here the King is required by this Constitution to exercise any function after consultation with any person or authority, the King may or may not exercise that function following that consultation'. See Fombad (n 10 above) 105.

4 Constitutionalism in the context of a plural legal system

As highlighted above, the decision of the Court would be difficult to comprehend without a proper appreciation of constitutionalism and the role played by the monarchy in constitutional development. The monarch's involvement in politics and legal development goes back to pre-colonial times, and was nurtured by the colonial master all the way through to independence. Today, the state of Swaziland officially claims to operate a dual legal system with Roman-Dutch common law (with a hint of English law) on the one side, and Swazi customary law on the other.³⁰ However, in reality, there are more than one customary law systems in Swaziland,³¹ even though they are officially disavowed. In essence, Swaziland does not necessarily embrace a legal dualist tradition, but a pluralist one.³² Kyed defines legal pluralism as the plurality of normative orders and institutions that enforce order within a political organisation.³³ This fits squarely into the Swaziland landscape because, apart from the Swazi (as an ethnic group), there are other races and ethnic groups living in and holding citizenship of Swaziland. For instance, there are a considerable number of citizens of Shangaan³⁴ and Zulu ethnicity.³⁵

Carefully analysed, Swaziland has always been saddled with a perpetual judicial crisis, save that it was often overshadowed by much more visible crises, including political, economic and social crises. The judicial powers given to the King through the 1973 King's Proclamation and confirmed in later decrees seem to have been the source of much of the judicial quagmire Swaziland has found itself in over the years.

In 2011, the then Chief Justice, Michael Ramodibedi, issued a directive preventing litigation in which the King or the *iNgwenyama* were cited.³⁶ This followed a High Court decision in the case of *Maseko v Commission of Police & Another (Maseko judgment)*,³⁷ which had found in favour of the applicant, Aaron Maseko, who was suing the King's office for the return of his cattle which had been unlawfully confiscated. Justice Masuku, who delivered the judgment, was later

30 K Starmer & TA Christou *Human rights manual and sourcebook for Africa* (2005) 886.

31 A Dube '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* 259-278.

32 See HM Kyed 'Legal pluralism and international development interventions' (2011) 63 *Journal of Legal Pluralism and Unofficial Law* 1.

33 As above.

34 F Ndhlovu *The politics of language and nation building in Zimbabwe* (2009) 57.

35 UNESCO 'SiSwati' <http://www.salanguages.com/unesco/siswati.htm> (accessed 16 April 2015). See also UNISA 'Zulu' http://www.ulwazi.org/index.php5?title=Zulu_language (accessed 16 April 2015).

36 Practice Directive 4 of 16 July 2011.

37 [2011] SZHC 66 (*Maseko judgment*).

charged by the Chief Justice for insulting the King. Justice Masuku wrote in his judgment that the King had recently appealed to Swazis to obey the law and that it was inconceivable to imagine that His Majesty could speak with a forked tongue, saying one thing and authorising his officers to do the opposite.³⁸ In a disciplinary hearing in which the Chief Justice acted as complainant, witness, prosecutor and judge, Justice Masuku was found guilty and dismissed from the bench. The *Maseko* judgment was appealed to the Supreme Court,³⁹ where the Chief Justice also was on the bench and reversed the High Court decision delivered earlier by Justice Masuku. His main reason was that to apply Roman-Dutch common law to the matter would have been insensitive and wrong, since the case 'cried out for Swazi law and custom'. His issuance of Practice Directive 4 was, therefore, meant to give effect to his own appeal judgment in the *Maseko* case.

Pursuant to the above events, all lawyers in Swaziland embarked on a four-month boycott of all courts in protest against the Chief Justice's conduct. The legal fraternity partnered with broader civil society to deliver petitions in parliament and to the Ministry of Justice, calling for the impeachment of the Chief Justice and the dropping of charges against Justice Masuku. These processes yielded no results.

The actions of the Chief Justice negatively impacted on judicial independence, and set the tone for what the behaviour of judges ought to be in matters related to the King and the *iNgunyama*. It is worth noting that, as early as 2010, the Chief Justice, speaking *ex curia*, had pronounced himself a *Makulu Baas*,⁴⁰ in response to media enquiries about his behaviour, whilst he was still acting Chief Justice.⁴¹ He was speaking at the opening of the High Court where he slammed the media and judges for their role in what he perceived as meddling in the functions of his office.

When the King appointed an unqualified candidate as a judge, much against the constitutional stipulation, the LSS saw this as an affront to judicial independence and a violation of the Constitution. The challenge was, therefore, brought within the context of an already-antagonised judiciary, one which saw the LSS as a rabble-rouser that needed to be dealt with. It was also brought about in a climate where the bench would proceed with caution, having learnt its lesson in the Justice Masuku case about what the consequences are of questioning the powers of the King.

38 *Maseko* judgment (n 37 above) para 42.

39 *Commissioner of Police & Another v Maseko* [2011] SZSC 15.

40 Address by the Acting Chief Justice, Justice MM Ramodibedi, on the occasion of the opening of the High Court of Swaziland on 18 January 2010.

41 W Dlamini 'I'm *Makhulu Baas*' *Times of Swaziland* 19 January 2010, <http://www.times.co.sz/News/12481.html> (accessed 24 February 2016).

5 Immunity of the King: History, context and impact

In dismissing the LSS application, the Court did not delve into whether both the JSC, in advising the King, and the King himself, in appointing Simelane, were exercising public power. It totally avoided this question. Instead, the Court went on the defensive and outlined reasons why it should not inquire into the constitutionality of the actions of the King. In this regard, it relied on three things. The first was the section 11 immunity of the King provided for under the Swaziland Constitution. The second was, at least up until the judgment, only found in customary law, namely, the traditional idiom *umlomo longacali manga*. The third was the failure of the LSS to join the JSC as a party to the proceedings.

Section 11 of the Swaziland Constitution provides:

The King and *iNgwenyama* shall be immune from –

- (a) suit or legal process in any case in respect of all things done or omitted to be done by him; and
- (b) being summoned to appear as a witness in any civil or criminal proceeding.

In the Court's understanding, *umlomo longacali manga* grants the *iNgwenyama* immunity in much the same manner as section 11 does. It prevents any individual or tribunal from inquiring into the actions of the King and *iNgwenyama*. This is a dangerous approach, because if the drafters of the Constitution had intended *umlomo longacali manga* to be part of the constitutional text, they would have inserted it in the text. What compounds the problem is that the Court took the literal meaning of the idiom, without inquiring into its origin, its various meanings and whether it is indeed applicable in a constitutional setting and in the exercise of public powers.

The Court's approach is also selective in the sense that *umlomo longacali manga* is not the only customary value that is central to governance. There are other customary values which work as checks and balances to stem excess power. The idea of a dictatorial king has no place in customary law, hence the equally-hallowed value in the Swazi context of *inkhosi yinkhosi ngebantfu*. This literally translates into 'a king is a king through the people', and it makes the legitimacy of a king's rule conditional upon his humane treatment of people under his rule. In his coronation speech on 26 April 1986, King Mswati III reaffirmed this when he said that '[a] king is king by his people'.⁴² It is a form of checks and balances on royal political power, and it means that the legitimacy of a king's rule flows from the people.

There is also no way the Court could selectively employ the idiom *umlomo longacali manga* without addressing itself to the age-old value of *ubuntu*, which underlies the checks and balances discussed above.

42 See JSM Matsebula *A history of Swaziland* (1988) 325.

The legitimacy of a king only subsists as long as he is able to treat his people in accordance with *ubuntu*. In essence, the philosophy of *ubuntu* advocates that everyone must be given his due on account of common humanity. Motshekga indicates that *ubuntu* can be traced back to the teachings of the African sage, Khem (popularly known as Thoth-Hermes). He further asserts that *ubuntu* transcends race, class and gender.⁴³ Ntuli echoes Motshekga's sentiment. He attempts to unpack *ubuntu* by analysing the root of the word *ubuntu*, and tries to ascertain its meaning. He asserts that the root of the word, *ntu*, is derived from the vital force, a godhead. *Ubuntu* flows from such godhead and refers to the search for the godhead within us.⁴⁴

Thus, the King is not excused or exempted from the value of *ubuntu*; he is equally bound by it. The Court's decision to carve out *umlomo longacali manga* from the ancient tree of customary wisdom, whilst conveniently leaving out the values of *ubuntu* and *inkhosi yinkhosi ngebantfu*, is very mischievous.

As can be gleaned from the earlier discussions, the idea of absolute immunity preceded colonisation, and traces its roots from customary rules in place before Western ideas permeated Swaziland's legal landscape. What colonisation did was to entrench this notion as well, since the British also favoured a system that perceived the King as infallible.⁴⁵ This notion that 'the King can do no wrong' and can, therefore, not be subjected to the justice system is what paved the way for colonial legislation such as the State Liability Act in South Africa and the Government Liabilities Act in Swaziland,⁴⁶ in terms of which state assets were protected from attachment and execution. These pieces of legislation, developed by the colonial governments, were inspired by the idea of the inviolability of the King (crown) and all crown assets. Murungu echoes the above sentiment and posits that immunity follows in the first place from the divine right of kings, which basically means that one could not put an infallible ruler on trial since, if one did, the verdict must always go in his favour. The King was deemed infallible and could not do any wrong in his own state or be sued in his own courts.⁴⁷ Akande and Shah share similar

43 African National Congress 'Speech by Honourable Mathole Motshekga during the National Assembly second reading debate on Legal Practice Bill' 12 November 2013, <http://www.anc.org.za/caucus/show.php?ID=3238> (accessed 15 April 2015).

44 P Ntuli 'Personhood: An African perspective' in T Nhlapo *African culture, human rights and modern constitutions* (2013) xiii.

45 See the case of *Nyathi v MEC for Health Gauteng* CCT 19/07; [2008] ZACC 8. In this case, Madala J, in finding sec 3 of the State Liability Act unconstitutional, traced the origins of the Act to the notion that the King can do no wrong. He held in para 18 that the Act was 'a relic of a legal regime which was pre-constitutional and placed the state above the law: a state that operated from the premise that "the King can do no wrong". That state of affairs ensured that the state and, by parity of reasoning, its officials could not be held accountable for their actions.'

46 Act 2 of 1967.

47 C Murungu 'Immunity of state officials and prosecution of international crimes' in C Murungu & J Biegona (eds) *Prosecuting international crimes in Africa* (2011) 37.

sentiments, as they argue that such immunity reflects remnants of the majestic dignity that once attached to kings and princes as well as remnants of the idea of the incarnation of the state in its ruler.⁴⁸

Whilst the trend in most jurisdictions today favours an approach which provides limits to the King's executive powers, Swaziland is holding fast to the idea of a king whose acts and omissions are beyond judicial scrutiny. This breeds confusion, especially given the seemingly democratic aspirations of the Swaziland Constitution. The current legal confusion in the Swaziland system stems from the conflation of the terms 'King' and *iNgwenyama*.⁴⁹ The text of the section 11 immunity does not make a distinction between the King and *iNgwenyama*. A clear distinction between the two offices is critical, since these two offices have very distinct, yet sometimes overlapping, functions. It would seem that this was a deliberate act on the part of the drafters of the Constitution, as the aim was to maintain the *status quo* and ensure the inviolability of the King.⁵⁰

The office of the King is an executive one.⁵¹ Understood in this sense, the King is the head of the executive arm of government. He thus exercises public power. In fact, in the process of judicial appointment, both the King and the JSC exercise public power, which legally ought to be subject to judicial review in the interests of sound constitutionalism, a limited government and the rule of law.⁵² As Burns posits, both are organs of state and both exercise powers or perform functions in terms of the Constitution.⁵³ Woolman defines a public power as the performance of a function pursuant to some statutory authority, or the performance of a task in furtherance of some government function.⁵⁴ The JSC's recommendation and the King's final ratification of such endorsement are performed pursuant to the authorising provision, section 160 of the Constitution, and this is done in furtherance of the governmental function of ensuring a properly-constituted and functioning and legitimate judiciary. To oust judicial inquiry over executive acts through constitutional enactments

48 D Akande & S Shah 'Immunities of state officials, international crimes and foreign domestic courts' (2011) 21 *European Journal of International Law* 824.

49 Dube (n 31 above) 259-278.

50 Part of the jurisdictions studied by the Swaziland government personnel as part of the drafting process was that of Morocco, which placed a premium on the inviolability of the King. It is obvious that Swaziland's sec 11 was inspired by Morocco's immunity provision.

51 See sec 64(1) of the Swaziland Constitution, which provides that '[t]he executive authority of Swaziland vests in the King as head of state and shall be exercised in accordance with the provisions of this Constitution'.

52 The need to subject the exercise of public power by public officials to judicial review in order to test its compliance with the values of the rule of law and the principle of legality was articulated in *Police and Prisons Civil Rights Union & 75 Others v Minister of Correctional Services & 5 Others* Case 603/05 ECJ, para 46.

53 Y Burns *Administrative law* (2013) 136.

54 S Woolman 'Application' in M Chaskalson *et al Constitutional law of South Africa* Revision Service 5 (1999) 62.

such as Swaziland's section 11 does not advance but impedes the rule of law.

There has also been judicial endorsement of this understanding of what public power is, which judicial reasoning would support the assertion that the exercise of the powers of the JSC and the King actually is an incident of public power. In *Van Zyl v New National Party*,⁵⁵ the exercise of public power was found to be synonymous with the ability to act in a manner that affects or concerns the public. It cannot be disputed that the appointment of judges affects and concerns the public, who have an interest in a fully-functional, independent and impartial judiciary.

The office of the *iNgwenyama* is a customary one.⁵⁶ In the Swaziland context, both the office of the King and the *iNgwenyama* are occupied by the same person. When acting as an *iNgwenyama*, the King performs customary functions, such as being a leader of various regiments, commissioning and overseeing various traditional ceremonies, as well as sitting and adjudicating over disputes brought under customary law dispute resolution mechanisms.⁵⁷ Ideally, the thin line between these two distinct offices must be navigated carefully, to avoid an encroachment on executive functions. In other words, when the King exercises public power, he ought to disengage from his customary capacity under which he is permitted to act as he deems fit, as the 'infallible mouth'.

The appointment of judges falls squarely within the office of the King, as executive head of state, and not that of the *iNgwenyama*, which is a customary office. The main reason behind this argument is that judicial appointment ought to be carried out in the context of proper safeguards, to ensure judicial independence and public confidence in the bench. Customary law, unfortunately, has not developed these safeguards for the appointment of judges to serve in the superior courts. The dangers of assessing judicial appointments through the lens of customary law are thus manifold.

As indicated above, the Court in the *Simelane* judgment avoided dealing with the question of whether the exercise of the powers of both the JSC and the King were public powers, and the impact of the section 11 immunity on the exercise of such powers. It simply acknowledged that ordinarily it would have been disinclined to entertain the matter, but was forced to do so in the current instance because of its national importance. However, despite acknowledging the public interest in the matter, the Court failed to proceed to treat the matter as such, and instead sought to find a shortcut to dismissing the application. What better way to do this than to invoke the section 11 immunity of the King and *iNgwenyama*? In paragraph 11, the

55 2003 (10) BCLR 1167 (CC) para 75.

56 Sec 228(1) of the Swaziland Constitution, ch XIV.

57 *iNgwenyama* in SiSwati is the appellation given to a lion, and signifies power and majesty, the king of the jungle.

Court simply concluded that due to this immunity, the application was frivolous from its inception and was bound to fail. It is quite disconcerting, on at least two grounds, that a judge would label an attempt to obtain judicial interpretation of the extent and scope of the immunity of the King in relation to the exercise of public power as frivolous. First, it carries the real risk of discouraging constitutional litigation, and demonstrates a lack of appreciation on the part of the judiciary on their role in a society that perceives itself to be open and democratic. Second, the Court does not venture to explain how it arrived at this finding, leaving anyone who wishes to test whether public power was exercised in conformity with the Constitution without a remedy. Such a state is not tenable in the pursuit of a society based on the rule of law.

6 Was the LSS application a frivolous one or merely a weak case?

In paragraph 11 of the judgment, the Court labelled the application as frivolous from the moment it was launched and, because of that reason, the Court felt it was bound to fail. According to the Court, the frivolity of the action flowed from the fact that it was a direct challenge to the powers of the King in his appointment of judges when the litigants knew full well that the King enjoyed immunity from all legal processes.

Frivolous litigation refers to the practice of starting or carrying on lawsuits that, due to their lack of legal merit, have little to no chance of success. Such lawsuits are brought without justification and have no merit.⁵⁸ The intention of the litigants in instituting frivolous lawsuits is merely to harass,⁵⁹ delay or embarrass the opposing party.

A frivolous lawsuit should be distinguished from a weak case, since the latter does have legal grounds, albeit weak, whilst the former does not necessarily have a basis.⁶⁰ These are lawsuits which are frivolous, improper and instituted without sufficient ground, to serve solely as an annoyance to the defendant.⁶¹ Courts are empowered by the common law to stop such frivolous and vexatious proceedings as they amount to an abuse of the court process.⁶²

58 *Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others* 1979 (3) SA 1331 (W).

59 MP Southwood *The compulsory acquisition of rights: By expropriation, way of necessity, prescription, labour tenancy and restitution* (2000) 263.

60 See *Bisset & Others v Boland Bank Ltd & Others* 1991 (4) SA 603 (D & CLD) 608E-H, where Booysen J stated that courts have inherent power to strike out such claims. See also *Western Assurance Co v Colderwell's Trustees* 1918 AD 266 271.

61 *Cohen v Cohen & Another* 2003 (1) SA 103 (CPD) para 14.

62 *Corderoy v Union Government* 1918 AD 512 517.

Whilst an action which is obviously unsustainable is vexatious, this must appear as a certainty, and not merely on a preponderance of probability.⁶³ Hence, the court in *ABSA Bank Ltd v Dlamini*⁶⁴ stated that, whilst a vexatious or frivolous action amounts to an abuse of the court process, determining what constitutes a frivolous action must be done on a case-by-case basis. There cannot be an all-encompassing understanding of the concept of abuse of the court process.⁶⁵

When looking closely at the LSS application, it does not appear as a certainty that the applicants knew from the beginning that theirs was a lost case. First, because of the reliance by the Court on *umlomo longacali manga*, an amorphous traditional idiom that had never before been used in constitutional litigation to bar proceedings, there was nothing to indicate to the litigants that their case was without merit. Second, because the nature of the application was a constitutional one, aimed at testing the constitutionality of the King's actions in the exercise of executive powers, it is our argument that the LSS *bona fide* aimed at testing the scope and reach of the immunity provisions in the exercise of public power. It was not aimed at harassing or annoying the respondent. Third, section 2(2) read together with section 64(2) places a right and a duty upon the King to uphold and defend the Constitution. It is our argument that the LSS application was aimed at giving the King an opportunity to defend and uphold the Constitution as mandated by sections 2(2) and 64(1). Only once the appointment of Simelane as judge was declared unconstitutional would the King be able to uphold the Constitution by appointing a qualified candidate. Unless Simelane's appointment was nullified, the King could not correct this as by then he was *functus officio*.⁶⁶ This is because there is no provision in the constitutional text that empowers the King to reverse his decisions once made. Hence, the argument that he would be *functus officio*, and another body, in this instance the High Court, which is vested with constitutional jurisdiction, would be the only one with the power to reverse the decision. This accords with the rule of law, in that individuals should be entitled to rely on governmental decisions, and should be able to plan their lives around such decisions. They should further be insulated, at least to some degree, from the injustice that would result from a sudden change of mind on the part of the King.⁶⁷

In the fourth place, it is our contention that the judges erred in deciding that the action was frivolous simply because of the section 11 immunity of the King. This is because the King does not act alone in appointing judges, but is advised by the JSC. Where the JSC gives the King advice which leads to an appointment which is

63 *Ravden v Beeten* 1935 CPD 296; *Burmharm v Fakheer* 1938 NPJ 63.

64 [2007] ZAGPHC 241; 2008 (2) SA 262 (J).

65 As above.

66 C Hoexter *Administrative law in South Africa* (2012) 277.

67 As above.

unconstitutional, both these actions need to be tested by the judiciary in line with the notion of *trias politica*. In any case, the JSC does not enjoy any immunity under the Constitution. Further, where the King acts *ultra vires*, as he did, that has implications for good governance and a judicial pronouncement on the extent of his immunity in relation to his *ultra vires* acts becomes imperative. The question before the Court, therefore, should have been whether the King's immunity extended to his exercise of public power even in cases where he flagrantly violates the Constitution by appointing an unqualified candidate as a judge. This is a fundamental question in constitutionalism, and the LSS cannot be faulted for wanting a competent authority, the Swaziland High Court, to pronounce on it. The case of the LSS was weak, but not entirely unfounded.

7 The order of costs: A very effective scarecrow?

Constitutional challenges like this are brought to test the constitutionality of the appointment process, which is an incident of exercise of public power and also instituted in the public interest. Despite the desirability of such challenges, and their instrumental role in ensuring a sound democratic state based on a limited government, respect for fundamental rights and the rule of law, there seems to be a tendency on the part of the Swazi bench to treat these challenges with contempt.

For instance, in punishing the LSS with an order of costs the Court stated:⁶⁸

For the reasons set out above and the *manner the applicant has dealt with a matter it brought in haste* to this Court, it is the considered view of this Court that this application be and is hereby *dismissed with an order for costs against the applicant on the punitive scale which costs the Court orders that they be paid by the members of the executive council of the applicant jointly and severally the one paying the other to be absolved and these are to include certified costs of counsel.*

It is worth noting that this punitive approach is not limited to the current case. There has been a growing trend in the Swaziland justice sector, particularly in cases of constitutional litigation,⁶⁹ where courts award punitive costs. This trend definitely has adverse effects on the administration of justice as it has the potential to cause would-be

68 My emphasis.

69 See in this regard the case of *Maria Temtini Dlamini & Others v Chairman of the Elections and Boundaries Committee & Others* High Court Case 1415/2013. In *Sithole NO & Others v The Prime Minister of Swaziland & Others* [2007] SZHC 190, the Court made an order of costs against the applicant, albeit not at the punitive scale. However, in *Sithole NO & Others v The Prime Minister and Others* [2008] SZSC 22 (n 18 above) para 76, the Court ordered each party to pay its own costs, after counsel for the appellants had argued that the matters raised were of much moment to them and their members, were of interest to the public, and were complex and fraught with legal difficulty.

litigants to be reluctant to challenge what they perceive to be unconstitutional decisions by state officials, such as the King and bodies exercising public power, such as the JSC.

8 Recommendations and conclusion

The foregoing clearly indicates that Swaziland's judiciary has endured years of interference. Such interference has come from both the executive arm of government as well as from within the judiciary itself. The actions of the Chief Justice, which led to prolonged boycotts of courts by legal practitioners, continue to have a negative impact on the legitimacy of the judiciary. Needless to say, it affects the rule of law and, by necessary extension, constitutionalism. The *Simelane* judgment further compounded the situation by importing a misplaced customary concept into Swaziland's constitutional jurisprudence. However, all is not lost. Swaziland can still redeem itself and restore the public's confidence in the legal system. The following are proffered as possible solutions.

Swaziland should embark on a constitutional review exercise with a view to amending the Constitution to limit the powers of the King as an executive state official. Lessons could be drawn from jurisdictions such as Lesotho, whose Constitution provides for a constitutional monarch, unlike the Swaziland Constitution which creates an absolute monarch. The new constitutional framework should bestow executive powers upon the Prime Minister, and not the King. Only a very limited scope of executive functions should, if necessary, be bestowed upon the King, provided that such constitutional amendment clearly states that those executive powers may not be exercised by the *iNgwenyama*, whose office is a customary one.

The process of constitutional amendment should also be aimed at removing the section 11 immunity, which currently prevents the King's actions as a state official from being scrutinised by a court. This would not be an easy task, as it is clear that Swaziland still wants to hold on to the archaic concept that the King can do no wrong. The best way to achieve this would clearly be to separate the two offices, that of the King from that of the *iNgwenyama*. The *iNgwenyama's* immunities should be regulated by customary law, because that is where the office belongs. Only the King should have power to exercise executive functions, and not the *iNgwenyama*, and these functions should be strictly limited, with the bulk of executive business being performed by the Prime Minister. Any immunity that is granted to the King should be accompanied by a clause that stipulates that such immunity does not extend to the performance of executive functions by the King. It is submitted that this would likely reduce the rising impunity on the part of the King, whose actions cannot be questioned under the current constitutional arrangement.

Swaziland's courts should desist from the selective incorporation of customary idioms into constitutional jurisprudence, as this tends to

cloud the real legal issues and permits judges to create new laws out of nothing. In the event that the courts refer to customary idioms, such idioms should be permeated by the values and principles of constitutionalism and the rule of law.

Swaziland should acknowledge the existence of other customary law systems in the territory and should shift away from its current obsession with what it calls Swazi law and custom. The recognition of Swaziland as a plural legal society rather than a dual one should be coupled with judicial reform aimed at raising awareness of this reality amongst judges and legal scholars.

Swaziland should also desist from the practice of constituting the bench through acting judges who have never served as judges before, or have never had to deal with constitutional litigation. Of the three judges that heard this matter, only one was drawn from the Industrial Court. The other two are practising attorneys who have never acted as judges before. They were in essence *ad hoc* judges with no judicial experience.

There should also be an improvement in the manner in which members of the JSC are appointed. Currently, it is the prerogative of the King to appoint members onto the JSC. Even though political parties are banned in Swaziland, the process can be made to be more participatory by involving the legislature in the appointment procedure. This is because there are currently members of parliament who are card-carrying members of these banned political parties, even if they were elected on individual merit and not on the basis of their membership of their parties. Getting the legislature involved in both the process of appointing the JSC and that of appointing judges would limit the possibility of recommending unqualified candidates as judges, as happened in the Simelane appointment.