Musa Ndlangamandla

A respected Swazi editor has been sentenced to two years in prison or a R200 000 fine for ñscandalising the courtsò following two critical articles he wrote about judges, particularly Swazilandôs controversial Chief Justice, Michael Ramodibedi. Bheki Makhubu and The Nation magazine that he edits were fined R200 000 each, with half of the fine suspended for five years. The balance must be paid within three days or Makhubu will go to jail.

Following are excerpts from the judgment of Justice Bheki Maphalala, in Criminal Case No: 53/2010. [*The King vs Swaziland Independent Publishers (PTY) Ltd & Another (53/2010) (2013) SZHC88 (2013)*

Summary of the judgment

Contempt of Court by Scandalizing the Court ï an application was made by the Director of Public Prosecutions (DPP) for an order committing and punishing respondents for contempt ï the application relates to two articles written and

published by the respondents ï the Court found that the said articles were intended and that they did have a tendency to bring the administration of justice into disrepute ï section 24 of the Constitution relating to the right of freedom of expression and opinion discussed - the court found that judges and courts are open to criticism provided that the criticism is fair and legitimate and does not exceed accepted boundaries ï the respondents found guilty of Contempt by Scandalizing the Court.

State's Charges and Prayers:

First Count: Criminal Contempt of Court charges were brought by the Attorney General (AG) against The Nation magazine (First Respondent) and Makhubu (Second Respondent) as a result of an articles written by the second respondent and published by the first respondent and contained in

the Nation Magazine of November 2009 entitled:**"Will the judiciary come to the party: Chief Justice Richard Banda needs to rally his troops behind the Constitution of 2005"**

(a) Which article was intended to interfere or was likely to interfere with the due administration of justice;

(b) Granting that the *rule nisi* be served on the respondents by an officer of the Attorney General.

(c) Alternative relief as the court may deem fit;

(d) Costs of the application

The *rule nisi* was granted by this Court on the 9th March 2010, and the respondents were called upon to appear in Court on the 21st April 2012 at 0930 hours to show cause, if any, why they should not be committed and punished for criminal contempt as a result of the said article written by the second respondent and published by the first respondent in the Nation Magazine of November 2009 as alleged. The parties were further ordered to submit their heads of argument on or before 15th April 2010.

Prior to the institution of these proceedings, the DPP issued a ñDelegation of Authority to Prosecuteò upon the Attorney General in terms of the powers conferred upon her under section 162 (5) of the Constitution of Swaziland Act No. 1 of 2005 as read with section 3 of the Director of Public Prosecutions Order No. 17 of 1973 and section 4 (c) of the Criminal Procedure and Evidence Act No. 67 of 1938. In terms of the ñDelegationò, the Attorney General was authorised to prosecute the respondents for the Criminal contempt of court in respect of its article ñWill the

Judiciary come to the Partyò. It was dated 24th February 2010.

What the State AG argued:

The applicant has alleged that in The Nation Magazine of November 2009, at pages 18 to 21, the following words appeared:

"The appointment of these new judges to the High Court and Industrial Court would be a turning point to Swaziland's Judiciary. While the judiciary has stayed away from the Constitutional process that is taking place in the country, ordinary people will now look to the new justices to help the people get used to

understanding what it really means to live in a Constitutional State".

The AG argued that after reading the article, he got the impression that it was critical of both the Supreme Court and the High Court; that it amounted to contempt mainly of the Supreme Court and to a lesser degree the High Court. According to him the article scandalises the Judiciary**.** He alleged that on the 21st December 2009, he wrote a letter to the second respondent pointing out to him the contemptuous nature of the article in the event the respondents would wish to apologise to the Chief Justice; the respondents had fourteen days within which to respond, but they did not respond to the letter let alone acknowledging receipt of the letter. Since the AG was doubtful whether the second respondent had

received the letter, he served him for the second time and asked him to sign for the receipt of the letter; however, no response was received from the second respondent. The AG has further cited certain passages of the article which, he argued, provided further evidence that the respondents were in contempt of the Courts. Paragraph 5.1 of the founding affidavit states the following:

"5.1 Some of the passages in the article which attracted my attention that the article could scandalise the courts and that its author and publisher were in contempt of the courts read:

The Judiciary despite being the custodian of the ideals of a Constitutional State, has yet to show its hand and join the party towards creating a

society whose values are based on the ideals of the rule of law. Could the appointment of the four eminent jurists signal a change of how the judiciary seeks to participate in our changing society. The main reason why the judiciary has been slow to adapt to the values brought about by the new order of 2005 has to do with the events of November 28, 2002 when the government, led by the current Prime Minister overthrew a decision of the Court of Appeal which sought to stop the eviction of some Swazis from Macetjeni and kaMkhweli. When Jan Sithole, Mario Masuku and a group of

prodemocracy organisations, ... approached the Supreme Court early this year to ask for the judges' opinion on whether the Constitution allowed for political parties the Justices, in the majority decision, were dismissive of the question to the point of being contemptuous to Swaziland's stance in relation to the Constitution. Justice P.A.M. Magid, sitting together with Justices M.M. Ramodibedi, J.G. Foxcroft and A.M. Ebrahim delivered a stunning majority judgment that equated Swaziland in 2009 with the medieval politics of England. This, it turns out, was the sole basis on

which they refused to unpack the Constitution and interpret it in a manner that brings Swaziland in line with the 21st century values which we all live by today. They went further to compare Swazi politics to the very repressive and failed political systems of East Germany and the Soviet Union when Justice Magid declared: Democracy is, I would suggest, like beauty, to be founding in the eyes of the beholder. Similarly, I suggest with Swaziland.

Essentially what the eminent Justices of the Supreme Court were telling us in this judgment was that they could not be bothered to interpret

the Constitution; that if Swaziland wants to create a repressive society, then so be it Again, the message sent by the judges here is that, whereas it is well known that academics play a crucial role in shaping the law, Swaziland has become so irrelevant to the world as we live in today to the extent that academic thinking has no place in our society. If one reads this judgment in its abstract form, you have to agree with Justice Albie Sachs's quote earlier: every judgment is a lie, not in its content, but in the story it tells. If we are to understand that the promulgation of the Constitution of 2005

sought to change our way of life insignificantly, then it is fair to say that the judgment is out of order. This point is particularly reinforced by the fact that the issues brought to the Court at the time had much to do with the question of fundamental rights. To discuss off-hand the question of fundamental rights, as the Court did, is criminal. To rubbish academics, as the judges did, simply because their views would not promote the agenda in this judgment is treasonous. (My emphasis) The question, thus arises again: what does the appointment of these judges mean, in real terms, to

jurisprudence in Swaziland? Can Justices Sarkodie, Hlophe, Maphalala and Mazibuko do what justice Ngoepe said was to 'bring new minds to bear on issues .... not simply to rubber-stamp prior judgments; be their masters voice? What ordinary Swazis now need is for the judiciary to begin to show us that this Constitution is ours and that we can use it to better our lives. The tradition among judges of higher Courts has always been one of big men who live mysterious lives away from ordinary folk; men to be feared and revered, whose standing in society is much above even those of

highest authority. In other countries, like South Africa, that thinking has changed....This country desperately needs to see a judiciary that works to improve the people's lot. It is up to these men to join people like Justice Masuku in making this a better country. As the controversial Judge John Hlophe of South Africa is quoted to have once said: '*Sesithembele kunina ke'*. The judiciary, judges and lawyers need to play their role in the Constitutional dispensation.

The AG proceeded to state what he understood the article to mean: **"In reading the article, the**

understanding which I got, and I submit, the understanding which the ordinary Swazi reader (of the article) is likely to get, is that the article means, *inter alia*-

(1) That the Supreme Court judges have failed the people of Swaziland by keeping aloof, leading mysterious lives and not being involved in the political aspirations of the Swazis.

(2) **That the Supreme Court judges cannot be trusted to do justice in Constitutional cases since "they could not be bothered to interpret the Constitution"; are not**

interested in upholding fundamental rights; their judgment (in Supreme Court case No. 50/2008) was deliberately wrong and "out of order" because they had an extraneous or illicit agenda to promote in that case since they had not forgotten "the events of November 28, 2002".

(3) **That the Supreme Court judges (and the judiciary in general) are not independent or impartial in the administration of justice.**

(4) **That Supreme Court case No. 50 of 2008 was so badly or incompetently handled**

that their Lordships did not only commit a crime but are also guilty of (high) treason, in their "stunning majority judgment".

(5) **The new or recently appointed judges are urged to break new ground and "turn the court around" in the sphere of fundamental rights.**

(6) **That the new judges should join the struggle for multiparty democracy and help the political organizations in the country to achieve through the courts**

what they (political organisations) have so far failed to achieve by themselves.

(7) **That the people of Swaziland must turn their back (lose confidence) in the currently constituted Supreme Court and have faith in or pin their hopes on the newly appointed judges.**

The AG concluded by stating that in his understanding of the article its author seeks to influence the judiciary to adopt a particular attitude in their future dealing with fundamental rights cases. He further argued that the article impugns the honour, dignity, authority,

independence and impartiality of the judges of the Supreme Court and the High Court by ñpoisoning the Fountain of Justice before it begins to flowò; and, that the article is contemptuous of the Courts.

Second Count: The AG brought a second application on the 22nd March 2010 in respect of the same parties under criminal case No. 68/2010. He sought the following orders:

(a) **Criminal criminal contempt of court as a result of an editorial of February 2010 entitled: "Speaking my Mind", which editorial was intended to interfere or**

likely to interfere with the due administration of justice.

(b) **Granting that the rule nisi be served on the respondents by an officer of the AG.**

(c) **Alternative relief as the Court may deem fit.**

(d) **Costs of the application.**

In his founding affidavit the AG alleged that in The article relates to an event on the 15th January 2010 where the [then] Acting Chief Justice, [Michael Ramodibedi] as he then was, was speaking in his official capacity as head of the

Judiciary during the official opening of the Legal Calendar. The AG argued that the editorial went far beyond to strike at the private person of the then Acting Chief Justice.

The AG further argued that the following paragraph in the said article is more of a threat to the physical well-being of the Chief Justice than a friendly warning; and, that the editorial is intimidating if not terrorising to the judge giving rise to a clear case of contempt of court. The paragraph states the following:

"The good thing for Justice Ramodibedi is that Swazis, because of their long, rich and strong traditions, will teach him what culture really is.

They will not sit him down and give him a lesson though. Because he is a well educated man, on the road trip back home to Lesotho when his time is up, Justice Ramodibedi will reflect on his tenure in Swaziland and he will become the man he is most certainly not right now. But, above all, he will know the Swazi people, hitherto mistakenly believed by the rest of the world to be submissive to blind authority. He will then realise that Swazis are not fools. Again I say, Justice Ramodibedi must not misinterpret the silence to his remarks, or think that in getting his way he had beaten the judges of the High Court into line. For I say again – and I beg the good judge to know and understand this saying – awulali Ngwane Kulala emehlo! It's important, Your Worship!

It is very important! Bheki Makhubu 1 February 2010."

The AG argued that the editorôs comment is not just a criticism but a violent and scurrilous attack on the integrity, authority and standing of the Chief Justice; and, that the article seeks to undermine and lower the dignity and office of the learned judge.

The comment in the magazine, in part reads as follows:

3.2. (1) When Chief Justice (name given) stood before his peers and the country as a whole at the official opening of the High Court last month, and went into an unprecedented show of beating his breast, Tarzan-style, calling himself

a 'Makhulu Baas', I almost wept. I am not sure whether I almost wept for the man himself or the levels to which our judiciary has sunk.

Here is a man, honoured by King Mswati III ... behaving like a high school punk. Justice (name given) whatever he might think of himself sunk to such a terrible low that day. He stooped below the floor. What extra-ordinary arrogance! Those of us who take a keen interest in general issues know that a person of Ramodibedi's standing should behave with decorum .... Judges, by tradition, do not behave like street punks. Ramodibedi's choice of words was very interesting. He calls himself a 'Makhulu Baas', a word he dug up from the cesspit of apartheid South Africa. He now comes to this country to use it against us.... If Ramodibedi suffers from a hang-over of

apartheid he should not take it out on us. (My emphasis) What is most disturbing about Justice (name given)'s behaviour is that he was exercising his authority mainly on his colleagues, the judges of the High Court. Not only did the Acting Chief Justice lower his own stature, but he brought the whole house down. I do not know Justice (name given) from a bar of soap... I do know some of the judges he thought he was giving a dressing down and can say that in the time they have practised on the Bench, they have behaved in a manner only to be expected of people of their standing. Decorum, Your Worship, decorum! Because people of Justice Ramodibedi's standing are appointed to office by King Mswati III, I will probably never know how he was selected to this position. I can say, though, that from his remarks he is a man

who does not inspire confidence to hold such high office. How can we respect a man who speaks such language as he did? (My emphasis). As it were the judicial system in this country is in shambles. This is why you have such a high incidence of murder yet nobody ever seems to stand trial. Justice (name given) is a guest in this country. Anyone who understands cultural etiquette will know that you do not just walk into another man's homestead and beat your breast telling everyone you are the boss. It is downright rude. Because he is a well educated man ... he will become the man he is most certainly not right now. But above all, he will know the Swazi people hitherto mistakenly believed by the rest of the world to be submissive to blind authority (sic). He will then realise that Swazis are not fools. Again I

say Justice (name given) must not misinterpret the silence to his remarks or think that in getting his way he has beaten the judges of the High Court into line."

The AG further argued that the second respondent used language which was despicable, derogatory and demeaning directed to the Chief Justice. He argued that the word ñMakhulu Baasò is common currency in Southern Africa; and, that the second respondent had decided to read the expression in bad faith in order to pour scorn and ridicule to the Chief Justice. According to him this was contemptuous. The AG contended that the editorial seeks to drive a wedge between the Chief

Justice and the other Judges of the High Court by alleging that the other judges have behaved in a manner only to be expected of people of their standing. He averred that this implied that the behaviour and sense of propriety of the Chief Justice was less than exemplary. He argued that the attack on the Chief Justice was reckless and without any justification and that it was intended to show that the Chief Justice does not deserve the position and honour conferred upon him by the King. He contended that these allegations are not only tendentious but clearly mischievous intended to demean, disparage and discredit the learned

judge and encourage the general public and in particular the other judges of the High Court to disrespect him. He argued that further evidence of the contemptuous attitude of the respondents was the allegation that the Chief Justice is a man who does not inspire confidence to hold such a high office. He decried the fact that the respondents described the head of the judiciary as a ñhigh school punkò or a ñstreet punkò. He described such a language as very demeaning and that it constitutes a declaration of unmitigated and unsolicited contemptuous ridicule for the person and office of the Chief Justice. He argued that the

publication is not only hostile and scandalous of the Chief Justice but that it was also personal and insulting. He contended that the publication seeks to set the Chief Justice at loggerheads with the people of Swaziland and the authorities of the country. It was further argued that the publication constitutes an impeachment of the Kingôs wisdom and goodness in the choice of his judges. Furthermore, that the editorial excites in the minds of the people a general dissatisfaction with all judicial determinations and that it indisposes their minds to obey them. The AG, in conclusion, argued that the editorial does not constitute a fair,

temperate and legitimate criticism to which our courts are generally open; and, that it interferes with the performance not only of the Chief Justice but the other judges in dispensing justice. According to his analysis, the editorial constitutes the offence of criminal contempt of scandalising the court by the scurrilous abuse of the Chief Justice and the judiciary as a whole.

It is common cause that a *rule nisi* in respect of the second article was issued on the 22nd March 2010; the respondents were ordered to appear in court on the 21st April 2010 to show cause, if any, why they

should not be committed and punished for criminal contempt of court as a result of an editorial written by the second respondent and published by the first respondent and contained in The Nation of February 2010 entitled: ñSpeaking My Mindò, which editorial was intended to interfere with the due administration of justice. It was further ordered that an officer in the AGôs Chambers should serve the order upon the respondents. The court also ordered that Criminal case No. 53/2010 be consolidated with Criminal Case No. 68/2010 under Criminal case No. 53/2010. On the return day, being 21st April 2010, there was an urgent

interlocutory application filed by the Editorsô Forum (Intervening Party) for an order directing that the applicant be joined as a third respondent in the proceedings under Criminal case No. 53/2010. A consent order was issued that the applicant be joined in the proceedings as a friend of the court. The parties in the main application further agreed to a consent order that the matter be removed from the Roll to take its normal course, and that the matter be referred to the Registrar of the High Court to allocate a date of hearing in the next session.

Makhubu and The Nation's Defence:

The application is opposed by the respondents. The second respondent deposed to an opposing affidavit on behalf of both respondents. Three points in *limine* were raised: firstly, that the procedure used in the present case is both unlawful and unconstitutional. He argued that ordinarily criminal proceedings are attended by a range of safeguards designed to protect individual rights, and, that his rights have been violated because he has not been furnished with a charge sheet and/or an indictment; and, that ordinarily, he would be entitled to request further particulars in terms of the ordinary rules relating to the criminal

procedure. He further argued that in terms of the ordinary rules of criminal procedure he would be entitled to raise objections to the charge or indictment on a variety of grounds before being called upon to plead. He also argued that the procedure adopted in the present case is inherently unfair and prejudicial and that it violated his constitutional right to be presumed innocent, and, that the onus is upon him to prove his innocence contrary to section 21 (2) (a) of the Constitution. The second respondent argued that section 21 (2) (b) of the Constitution guarantees to an accused person the right to be informed ñin sufficient detail

of the nature of the offence or charge; he argued that this is not the case in this matter. He further argued that there is no basis in law why the ordinary criminal procedure has not been followed; and, that the procedure adopted in this matter was a radical departure from the fundamental safeguards enshrined in the Common law, the Criminal Procedure and Evidence Act as well as the Constitution. He called for the orders to be discharged on that basis. He further argued, in *limine,* that the AG lacks jurisdiction to institute the proceedings. He argued that it is the DPP who has the power to institute criminal proceedings in

accordance with section 162 (4) of the Constitution. He contended that in terms of section 77 of the Constitution, the AG is the Principal Legal Advisor to the Government and the King, and, that he does not have the power to prosecute in his own right or under delegated authority. The second respondent argued that it is not competent for the AG to represent the DPP in terms of the Constitution. In the alternative he argued that there has been no lawful delegation of authority by the DPP. He contended that the DPP in the performance of his duties is enjoined in terms of section 162 (6) of the Constitution to have

regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process.

Furthermore, that the Director should be independent and not be subject to the direction or control of any other person or authority. To that extent he argued that the procedure adopted in this matter constitutes an abuse of the legal process which the Director is enjoined to prevent. According to the second respondent, if the Director had instituted these proceedings, he would not have adopted this procedure. He called for the dismissal of the two cases. He also argued

in *limine* that the contents of the two articles do not constitute contempt of court. He averred that in light of section 24 of the Constitution which guarantees the freedom of expression as well as the relevant case law in comparable jurisdictions, the respondents have not committed the offence of contempt of court. He argued that the opinions expressed in the articles fall within the bounds of legitimate comment and criticism which is not only tolerated but protected in other comparable jurisdictions.

The second respondent regards himself as a loyal and patriotic citizen who is committed to the

promotion of democracy in the country. He contends that in his capacity as Editor of The Nation, he has always sought to act in the best interests of the country; and, to present his readers with a range of opinions to enable them to be better informed and sensitive to important issues which affect their lives. He avers that when he is critical of individuals or institutions in his writings, it has not been out of personal ill-will or animosity but it was to advance what he believed to be legitimate and constructive criticism. He emphasised that this has informed his approach in both of the articles which form the subject-matter

of the present proceedings. He believes that the judiciary performs a critical function in all societies and that this country is no exception. He contends that judges are not above criticism where the criticism remains within certain limits; and to that extent, he argued that his articles constitute legitimate and constructive criticism which should be protected by the law.

The Editor argued that judges wield significant power; that in criminal proceedings, they have the power to deprive individuals of their liberty, and, in civil proceedings, judges have the power to make significant decisions which affect the lives

of those who appear before them. He contends that judges exercise this power not by election but by appointment; and, that once appointed judges enjoy significant security of tenure and their independence is constitutionally guaranteed. He avers that it is for these reasons that judges the world over recognise that they are subject to criticism; and, that it is particularly the case in this country in light of the constitutional guarantee of freedom of expression.

He denies any intention on his part to bring the Judiciary into disrepute or to scandalise the judiciary as suggested by the AG. He contends

that his intention is to ensure that judges perform their constitutionally mandated position. He concedes that he did not respond to the letters by the AG because he was advised that the AG has no *locus standi* to institute the present proceedings. He denies that the passages highlighted in the articles scandalize the courts or that they disclose any offence as alleged. He argued that on a fair and objective assessment of the articles read in their context and as a whole, no offence is disclosed or is any offence intended. However, he admits that the Chief Justice was acting in his official capacity as head of the judiciary on the

occasion of the official opening of the Legal Calendar but denies that the first article is intimidating to the judge or that it constitutes contempt of court. With regard to the second article, the respondent accepts that the Chief Justice describes himself as ñMakhulu Baasò. He contends, however, that it is such a description that has made him the legitimate target of criticism in the following respects: firstly, that the phrase ñMakhulu Baasò means ñbig bossò, and that it was vulgarisation constructed by mine bosses in apartheid South Africa to enable them to issue commands to black workers. Secondly, that the

phrase constitutes a language which is demeaning to black workers and was a product of arrogance emanating from mine bosses who considered black workers and their languages unworthy of dignity and respect. He contends that the mining dialect has ceased to be spoken today, and even when in use it was not used outside the mining context. He argued that the mining dialect with its pidgin vocabulary cannot be referred to as a common and current prose within the region. He contends that given that there is no dispute that the Chief Justice so described himself, such criticism as was levelled against him fell within legitimate bounds

particularly because such description does not relate to his judicial functions; and, that he does not have to be a ñMakhulu Baasò in order to legitimately discharge his duties.

Court's Judgement:

It is common cause that the crime of contempt of court may take a variety of forms; however, all contempt of court involves an interference with the due administration of justice either in a particular case or as a continuing process as well as impeding, and perverting the course of justice. The punishment for contempt of court is to keep the streams of justice clear and pure. Contempt of

court is a criminal offence but it is not tried on indictment. It is tried summarily by a judge. In terms of the law judges who are scandalised can punish the offender, not to protect themselves as individuals but to preserve the authority of the Court. Contempt of Court is punished because it undermines the confidence not only of the litigants but also of the public as potential litigants in the administration of justice by the Courts. See *A.G. v. Times Newspapers Ltd* (1973) 3 All ER 54 at 73. It has also been accepted that in determining whether a publication is contemptuous, regard

must be had to the passage as a whole and not to isolated paragraphs of the publication.

It is argued by the respondents, in *limine,* that the summary procedure employed in this case is both unlawful and unconstitutional. It is not in dispute that this procedure has been employed for centuries. Contempt of court, even civil contempt is a criminal offence. The Crown is at liberty to prosecute the offence either summarily or in terms of the ordinary criminal procedure; the decision on which procedure to employ lies within the discretion of the Crown and it is a prerogative of the Crown. Section 139 (3) of the Constitution

provides inter alia, that the superior courts are courts of record and have the power to commit for contempt to themselves and all such powers as were vested in a superior court of record immediately before the commencement of the Constitution. It is evident from the subsection that the procedure for committal for contempt is not prescribed; and, this presupposes that the procedure applicable prior to the coming into force of the Constitution is still applicable. The Constitution does not abolish the Common Law summary procedure in this country; instead, it has reaffirmed it.

The Summary Procedure does not offend section 21 of the Constitution as alleged or at all. It is also not true that this procedure erodes the usual safeguards accorded to accused persons. The founding affidavit in a summary contempt proceedings clearly sets out the basis of the application and the and the particulars of the charge preferred against the respondent in sufficient detail to enable him to plead; this is the case even in this matter. The application for committal for contempt complies with section 21 (1) of the Constitution in so far as the presumption of innocence is concerned. The Court merely

issues a *rule nisi* calling upon the respondent to show cause why he should not be committed for contempt.

The respondent is given an opportunity to respond to the allegations; in addition, he is entitled to file a Notice to Raise Points of Law if the allegations do not disclose an offence. It is a principle of our law that no person should be punished for contempt of court unless the offence charged against him is distinctly stated with sufficient particularity to enable him to respond to the allegations; in addition, he is given an opportunity

to file an Answering Affidavit. He must be allowed a reasonable opportunity of placing before the court any explanation or amplification of his evidence as well as submissions of fact or law, which he may wish the Court to consider as having a bearing upon the charge or upon the question of punishment.

Unlike the ordinary criminal procedure, the personal liberty of the respondent is not interfered with. He is not arrested by the police and compelled to institute bail proceedings to regain his liberty prior to the trial. Prior to issuing the *rule nisi* the court should be satisfied that a prima

case against the accused has been made; this requirement is in accordance with the presumption of innocence. Contrary to submissions made by the respondents, the onus of proof in summary proceedings rests with the applicant and it does not shift to the respondents. The applicant sill bears the onus to prove the commission of the offence beyond reasonable doubt.

More importantly the respondents are entitled to legal representation before and during the hearing. They are further entitled to call witnesses and file supporting and confirmatory affidavits in terms of

Court Rules. In addition the respondents can appeal the decision of the court to the Supreme Court. In the circumstances this point of law is bound to fail.

It was further argued that by the respondents, in *limine,* that the Attorney General lacks jurisdiction to prosecute this matter on two grounds: firstly, that the powers of the AG as set out in terms of section 77 of the Constitution do not include the power to prosecute either in his own right or acting under delegated authority. Secondly, that the power to prosecute is vested upon the DPP in terms of section 162 (4) of the Constitution. The

respondents argued that the contention by the Attorney General that he represents the DPP is not competent in terms of the Constitutioné In terms of section 77 of the Constitution the AG is the Principal legal adviser to the Government; *ex-officio* member of Cabinet, Adviser to the King on any matter of law; provide guidance in legal matters to Parliament; assist Ministers in piloting bills in Parliament; drafts and signs all Government bills to be presented in Parliament; draw or peruse agreements, contracts, treaties, conventions and documents to which the government has an interest; represent the

government in courts or in any legal proceedings to which the government is a party; as well as being available for consultations with the DPP in terms of section 162 (7) of the Constitution in respect of matters where natural security may be at stake.

The AG has argued that his authority to institute and prosecute contempt proceedings is two-fold. Firstly, that he may on his own, in the public interest, intervene; and, that this power is inherent and a constitutional prerogative. He further argued that he was entitled to institute these proceedings by virtue of being the principal legal

adviser to the Government, *ex-officio* member of cabinet as well as the Parliamentary Counsel. In the absence of a specific constitutional provision allowing the AG to prosecute this matter, I would agree with the AG that such power is implied, inherent and a constitutional prerogative by virtue of his position as the principal legal adviser to the Government. It is my considered view that he is entitled to institute these proceedings in his capacity as such in the public interest. The AG does not only advise the Government, the King and Parliament but he represents the Government and Parliament in Court proceedings.

The AG further argued that he derives the authority to institute these proceedings from the delegated authority of the DPP.

The third point in *limine* goes to the merits of these proceedings. The respondents contend that the articles published by the respondents do not disclose the offence of contempt of court. In order to objectively analyse these articles, it is imperative for the court to consider each article as a whole.

The essence of the first article is that the Legislative and Executive organs of State have shown commitment to the ideals of

Constitutionalism since the advent of the Constitution of 2005; and, that the Judiciary has been slow in adapting to the values of the new Constitutional Order. To substantiate his view the second respondent referred to the case of *Jan Sithole and Seven Others v. The Government of Swaziland and Seven Others* Civil Appeal No. 50/2008, the issue being whether the Constitution of 2005 allows for the participation of political parties in the governance of the country. He accused the judges of the Supreme Court of failing to interpret the Constitution in a manner that would allow for the participation of political

parties in the governance of the country. He further accused them of dismissing off-hand the question of fundamental rights by failing to unpack the Constitution and interpret it in a manner that brings the country in line with the values of the 21st century. He characterised the judgesô conduct as criminal, and he attributed their conduct to an agenda which the judges were pursuing. He characterised their conduct as treasonous.

The first article accuses the judges of the Supreme Court of not being impartial in their decisions and actuated by a particular agenda. It is a truism that

jurisprudence is ever evolving as observed by Justice Bernard Ngoepe, and, that even though judges should examine previous judgments of their predecessors, they should not subjugate their intellectual powers to their predecessors as that would amount to intellectual laziness. Similarly, it is imperative that judges should embrace the ideals of constitutionalism and the rule of law with a view to advance and protect the fundamental rights and freedoms enshrined in the Bill of Rights. The invitation by the respondents to ñthe newly appointed judges of the High Court and Industrial Courtò, at the time to embrace the ideals of

Constitutionalism and the rule of law on its own does not constitute contempt of court. However, the respondents went further and scurrilously attacked the judges of the Supreme Court that they were not impartial and that their decision was actuated by an improper motive or agenda which they were pursuing.

Section 145 of the Constitution establishes the Supreme Court of Judicature for Swaziland which is the final Court of appeal; and, section 16 of the Constitution provides, *inter alia*, that this court is the final Court of appeal with appellate jurisdiction to hear appeals from the High Court of Swaziland.

Section 146 (5) sets this court apart from the other courts on the basis that it is not bound to follow the decisions of other courts save its own; in addition this court may depart from its own previous decisions when it appears that they were wrongly decided. On the basis of this subsection, it was open to the litigants in the case referred to in the article to approach the Supreme Court to review its previous decision. The scurrilous attack on the Supreme Court was not necessary and certainly not justified in law.

The second count relates to an article that was written and published in February 2010 in the

Nation Magazine; it was in the form of an editorial comment entitled ñSpeaking my mindò. The AG alleges that by so doing the respondents unlawfully and intentionally violated or impugned the dignity, repute or authority of the Chief Justice of Swaziland. He contended that the article was calculated or intended to bring into contempt and disrepute or to lower the authority of the judge or to interfere with the due course of the administration of justice.

The article states that during the official opening of the High Court, the Chief Justice went into an unprecedented show of beating his breast Tarzan-

style and calling himself a ñMakhulu Baasò; and, that this conduct showed the level to which our judiciary has sunk. He accused the Chief Justice of behaving like a high school punk; and, that in the process, he sank to a terrible low and stooped below the floor. He contended that the Chief Justice by virtue of his office should behave with decorum, and, that his office is one of men and women whose integrity is beyond reproach. He accused the Chief Justice of being extraordinary arrogant, and argued that judges by tradition do not behave and speak like street punks.

It is not in dispute that the Chief Justice called himself ñMakhulu Baasò on the day in question. The second respondent argued that the word ñMakhulu Baasò was dug by the Chief Justice from the cesspit of apartheid South Africa and accused him of suffering from a hangover of apartheid.

It is apparent that the second article was calculated or intended to bring into contempt and disrepute and to lower the authority of the Chief Justice; similarly, the article was intended to interfere with the due course of the administration of justice. See the case of *Reg v. Gray* (supra) at page 62.

It is trite that personal abuse of a judge in his official capacity as such amounts to contempt of Court because it has a tendency to bring the administration of justice into disrepute. Similarly, a scurrilous abuse of a judge is contempt where the words or publication reflect upon his capacity as a judge:

The conclusion to which I have arrived that both articles are contemptuous does not undermine or detract from the fundamental rights and freedoms

guaranteed by the Bill of Rights in chapter III of the Constitution of 2005. Section 24 of the Constitution provides the following:

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

It is apparent from section 24 that the right of freedom of expression and opinion is not absolute; it is subject to various limitations as reflected in section 24 (3). Subsection (3) (b) (iii) is relevant for purposes of these proceedings; it provides, *inter alia*, that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this

section to the extent that the law in question makes provision that is reasonably required for the purpose of maintaining the authority and independence of the courts. It is apparent from section 24 (3) of the Constitution that the right of freedom of expression and opinion is subject to the limit that it will be sustained unless it is shown not to be reasonably justifiable in a democratic society. 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. The onus of proving that the limitation is reasonably

justifiable in a democratic society lies with the party seeking to uphold the limitation. It apparent that the law of contempt by scandalizing the court itself is reasonably required for the purpose of ómaintaining the authority and independence of the courtsô as reflected in section 24 (3) (b) (iii) of the Constitution. The Constitution does not only curtail the extent of the right of freedom of expression but it does not protect the derogation of this right in sections 37 and 38 of the Constitution. The right of 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 this right like with all other rights should not interfere with the rights of others. The judicial power of Swaziland vests in the Judiciary, and, in exercising its functions, the Judiciary is independent and subject only to the Constitution. The Judiciary is not subject to the control or direction of any person or authority. To that extent neither the Crown nor Parliament

should interfere with Judges or judicial officers in the exercise of their judicial functions. All organs or agencies of the Crown are legally enjoined to give the judiciary such assistance as may reasonably be required in order to protect the independence, dignity and effectiveness of the Courts. It is against this background that the Constitution gives the Superior Courts the power to commit for contempt to themselves. See sections 138,139,140 and 141 of the Constitution.

The protection given to the Courts in respect of the law of contempt ensures the maintenance of a functioning system of administration of justice as

well as the confidence the public has that disputes brought before the Courts are determined according to law. It is essential, therefore, that the Courts and judges should not be accused unjustifiably of bias or other judicial misconducts which tend to impugn their integrity, independence or authority.

In upholding and seeking to enforce the law of contempt of court, it must always be borne in mind that the objective is not to shield the judiciary or the judicial system from criticism or the individual decisions of various judges from appropriate comment. It is justice itself that is flouted by

contempt of court, not the court or judge administering the law of contempt. The courts have a duty to protect and advance the administration of justice and should frown against conduct which is calculated to undermine public confidence in the proper functioning of the Courts. Similarly, Courts should confront conduct calculated to bring the Court or a judge into contempt or to lessen his authority. It is trite that judges and Courts are open to criticism in a fair and legitimate manner. It is only when the bounds of moderation and of fair and legitimate criticism have been exceeded that the Courts should

interfere. This will happen if the administration of justice has been brought into contempt. Whenever the issue of scandalising the courts has arisen the need to balance the competing public interests of the due administration of justice and the free debate of matters of public importance have been indicated. It is essential to bear in mind that the right of freedom of expression and opinion together with the other rights and freedoms in the Bill of Rights depend for their continued existence upon the administration of justice. It is the Courts acting in terms of section 35 of the Constitution which are empowered to enforce the Bill of

Rights; and without the proper functioning of the Court system, all the rights and freedoms guaranteed in the Constitution will count for nothing. It is against this background that ñthe fountain of justiceô should not be tainted by unscrupulous and scurrilous accusations and improper insinuations which are calculated and have a tendency of bringing the administration of justice into disrepute and erode public confidence in the Courts.

The offence of contempt, being criminal in nature, requires proof of *mens rea* in the form of intention.

The overriding test is whether the articles published have a tendency to lower or impair the authority and integrity of the judges and bring the administration of justice into disrepute. Section 139 (3) of the Constitution as read with section 24 (3) (b) (iii) of the Constitution protects the Courts and judges from conduct that is scandalising the courts as well as from scurrilous attacks on the judges. The protection of judges and Courts by the Constitution is justified because they cannot protect themselves as compared to the other two arms of government. The Courts do not wield any significant power outside the Constitution. The

first article by insinuating that the decision of the Supreme Court was predicated by a particular agenda and not based on law and evidence presented constitutes contempt of court. Similarly, the second article constitutes a scurrilous abuse of the Chief Justice. It was calculated to undermine or lower the dignity of the judge and to bring the due administration of justice into disrepute.

The legal position as stated by *Chaskalson P in S.v. Mankwayane* (supra) with regard to the limitations of constitutional rights in relation to the offence of scandalizing the court reflects the law in this country.

It is apparent from the preamble to the Constitution of 2005 that this country committed itself to a new era of Constitutional supremacy and the rule of law. The country further committed itself to ñstart afresh under a new framework of constitutional dispensationò, and to protect and promote the fundamental rights and freedoms of All in terms of a Constitution which binds the legislature, the executive, the judiciary and the other organs and agencies of the government. The Preamble further provides that all the branches of government are the guardians of the Constitution,

and that it is therefore necessary that the courts be the ultimate Interpreters of the Constitution. Similarly, section 2 (1) of the Constitution provides that the Constitution is the supreme law of this country and that if any law is inconsistent with this Constitution, that other law shall to the extent of the inconsistency be void.

Section 139 (3) of the Constitution provides that the Superior Courts are Superior Courts of record and have the power to commit for contempt to themselves and all such powers as were vested in a Superior court of record immediately before the

commencement of this Constitution. It is apparent from the preceding paragraphs of the judgment that the contempt of scandalising the court has its origins in the English law as well as the Roman Dutch Common Law and that it has developed over the centuries to this day.

This jurisdiction recognises the offence of scandalizing the court as an offence punishable by law. Any act done or writing published which is calculated to bring the court or a judge of the court into disrepute constitutes contempt of court. The test is whether the offending conduct viewed contextually is likely to damage the administration

of justice. In arriving at an appropriate decision, the court has to balance the right of freedom of expression to the protection of the administration of justice. Section 24 (3) (b) (iii) of the Constitution provides for the right of freedom of expression and opinion. However, this right is limited to the extent that is reasonably required for the purpose of ñmaintaining the authority and independence of the courtsò. Accordingly, this right is not absolute as its counterpart in the United States of America. Our law envisages a balancing of the right of freedom of expression in a democratic society and the limitation imposed in

favour of preserving the authority and independence of the Courts.

It is a trite principle of our law that no wrong is committed by any member of the public who exercises the ordinary right of criticising an individual judge or the administration of justice in good faith and in a fair and legitimate manner. It is only when the bounds of moderation and of fair and legitimate criticism have been exceeded that the court has power to interfere. The protection and maintenance of the rule of law and the rights and freedoms guaranteed by our Constitution depend for their efficacy in the public confidence

of the administration of justice. It is against this background that the Constitution provides for a limitation in the right of freedom of expression and opinion in section 24 (3) (b) (iii). Such a limitation is reasonably required for the purpose of maintaining the authority and independence of the Courts.

In the first count the judges of the Supreme Court are accused of not being impartial and that their decision not to allow multipartism in this country was actuated by an improper agenda which they were pursuing and that it was not based on law and their conscience. Such a publication has a

tendency of bringing the administration of justice into disrepute. There is a limit beyond which Courts, in their liberal interpretation of the Constitution, could bring about multipartism in the face of section 79 of the Constitution which expressly provides that ñthe system of government for Swaziland is a democratic, participatory, tinkhundla ï based system which emphasises devolution of State power from the Central government to tinkhundla areas and individual merit as a basis for election or appointment to public officeò. The judgment of the Supreme Court shows that proponents of multipartism may

well be advised that their remedy does not at all lie in the Courts but with the Swazi Nation as a whole by amending the Constitution in accordance with Chapter XVII thereof.

The Article in the second count is a scurrilous attack on the Chief Justice as a Judge of this court. The article unlawfully and intentionally violated and impugned his dignity and authority; it was calculated or intended to lower his authority and interfere with the administration of justice. They accused the Chief Justice of behaving like a high school punk, a street punk; and that he lacked decorum and integrity and that he was

extraordinarily arrogant. He was further accused of contesting the political position of the highest authority in the country by calling himself Makhulu Baas; this allegation is treasonous if not subversive in the extreme. Similarly, it was alleged that the Chief Justice does not inspire confidence to hold such an office in the judicial hierarchy and further doubted if his appointment was eligible. The Chief Justice was accused of bringing the Judicial system in this country into shambles and, that there is a high incidence of murder perpetrators in this country which he has failed to bring to justice.

Sentencing:

Accordingly, I make the following orders:

(a) The first and second respondents are found guilty of contempt of court in respect of both counts.

(b) The first and second respondents will each pay a fine of E100 000.00 (one hundred thousand emalangeni) in respect of the first article published in November 2009 within three days of this Order.

(c) The first and second respondents will each pay a fine of E100 000.00 (one

hundred thousand emalangeni) in respect of the second article published in February 2010 within three days of this Order.

(d) Half of the total substantive fine of E400 000.00 (four hundred thousand emalangeni) in respect of both respondents will be suspended for a period of five years on condition that they are not found guilty of a similar offence within the period of suspension.

(e) Failing payment of the fine of E200 000.00 (two hundred thousand

emalangeni) within three days of this Order, in respect of both respondents, the second respondent will be committed to prison forthwith for a period of two years.

(f) The Director of Public Prosecutions is directed to enforce compliance with this judgment.

(g) The respondents will pay costs of suit at the ordinary scale.