IN THE SUPREME COURT OF APPEAL OF SWAZILAND

Criminal Case No.:53/2010

In the matter between:

SWAZILAND INDEPENDENT PUBLISHERS (PTY) LTD First Appellant
(1st Respondent in
the Court below)

EDITOR OF THE NATION Second Appellant
(2nd Respondent in
The Court below)

and

THE KING Respondent
(Applicant in the
Court below)

NOTICE OF APPEAL

KINDLY TAKE NOTICE that the above-named appellants hereby appeal to the Supreme Court of Appeal of Swaziland against the conviction and sentence imposed on them by Maphalala J in Criminal Case No.53/2010, handed down on 17 April 2013.

KINDLY TAKE FURTHER NOTICE that the grounds upon which the appeal is based are set out below.

THE MERITS

1 **First Ground: The summary procedure was unlawful and unconstitutional**

1.1 Having correctly found that contempt of court is a criminal offence, the Court erred in holding that **"it is not tried on indictment"** but **"is tried summarily by a Judge"** (paras 37 and 60 of the Judgment). The Court ought to have held that even at common law ï

1.1.1 Summary proceedings for contempt of court, if justified at all, are reserved only for cases where there is an urgent and pressing need to address the conduct in question;

1.1.2 No such need was demonstrated nor present in the present case inasmuch as the conduct in question was committed *ex facie curiae.*

1.2 The Court ought further to have held that the summary procedure for contempt *ex facie curiae* is unconstitutional in that on the facts of the present case, the procedure adopted imposed a reverse onus on the appellants contrary to ï

1.2.1 The presumption of innocence;

1.2.2 The right to remain silent;

1.2.3 The prohibition on self-incrimination.

1.3 The Court ought to have held that, in the present case, the summary procedure was exercised for purely punitive purposes and for this reason alone, the safeguards attendant upon trial by indictment ought to have been followed. The effect of the summary procedure was to deprive the appellants of at least the following safeguards to which they would have been entitled in a trial on indictment:

1.3.1 The provision of a charge sheet complying with all the requirements set out in the Criminal Procedure and Evidence Act and framed with the necessary specificity.

1.3.2 The right to request further particulars to the indictment.

1.3.3 The right to raise objections to the charge before being called upon to plead.

1.3.4 The right to put the State to the proof of all elements of the offence.

1.4 The Court ought to have found that even if the summary procedure is competent, it was incumbent upon the Attorney-General to satisfy the Court why the ordinary procedure governed by the Criminal Procedure and Evidence Act was not followed.

2 **Second Ground: The Attorney-General lacked jurisdiction to prosecute**

2.1 The Court erred in concluding that present prosecution was competent at the instance of the Attorney-General. The Court ought to have held that:

2.1.1 Both the Attorney-General and the Director of Public Prosecutions are constitutional institutions to whom separate and distinct powers are conferred and that the power to institute and undertake criminal proceedings is conferred by section 162(4) of the Constitution on the Director of Public Prosecutions.

2.1.2 Section 77 of the Constitution, which stipulates the powers of the Attorney-General, does not include the right to prosecute whether in his own right or acting under delegated authority.

2.1.3 While section 162(5) envisages the power of the Director of Public Prosecutions to delegate, this is only competent in relation to **"subordinate officers"** and the Attorney-General is clearly not a **"subordinate officer"**.

2.1.4 To the extent that a delegation is relied upon, and is competent in law, which is denied, the Attorney-

General failed to discharge the onus resting upon him to prove any lawful delegation.

2.2 The prosecution at the instance of the Attorney-General and not the Director of Public Prosecutions was in conflict with section 162(6) of the Constitution. More particularly, the Director of Public Prosecutions was precluded from performing his constitutionally assigned role to ï

2.2.1 Have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process; and

2.2.2 Be independent and not be subject to the direction or control of any other person or authority.

3 **Third Ground: No offence was committed**

3.1 The Court erred in finding that the articles in question constituted contempt of court. The Court ought to have found that no offence was committed.

3.2 Properly interpreted, the article entitled **"Will the judiciary come to the party?"**, considered as a whole ï

3.2.1 Is strongly supportive of the principle of constitutionalism and the rule of law;

3.2.2 Underscores the centrality and importance of the judiciary in upholding the Constitution;

3.2.3 Stresses the potential of the Constitution and the judiciary to have a direct impact on the lives of the people.

3.3 With regard to the article entitled **"Speaking my mind"** the Court ought to have had regard to the fact that it was unrelated to the performance of the Acting Chief Justice on the Bench and, as such, is excluded from the definition of contempt of court.

3.4 Even if criticism of the conduct of a judicial officer, unrelated to his or her conduct on the Bench, is capable of constituting contempt of Court (which is denied) the present article was based upon undisputed facts, namely, that the Acting Chief Justice referred to himself as **"makhulu baas"**. A full and undisputed justification for the authorôs view that such was unbecoming of the judicial office was set out in the answering affidavit, including the following ï

3.4.1 The phrase **"makhulu baas"** is a Fanakalo phrase meaning **"big boss"**. Fanakalo is a **"language"** which combines certain African languages, particular Inguni languages with English and Afrikaans. It is a vulgarisation constructed by mine bosses in Apartheid

South Africa to enable them to issue commands to Black workers.

3.4.2 It is generally regarded as a **"language"** which is demeaning to Black workers and was the product of arrogance emanating from mine bosses who considered Black languages and Black workers unworthy of dignity and respect. It is almost never spoken today and even when in use, is not used outside the mining context.

3.4.3 The phrase **"makhulu baas"** derives from the Zulu and Xhosa word **"khulu"** meaning **"big"** and the Afrikaans word **"baas"** meaning **"boss"**.

3.5 In finding that the articles constituted contempt of court, the Court erred in failing to give sufficient weight to the constitutional protection of freedom of expression under the Constitution of Swaziland. More particularly, the Court failed to have sufficient regard to the importance attached, the world over, to affording a wide latitude to criticism of the judiciary in a constitutional dispensation.

4 **Fourth Ground: Absence of intention**

4.1 The Court correctly found that contempt of court constituted a crime requiring intention. The Court erred, however, in convicting

the appellants in the absence of any or sufficient investigation into the presence of intention on their part. More particularly ï

4.1.1 The Attorney-General chose to proceed by way of motion proceedings in which all the evidence is contained in the affidavits.

4.1.2 Since the onus rested with the prosecution to prove the offence beyond a reasonable doubt, this could only be achieved by resolving such disputes of fact as might arise according to long established principles for the resolution of factual disputes in motion proceedings.

4.1.3 There was absolutely no countervailing evidence whatsoever to displace the appellantsô evidence in which it was unequivocally stated, inter alia, that ï

4.1.3.1 Such criticism as was expressed was advanced in good faith and was honestly held;

4.1.3.2 The criticism was advanced out of genuine concern for democracy in the Kingdom of Swaziland and in the honest belief that such criticism was legitimate and within limits recognised the world over, including the Kingdom of Swaziland;

4.1.3.3 It was never the intention to bring the judiciary into disrepute or to scandalise the judiciary. On the contrary, the intention was to ensure that Judges perform their constitutionally mandated position.

4.2 There was no basis whatsoever, therefore, for rejecting the appellantsô version and since that version was reasonably possibly true, they were entitled to an acquittal.

5 **SENTENCE**

5.1 The very imposition of any sentence at all was unlawful and unconstitutional in that, the Court dealt with sentence ï

5.1.1 Without advising the appellants that they had been found guilty of contempt;

5.1.2 Without affording the appellants any opportunity whatsoever for adducing evidence in mitigation;

5.1.3 Without hearing any argument whatsoever on sentence.

5.2 The sentence was thus imposed in breach of the most fundamental right to be heard on punishment and is the consequence of the procedure permitted and adopted by the Court in direct conflict with the most basic rights of all accused people.

5.3 The sentence, having been imposed without notice and without even hearing argument is so severe as to induce a sense of shock.

DATED at MBABANE on this the é é é é day of APRIL 2013.