IN THE SUPREME COURT OF SWAZILAND

JUDGEMENT

Criminal Appeal Case No. 18/2014

In the matter between:

THULANI MASEKO	**1ST APPELLANT**
THE NATION MAGAZINE	**2ND APPELLANT**
BHEKI MAKHUBU	**3RD APPELLANT**
SWAZILAND INDEPENDENCE PUBLISHERS	**4TH APPELLANT**
And	
Rex	**RESPONDENT**

Neutral Citation: *Thulani Maseko and others v Rex (18/2014) [2015] SZSC 03 (29 July 2015)*

Coram: DR. B.J. ODOKI JA; J. P. ANNANDALE AJA; M.D. MAMBA AJA

Heard: 30 JUNE 2015

Delivered: 29 JULY 2015

Summary

Contempt of court – sub judice rule – unlawfully and intentionally violating and undermining the dignity repute and authority of the High Court of Swaziland – Publication of malicious and contemptuous statements about pending case – whether publication had potential of influencing the outcome of the pending trial – joinder of offenders – whether 2nd Appellant was a legal person freedom of expressing – whether limitation justified in a free and democratic society – whether sentence was too harsh in order to discourage critical and vibrant journalism in the country – Judicial notice – whether trial those entitled to take judicial notice of his peculiar private knowledge as Judicial Officer – Bias – failure of the trial judge to recuse himself as a potential witness – Trial Judge displays attitude of hostility towards defence and partiality in favour of prosecution – Evidence – Trial Judge simply rejecting evidence and misconstrue submissions – Sentence – Sentence inducing a sense of shock and motivated by anger and emotion – Crown conceded material irregularities in the trial and did not support the conviction and sentence – Appeal against conviction and sentence upheld. Appellants ordered to be released ordered to be released from custody forthwith.

JUDGMENT

DR. B.J. ODOKI, JA

[1] This appeal raises important issues relating to the independence and impartiality of the courts, the right to freedom of expression and the media, the offence of contempt of court and the **sub judice** rule, and the right to a fair trial by an impartial court.

[2] The four appellants were charged with two counts of contempt of court. They all pleaded not guilty and raised the plea of ***lis pendetis***. They were all convicted as charged. The first appellant and the third appellant were each sentenced to two years imprisonment, without an option of a fine. The second appellant and the forth appellant were each sentenced to a fine of fifty thousand Emalangeni (E50 000. 00) on each count to be paid within one month from the date of judgment.

[3] The Appellants appealed to this court against both conviction and sentence. Their counsel filed comprehensive Heads of Arguments.

[4] When the appeal came up for hearing, counsel for the Crown, Mr. Mduduzi Mabila, who had not filed Heads of Arguments, informed the court that he was conceding to the appeal and was not supporting both the convictions and sentences appealed against. Mr. Mabila gave several reasons why the convictions and sentences could not be sustained. The court commended on Mabila for conceding to the appeal in the interest of justice.

[5] In response, counsel for the appellants submitted that the appellants should be released immediately instead of waiting until the date of judgment on 29 July 2015 when they could have served their sentences.

[6] Since the appeal was not opposed for the sound reasons expounded by counsel for the Crown, which the court agreed with, the court found it appropriate to allow the appeal in its entirely set aside both the conviction and sentence, and order the release of the appellants in custody forthwith.

[7] We reserved the reasons for our decision to uphold the appeal. We now give those reasons.

[8] The first appellant, Thulani Maseko, was a contributing writer in The Nation Magazine as well an admitted Attorney in Swaziland. The second appellant, The Nation Magazine, is a monthly publication published by the fourth appellant, Swaziland Independent Publishers (Pty) Ltd, a company carrying on the business of publishing the Nation, among others. The third appellant, Bheki Makhubu, is the Editor of the Nation Magazine and co-director of the third appellant.

[9] The four appellants were charged with two counts of contempt of court as follows:

COUNT 1

Accused 1, 2 and 3 are guilty of the crime of ***CONTEMPT OF COURT.***

In that upon or during the month of February 2014 and at or near Mbabane area, in the Hhohho Region, the said accused each or all of them, acting jointly and in furtherance of a common purpose did unlawfully and intentionally violate and undermine the dignity, repute and authority of the High Court of the Kingdom of Swaziland did issue and publication malicious and contemptuous statements about the case of the King versus Bhantshana Vincent Gwebu High Court Case No. 425/2014, a criminal matter currently pending before the High Court of Swaziland and therefore ***sub judice*** *in the following manner:-*

(a) Compared the judicial officer who issued the warrant against Bhantshana Gwebu to Caiphus who led Jesus to his killers;

(b) Alleged that the judicial officer "massaged" the law "to suit his own agenda".

(c) Alleged that the judicial officer collaborated with "willing servants" to "break the law".

(d) Falsely alleged that Bhantshana Gwebu (the accused) was denied legal representation.

COUNT 2

Accused 1, 2, 3 and 4 are guilty of the crime of CONTEMPT OF COURT.

In that upon or during the month of March 2014 and at or near Mbabane area, it the

Hhohho Region, the said accused each or all of them, acting jointly and in furtherance of a common purpose did unlawfully and intentionally violate and undermine the dignity, repute and authority of the High Court of the Kingdom of Swaziland did issue and publish malicious and contemptuous statements about the case of the King versus Bhantshana Vincent Gwebu Court Case No. 25/2014 a criminal matter currently pending before the High Court of Swaziland and therefore ***sub judice*** *in the following manner:-*

(a) That the arrest of Bhantshana Gwebu was a demonstration of "corruption", abuse of authority and lacking in "moral authority" orwas a "demonstrationof moral bankruptcy";

(b) That the proceedings against Bhantshana Gwebu are "a travesty of justice";

(c) That the proceedings against Bhantshana Gwebu amount to "a kangaroo process";

(d) That the proceedings against Bhantshana Gwebu were aimed at settling personal scores and that the idea behind these proceedings was to ensure that he was "dealt with";

[10] As stated earlier, all the appellants were convicted as charged. Dissatisfied with the judgment of the court **a quo**, they filed an appeal to this court against both the conviction and sentence.

[11] In their notice of appeal, the appellants submitted eighteen grounds of appeal framed as follows:

> *"1. The learned judge **a quo** erred in law and committed a gross irregularity by displaying an attitude of hostility towards the defence and one partiality in favour of the prosecution throughout the proceedings.*
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> - *The learned judge **a quo** erred in law and in fact by distorting the doctrine of judicial notice in that he used his peculiar private knowledge and his position as a judicial officer to reject the evidence of DW1 (Bhantshana Gwebu) on what transpired in the Chief Justice's chambers despite the fact that the DW1's sworn evidence was not challenged in all material respects.*
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> 3. *The learned judge **a quo** erred in law and in fact in rejecting the sworn evidence of the Appellants on his mistaken view that the February and March 2014 publications had alleged that the Chief Justice had locked out DW1's lawyer when the said DW1 appeared in the Chief Justice's chambers.*
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> 4. *The learned judge **a quo** erred in law and in fact in labeling DW2 **(Quinton Dlamini's)** sworn evidence as hearsay notwithstanding the fact that such evidence was corroborated by **Gwebu's** sworn testimony which went unchallenged in all material respects.*

5. *The learned judge **a quo** erred in law and in fact in placing undue reliance on the issue of whether there was any connection between **Gwebu** (DW1) and the trade union (**NAPSAWU**) in as much as that issue was irrelevant regarding whether or not the Appellants had committed the crime of **Contempt of Court**.*

6. *The learned judge **a quo** erred in law and in fact an completely misconceived both the evidence and the submissions on the relevance of the American case of **BRIDGES VS CALIFORNIA 314 US 252 (1941)***

7. *The learned judge **a quo** erred in law and in fact and completely misconceived the defence's submission on the Crown's propriety of placing reliance on the South African case of **S.VS. MAMABOLO** which is a totally different species of **Contempt of Court.***

8. *The learned judge **a quo** erred in law in fact in convicting the appellants despite the fact that there was no evidence led by the Crown suggesting that in writing and publishing the article complained of the Appellants intended to act unlawfully.*

9. *The learned judge **a quo** erred in law and in fact in ignoring the sworn version of the Appellants in as much as it could reasonably possibly be true.*

10. *The learned judge **a quo** erred in law and in fact in ignoring the sworn evidence of PW1 **(MSEBE MALINGA)***

*AND DW5 (**BHEKI MAKHUBU**) that only the 3rd Appellant (Swaziland Independent Publishers (Pty) Ltd has legal personality and not the 1st Appellant (**The Nation Magazine**).*

11. *The learned judge **a quo** erred in law and in fact in ignoring the defence submission that the limitation of the enjoyment of the freedom of expression can only be justified upon proof of the jurisdiction facts that the judiciary of Swaziland does indeed have **authority** and **independence** especially having regard to the notorious fact that to date the courts of this country have done nothing to the executive arm of government despite the fact that the latter has flatly refused to comply with judgments in the **Macetjeni** and **KaMkhweli** evictions. Neither is there anything in learned judge **a quo's** judgment showing that he ever considered the defence submissions supported by authority and local publications showing that comments made by the Chief Justice of this country leave one with the reasonable conclusion that the independence of this country's judiciary has been severely compromised.*

12. *The learned judge **a quo** erred in law and in fact in not holding that the evidence presented before court, in its totality, does not show that the Crown proved its case beyond all reasonable doubt.*

13. *The learned judge **a quo** erred in law and in fact in not demonstrating by his treatment the evidence presented, how the newspaper articles complained of had the potential of influencing the outcome of the pending criminal trial If DW1 **(Gwebu).***

14. *The learned judge **a quo** erred in law and in fact in meting out a sentence which in all respects and on the peculiar facts of this particular case induces a sense of shock.*

15. *The learned judge **a quo** erred in law and fact in not considering the fact that the 1st Appellant in not a legal entity.*

16. *The learned judge **a quo** misdirected himself in meting out a sentence that was clearly motivated by anger and emotion.*

17. *The learned judge **a quo** erred in law misdirected himself in treating the Appellants as repeat offenders notwithstanding the fact that the present offence was allegedly committed at the time when the previous convictions had been suspended by the then pending appeal and the judgment on appeal expressly provides that it takes effect from the 31st May, 2014, i.e. well after the alleged commission of the present offence.*

18. *The learned judge **a quo** misdirected himself in meting out a sentence that is so harsh that it has the effect of discouraging critical and vibrant journalism in this country."*

[12] In his submissions before this court counsel for the Crown pointed a number of errors and irregularities committed by the trial court which led him to concede to the appeal. I shall mention some of them:

- The refusal of the trial judge to recuse himself.
- The hostile attitude the judge adopted against the appellants.
- The trial judge taking judicial notice of his own observations which made him a potential witness.
- There was not matter pending before the court.
- The refusal of the court to allow the appellants to be represented.
- The inadequacy of the evidence to support the charges.

[13] The above reasons substantially concede to the numerous grounds of appeal filed by the appellants. We therefore do not find it necessary to analyze and decide each of grounds of appeal as they are deemed to have been successful.

[14] However, it remains for me to observe that what happened in this case was a travesty of justice. Whatever issues that arose with regard to the need to balance freedom of expression or of the press with the protection of fair hearing and authority of the courts; those issues were not properly handled. The importance of freedom of expression in promoting democracy and good

governance cannot be over emphasized. Equally important is the need to strengthen and promote the independence and accountability of the judiciary.

[15] It was for these reasons why we allowed the appeal and set aside the convictions and sentences against the appellant and ordered the immediate release of the appellants in prison. Any fines paid by the appellants are to be refunded.

DR. B.J. ODOKI
JUSTICE OF APPEAL

I Agree

J. P. ANNANDALE
AG JUSTICE OF APPEAL

I Agree

M.D. MAMBA
AG JUSTICE OF APPEAL

For the 1st Appellant:	Mr. Mkhwanazi
For the 2nd, 3rd and 4th:	Ms. Annemarie de Vos
For the Respondent:	Mr. Mabila