



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CRIM. CASE NO. 08/ 2013

In the matter between:

JUDGMENT

**SWAZILAND INDEPENDENT PUBLISHERS
(PTY) LIMITED**

1ST APPELLANT

EDITOR OF THE NATION

2ND APPELLANT

And

THE KING

Neutral Citation: Swaziland Independent Publishers (Pty) Ltd & The Editor of the Nation and The King(74/13) [2014] SZSC 25 (30 May 2014)

Coram: A.M. EBRAHIM J.A., S.A. MOORE J.A. and Dr. S. TWUM J.A.

Heard : **23 MAY 2014**

Delivered: **30 MAY 2014**

Summary: Scandalizing the court –elements of offence – offence still exists in Swaziland – May be prosecuted by summary procedure – DPP’s delegation of authority to prosecute to the Attorney General permissible – Two articles published in *The Nation Magazine* - one a permissible exercise of the freedom of the press – the other constituting the offence of scandalizing the court – Appeal against conviction and sentence – Appeal allowed in one case – Appeal dismissed in the other – Trial court not permitting convicted appellants to be heard in mitigation of sentence – High court not assisted by prosecuting counsel in ensuring that appellants afforded their rights to be heard - Sentences of the trial court impermissibly harsh – This court allowed parties to tender written submissions on the matter of sentence – Those submissions duly considered by this court - Sentences of the High court set aside - Appropriate sentences substituted by this Court.

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INTRODUCTION

[1] *The Nation* is an independent monthly magazine published and circulated within the Kingdom of Swaziland. It sometimes travels beyond the borders of this Country to other parts of the world. Swaziland Independent Publishers (Pty) Limited is a limited company incorporated in terms of the Companies Act. It has offices at 3rd Floor, Mbabane House, Warner Street, Mbabane. *The Nation* may be fairly described as an outspoken and vigorous commentator upon public and governmental affairs and upon other matters of interest to the public generally. In doing so, it asserts its rights to freedom

of expression enshrined in section 24 of the Constitution of the Kingdom of Swaziland Act, 2005, Act No. 001 of 2005.

[2] Section 24 of the Constitution is to be found in Chapter III which is captioned “PROTECTION AND PROMOTION OF FUNDAMENTAL RIGHTS AND FREEDOMS.” Section 24 is headed in bold letters: **“Protection of freedom of expression”**. Those captions are undoubtedly intended to alert the reader to the entitlement under the Constitution, to the amplitude of the freedoms expressed in Part III as a whole; and to the protection of all persons within the borders of this Kingdom from unlawful infringements of those rights. It is hardly surprising therefore that attention is focused primarily upon constitutional rights and not upon their corresponding duties and obligations.

[3] In **AFRICAN ECHO [Pty] LTD v SIMELANE** [2013] SZSC 7, this Court observed that:

"[3] Some writers on Constitutional Law have suggested that captions above the provisions relating to fundamental rights and freedoms should include the word 'obligations' and should therefore read 'Protection of Fundamental Rights, Freedoms

and Obligations’ so as to focus the minds of readers of constitutions that, whereas constitutions protect freedoms, they also impose obligations designed to protect the rights and freedoms of other persons, and also to secure the public interest. A proper balance must therefore be struck between Constitutional rights and freedoms while also giving full consideration to Constitutional duties and obligations.

[4] *The fundamental rights and freedoms expressed in subsections (1) and (2) must be read and interpreted against the background of the qualifications contained in subsection (3) which is of such critical importance that I set it out in full. It reads:*

(3) 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 –

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of –

- (i) *protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;*
 - (ii) *preventing the disclosure of information received in confidence;*
 - (iii) *maintaining the authority and independence of the courts; or*
 - (iv) *regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication; or*
- (c) *that imposes reasonable restrictions upon public officers, except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society.'"*

[4] The process of the dissolution of what was then the British Empire began in earnest with the grant – some would say the acquisition – of independence to India by the passage in the United Kingdom Parliament of the Indian Independence Act 1947 which partitioned what was formerly British India into the new Dominions of India and Pakistan. Those two countries joined

the family of Free and Independent Nations in August 1947. Pakistan was later to fracture when Bangladesh successfully delinked in March of 1971.

- [5] The ramparts of British Colonialism having been thus breached in 1947, the agitation for Independence and self determination by the still subject peoples of the Empire acquired such widespread momentum as to become a virtually irresistible force. The strength of that force, and the inevitability of freedom from colonialism were famously articulated in 1960 by the then British Prime Minister Mr. Harold Mc Millan in Cape Town in what was then apartheid South Africa who asserted the truism that:

'The wind of change is blowing through this continent. Whether we like it or not, this growth of national consciousness is a political fact.'

- [6] That political fact was slow to dawn upon his stunned hearers of the apartheid regime. But not so upon Kwame Nkrumah and the other heroes of the pre Independence Movement in Ghana who had already gained their independence on the 6th March 1957. Nor upon the peoples in those colonies who still yearned for freedom from colonialism.

[7] The wind of change of which Prime Minister Mc Millan spoke so prophetically not only ushered in the new era of independence from colonial rule, but the virtual end of the British Colonial era. The immediately post-colonial period of the newly independent states was characterized by a commendable and understandably justifiable desire to retain as many of their traditional laws, customs and practices which were consistent with modern precepts of good government, and the protection of individual rights and freedoms. The survival in this Kingdom of love and respect for Swazi Law and Custom, mirrors the British reverence for its institutions going back to Anglo Saxon times and even before.

[8] The processes leading up to the existing Constitution of Swaziland were shaped in substantial measure by events taking place during the reign of the late King Sobhuza II who strove heroically to preserve elements of Swazi Law and Custom which blended harmoniously with modern precepts of freedom and justice under the rule of law. The preamble to the Constitution expresses the desire to ‘start afresh under a new framework of constitutional dispensation;’... ‘under a constitution created by ourselves for ourselves in complete liberty;’ ‘to blend the good institutions of traditional Law and Custom with those of an open and democratic society so as to promote

transparency and the social, economic and cultural development of the Nation'. Those processes proved to be the precursor of the new dispensation which saw the ancient concept of parliamentary sovereignty give way to the new regime of a written constitution which is a meld of elements of the Westminster type constitution, and elements of Swazi Law and Custom.

[9] What has become known as the Westminster type constitution is one modeled upon a template designed by the British Government in consultation with representatives of the erstwhile colonies. These constitutions enjoy much in common: but they reflect variations arising out of the peculiar political social cultural and economic conditions prevailing in the particular country immediately prior to its independence. Thus, the Independence Constitution of Guyana provided for a system of proportional representation which was not a common feature of other Westminster type constitutions.

[10] Swaziland, in common with its immediate neighbours in Southern Africa, has had a colonial history where the evolution of its existing system of government was, to a substantial extent, influenced by the laws, customs and practices of an open and democratic society; 'to march forward

progressively under our own constitution;' to 'accept the following constitution as the Supreme Law of the Land'.

[11] The Supremacy of the Constitution of the Kingdom of Swaziland is specifically stated in the body of the document in section 2 (b) under the rubric **The Constitution**. That subsection reads:

'This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'.

[12] It follows logically from the foregoing therefore, that, in adjudicating upon any issue or question of a constitutional nature in this Kingdom, it is to the Constitution of this Kingdom that a Court must first turn.

FREEDOM OF THE PRESS

[13] In **African Echo [Pty] Ltd, Thulani, Mabandla Bhembe v Inkhosatana Gelane Simelane** SZSC 7 (29 November 2013), this Court stated the following at paragraph [2]:

“Freedom of the press is guaranteed under Section 24 of the Constitution. Subsection (1) declares plainly and simply but powerfully that:

'(1) A person has a right to freedom of expression and opinion'.

Subsection (2) gives examples of the freedoms covered under subsection (1). It may be argued however, that in a democratic Kingdom such as Swaziland there may even be other freedoms enjoyable by persons besides those expressly set out. Subsection (2) reads:

'(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say-

- (a) Freedom to hold opinions without interference;*
- (b) Freedom to receive ideas and information without interference;*
- (c) Freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and;*
- (d) Freedom from interference with the correspondence of that person'.*

*It is a fundamental characteristic of all freedoms, however, that they are enjoyable **subject to corresponding responsibilities, duties and obligations.***” Emphasis added.

- [14] The principle that the enjoyment of freedoms is subject to such limitations as are reasonably justifiable in a democratic society was set out at paragraph 1.15 of the respondent’s Heads by Argument in this way:

*“1.15 We also hold the freedom of expression under the Constitution to be limited as therein prescribed. K.C. Wheare, **Modern Constitutions** (1966): ‘If a government is to be effective, few rights of its citizens can be stated in absolute form. If a Constitution declares that it guarantees to citizens, say freedom of speech, freedom of the press, freedom of assembly, freedom of street processions and demonstrations, and inviolability of the person and of the home, surely it guarantees licence. There must, it would seem, be some restrictions on these rights. Most constitutions which contain declarations of rights do recognize that some qualifications must be attached to their exercise. (pp38-39) (My emphasis).’”*

- [15] In the context of this case, section 24 (3) (b) iii of the Constitution is evidently of the greatest relevance. It enables the passage of laws that authorize the Court and judges of the courts to take appropriate action to maintain the authority and independence of the courts. It reads:

"(3) 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 –

(b) that is reasonably required for the purpose of -

*(iii) maintaining the authority and independence of the courts;
or"*

It also preserves any common law or pre-constitution laws and practices which have been available to judicial officers for achieving the purposes set out in section 24 (3) (b) iii of the Constitution. The issue raised by the appellants in their third and fourth grounds of appeal is whether the contents of the articles in question amount to no more than a legitimate and constitutionally permissible expression of their protected freedom of expression guaranteed by the Constitution, or whether those expressions crossed the line and entered into impermissible contempt of court justifying their convictions.

SCANDALIZING THE COURT

[16] Counsel for the appellants submitted that:

‘2.3 Burchell and Milton provide us with the following general definition which itself needs careful reading by reason of the ‘protean’ character of contempt of court:

“Contempt of court consists in unlawfully violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it”’.

[17] One of the more recent statements on the captioned subject is to be found in paragraph [13] of the highly authoritative, persuasive and much quoted dictum of Kriegler J., sitting in the Constitutional Court of South Africa in the case of **S. v Mamabolo** [2001] ZCCC 17; 2001 (3) SA 409 (cc); 2001 (5) BCLR 44.

“scandalizing is a form of contempt of court which, in turn, is a broad variety of offences that have little in common with one another save that they all relate, in one way or another, to the administration of justice. Contempt of court has indeed been called “the Proteus of the legal world, assuming an almost infinite diversity of forms”. The breadth of the genus is apparent from the definitions of contempt of court in standard textbooks on South African criminal law. For example Burchell and Milton’s definition reads:

“Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or

interfering in the administration of justice in a matter pending before it.”

[18] Kriegler J explained the rationale behind the continuing existence of the admittedly ancient offence of contempt of court in this way at paragraph [14]:

*“The reason for the existence of contempt of court as a punishable offence is often traced back to the observations of Wilmot J in the old English case of **R v Almon**;*

*The arraignment of the justice of the Judges, is arrainging the King’s justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, **and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men’s allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever, not for the sake of the Judges, as private individuals, but because they are channels by which the King’s justice is conveyed to the people.** To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.*

Something of the kind also existed in Roman and Roman Dutch law, although it was not recognized as a specific crime. It has also received the stamp of approval, albeit in passing, of this Court in Coetzee v Government of the Republic of South Africa.” Emphasis added.

[19] Kriegler J then posed at paragraph [15] the question which has been posed by commentators who query the retention in this age of instant communication, the worldwide web and an enhanced concern for the freedom of the press in the free world and beyond. This is how His Lordship put it at paragraph [15]:

“The fundamental question that has to be addressed at the outset here, is why there is such an offence as scandalizing the court at all in this day and age of constitutional democracy. Why should judges be sacrosanct? Is this not a relic of a bygone era when judges were a power unto themselves? Are judges not hanging on to this legal weapon because it gives them a status and untouchability that is not given to anyone else? Is it not rather a constitutional imperative that public office-bearers, such as judges, who wield great power, as judges undoubtedly do, should be accountable to the public who appoint them and pay them? Indeed, if one takes into account that the judiciary, unlike the other two pillars of the state, are not elected and are not subject to dismissal if the voters are unhappy with them,

should not judges pre-eminently be subjected to continuous and searching public scrutiny and criticism?

[20] Having thus posed the question himself, the scholarly judge provided the following response at paragraphs [16] and [17]:

“The answer is both simple and subtle. It is, simply, because the constitutional position of the judiciary is different, really fundamentally different. In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state.

No-one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law against governmental erosion. The emphatic protection afforded the judiciary under the Constitution therefore has a particular resonance. Recognizing the

vulnerability of the judiciary and the importance of enhancing and protecting its moral authority, chapter 8 of the Constitution, which marks off the terrain of the judiciary, significantly commences with the following two statements of principle:

- (1) The judicial authority of the Republic is vested in the courts.*
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear; favour prejudice.*

These two general propositions are then fleshed out and reinforced in the succeeding three subsections of section 165 of the Constitution:

- (2) No person or organ of state may interfere with the functioning of the courts.*
- (3) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”*

The breadth of the injunction is emphasized if one has regard to the compendious meaning that the Constitution gives to the terms “organ of state” so as to include all executive and legislative bodies in all spheres of government.” Emphasis added.

Similar provisions are to be found in section 141 of the Constitution of Swaziland under the rubric Independence of the Judiciary.

[21] Section 138 of the Constitution of Swaziland provides that:

“Justice shall be administered in the name of the Crown by the Judiciary which shall be independent and subject only to this constitution.”

[22] Importantly, in the context of this case, section 139 (3) of the Constitution clothes the superior courts of this Kingdom with the powers conferred upon them by the subsection which reads:

*“The superior courts are superior courts of record and have **the power to commit for contempt of themselves** and all such powers as were vested in a superior court of record immediately before are commencement of this Constitution.”* Emphasis added.

[23] Section 140 (2) of the Constitution declares that:

“In the exercise of the judicial power under this Constitution or any other law, the superior courts may, in relation to any matter within their jurisdiction, issue such orders or directions as may be necessary to ensure the enforcement of any judgment, decree or order of those courts.”

[24] The Independence of the Judiciary is declared under section 141 (1) of the Constitution in these terms:

“In the exercise of the judicial power of Swaziland , the Judiciary, in both its judicial and administrative functions, including financial administration, shall be independent and subject only to this Constitution, and shall not be subject to the control or direction of any person or authority.”

[25] Some of the additional elements of the Independence of the judiciary are spelt out in subsections (2) to (7) which read:

“(2) Neither the Crown nor Parliament nor any person acting under the authority of the Crown or Parliament nor any person whatsoever shall interfere with Judges or judicial officers, or

other persons exercising judicial power, in the exercise of their judicial functions.

(3) All organs or agencies of the Crown shall give to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts under this Constitution.

(4) A judge of a superior court or any person exercising judicial power, is not liable to any action or suit for any act or omission by that judge or person in the exercise of the judicial power.

(5) The administrative expenses of the Judiciary, including all salaries, allowances, gratuities and pensions payable to, or in respect of persons serving in the Judiciary, shall be charged on the Consolidated Fund.

(6) The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Judge of a superior court or any judicial officer or other person exercising judicial power, shall not be varied to the disadvantage of that Judge or judicial officer or other person.

(7) The Judiciary shall keep its own finances and administer its own affairs, and may deal directly with the Ministry

responsible for finance or any other person in relation to its finances or affairs.”

[26] In addition to the support which section 141 (3) affords to the courts from agencies of the Crown, the judiciary also relies upon the support of the public as well: if it is to discharge its onerous duties free from the stresses which public hostility, or lukewarm support could engender. This point was rationally made by Kriegler J at paragraph [18] of **Mamabolo** in this way:

*“[18] The judiciary cannot function properly without the support and trust of the public. Therefore courts have over the centuries developed a method of functioning, a self-discipline and a restraint which, although it differs from jurisdiction to jurisdiction, has a number of essential characteristics. **The most important is that judges speak in court and only in court. They are not at liberty to defend or even debate their decisions in public. It requires little imagination to appreciate that the alternative would be chaotic.** Moreover, as a matter of general policy judicial proceedings of any significance are conducted in open court, to which everybody has free access and can assess the merits of the dispute and can witness the process of its resolution. This process of resolution ought as a matter of principle to be analytical, rational and reasoned. The rules to be applied in resolving the dispute should either be known beforehand or be debated and determined openly. All decisions of judicial bodies are as a matter of course announced in public; and, as a matter of*

virtually invariable practice, reasons are automatically and publicly given for judicial decisions in contested matters. All courts of any consequence are obliged to maintain records of their proceedings and to retain them for subsequent scrutiny. Ordinarily the decisions of courts are subject to correction by other, higher tribunals, once again for reasons that are debated and made known publicly." Emphasis added.

To the above dictum I would respectfully add that even judgments of the highest and final courts are open to searching academic, journalistic, judicial, parliamentary and other forms of public criticism. Ultimately, they may even be overturned by the legislature.

[27] Some of the factors restraining judges from entering into public controversies concerning cases decided in the courts were discussed by this Court in **African Echo**.

'Because of the many constraints inhibiting him or her from entering into public debate on controversial subjects, a judicial officer is effectively muzzled from replying publicly to write-ups adversely affecting his or her personal or professional reputation. That is why fair minded journalists, true to the ethics and values of their profession, are scrupulously careful in write-ups about defenseless judicial officers. Contempt of court is a blunt instrument which

judicial officers are loath to deploy, even where it could be properly unsheathed in a case warranting its use.'

That said, however, judges have made, and continue to make, valuable extra judicial contributions to the advancement of learning, and the evolution of legal and related concepts, by writing scholarly and learned papers, and delivering feature lectures in academic and other appropriate fora.

[28] Judges from the earliest times have always striven to ensure that their judicial conduct was totally in keeping with their judicial oaths. Their quest has always been to ensure that decisions taken could stand the critical scrutiny of their peers, the superior courts, the legal profession, the academic community, and the public at large. Nowadays, decisions of the superior courts – including the superior courts of Swaziland – are available on the worldwide web within hours of their publication from the bench. Courts in many parts of the world have invited television cameras into their courtrooms. The world can thus watch the process of the administration of justice live. For all their training and experience, however, judges are not mechanical robots. That is why they conduct themselves in a restrained and self-effacing manner which would inspire public confidence. That is why Kriegler J. expressed himself thus in paragraphs [19] to [20] of **Mamabolo**:

“[19] This manner of conducting the business of the courts is intended to enhance public confidence. In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute.

*[20] That is where the crime of scandalizing the court fits into the overall scheme of the administration of justice. It is one of the devices which protect the authority of the courts. It is therefore hardly surprising that it is recognized as a crime in many common law jurisdictions. In a recent judgment of the Zimbabwean Supreme Court, reported as *In re: Chinamasa*, Gubbay CJ conducts a review and analysis of comparative sources and provides a lucid and exhaustive exposition of the law on this topic – so much so that anything more than adoption would be supererogatory. Suffice it to say that in present day practice scandalizing the court is to be found in the jurisdictions of England and Wales, Canada, India, Australia, New Zealand, Mauritius, Hong Kong and of Zimbabwe, Namibia and our own country.*

[29] The South African case of In **Re Philani** (1877) put the matter thus:

“[22]... any publications or words which tend, or are calculated, to bring the administration of justice into contempt, amount to a contempt of Court. Now, nothing can have a greater tendency to bring the administration of justice into contempt than to say, or suggest, in a public newspaper, that the Judge of the High Court of this territory, instead of being guided by principle and his conscience, has been guilty of personal favouritism, and allowed himself to be influenced by personal and corrupt motives, in judicially deciding a matter in open Court.”

[30] The cases make it clear however, that the crime of scandalizing the court was not created for the purpose of providing a salve for the wounded feelings of the judicial officer concerned or balm to soothe his bruised ego. Rather it has been designed by our judicial forebears to serve a much nobler purpose. That purpose is the preservation of the moral authority of the judicial process itself. ‘The real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone.’ In **Argus Printing and Publishing Co. Ltd and Others v Esselen’s Estate** [1993] ZASCA 205; 1994 (2) JA 1 Corbett CJ explained that:

“[24] The purpose which the law seeks to achieve by making contempt a criminal offence is to protect ‘the fount of justice’ by preventing unlawful attacks upon individual judicial officers or the administration of justice in general which are calculated to undermine public confidence in the courts. The criminal remedy of contempt of court is not intended for the benefit of the judicial officer concerned or to enable him to vindicate his reputation or to assuage the wounded feelings...”

[31] In **Re Chinamasa** Gubbay CJ held that:

“[24] The recognition given to this form of contempt is not to protect the tender and hurt feelings of the judge or to grant him any additional protection against defamation other than that available to any person by way of a civil action for damages. Rather it is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed.”

[32] The consensus of the cases cited so far and others which I have read hurriedly - this being but one of sixteen appeals which I heard within a month, and seven where I have prepared the judgment of the court without the help of a Judge’s clerk, judicial assistant, or legally qualified staff - is that freedom of the press and freedom of expression are freedoms

guaranteed by nearly every written constitution to which reference has been made. The cases underscore the right of full, ample, vigorous and candid criticisms of the judgments of the courts, and of the opinions expressed by judges. Such is the entitlement of journalists in a free and democratic Swaziland.

[33] The cases also make it clear that there is a tension between liberty and licence. There is no clear bright line between these two concepts. Sometimes a line is not easy to draw. That is one of the difficulties now confronting this Court. The cases also provide assistance to trial courts in deciding upon which side of the divide a particular publication falls. Once again the judgment of Kriegler J is of inestimable assistance. At paragraphs [32] and [33] of **Mamabolo** he is quite clear in his mind that:

“[32] The freedom to debate the conduct of public affairs by the judiciary does not mean that attacks, however scurrilous, can with impunity be made on the judiciary as an institution or on individual judicial officers. A clear line cannot be drawn between acceptable criticism of the judiciary as an institution, and of its individual members, on the one side and on the other side statements that are downright harmful to the public interest by undermining the

legitimacy of the judicial process as such. But the ultimate objective remains: courts must be able to attend to the proper administration of justice and – in South Africa possibly more importantly – they must be seen and accepted by the public to be doing so. Without the confidence of the people, courts cannot perform their adjudicative role, nor fulfill their therapeutic and prophylactic purpose.

*[33] Therefore statements of and concerning judicial officers in the performance of their judicial duties have, or can have, a much wider impact than merely hurting their feelings or impugning their reputations. An important distinction has in the past been drawn between reflecting on the integrity of courts, as opposed to mere reflections on their competence or the correctness of their decisions. **Because of the grave implications of a loss of public confidence in the integrity of its judges, public comment calculated to bring that about has always been regarded with considerable disfavor. No one expects the courts to be infallible. They are after all human institutions. But what is expected is honesty. Therefore the crime of scandalizing is particularly concerned with the publication of comments reflecting adversely on the integrity of the judicial process or its officers.**"* Emphasis added.

[34] Counsel for the appellants posit that the South African courts have accepted Hunt's definition of scandalizing the court as:

“Unlawfully and intentionally violating the dignity, repute or authority of a judicial body.”

[35] Learned Counsel for the respondent contended that:

“5.11 We accept that “Freedom of expression lies at the heart of democracy.” But we also hold that unless controlled, freedom of expression can destroy the authority and independence of the courts and in turn the rule of law. In the result the authority and independence of the courts must be held higher than freedom of expression. That is what our Constitution ordains. The protection given to the authority and independence of the courts cannot be managed by any disputation short of changing the Constitution. Consequently the ‘rationalizing arguments based on the South African and other legal authorities cannot be helpful unless it can also be shown that those authorities flow from the common law or from analogues (sic) constitutional sources. At this point in time the South African and Swazi legal sources, with respect to freedom of expression and its possible limitation are different. This calls for caution in using constitutional precedents from the Older Commonwealth in which freedom of speech is ranked higher than in the New Commonwealth.”

[36] Counsel for the appellant accepted that the major Commonwealth jurisdictions are *ad idem* upon the broad general principles. Visits to

England, Australia, Canada, Malaysia, Hong Kong, Sri Lanka, and Zimbabwe, disclosed the existence of the offence of contempt of court in all of those jurisdictions. Counsel was at pains to point out that “in a number of countries, although the offence of scandalizing the court exists in theory, it is obsolete in practice. Obsolescence is a relative term. It is true that no successful prosecution has been brought in England and Wales since 1931. That fact foreshadowed the abolition of the offence in those jurisdictions by section 33 of the Crime and Courts Act 2013. The question before us, however, is whether the offence exists in Swaziland at his present time. Quite correctly, counsel for the appellant refrained from submitting that it did not.

[37] The very latest pronouncements on the offence of scandalizing the Court or, as the offence is quaintly described in Scotland, murmuring judges, were made by the judges of the her Majesty’s Privy Council as recently as the 16th April 2014 in **DHOOHARIKA V THE DIRECTOR OF PUBLIC PROSECUTIONS** [2014] UKPC 11. Their Lordships have appended an Annex A to their judgment which contains a list of recent cases on scandalizing the court. That list shows that the offence exists in 13 countries in Africa, Asia, Australia, New Zealand, Central America, North America

and Oceania. Australia, Canada and New Zealand are among the old Dominions which formed part of the British Empire before its dissolution following the end of the World War II. India appears on the list. Only a few days ago there was a peaceful transition of power following general elections, in the world's largest democracy.

[38] The existence of the offence of scandalizing the court in Swaziland is not therefore, some local aberration peculiar to this Kingdom, but is known to the law of the 13 countries listed in the Annex where it is still actively prosecuted. I have every confidence that their Lordships of the Privy Council will permit me to attach their Annex A to this judgment, provided that I acknowledge its source, which I hereby gratefully do.

[39] The cases in every jurisdiction make it abundantly clear that in determining whether an article in any given publication scandalizes the court, the piece must be read as a whole and its overall tone and tenor examined before a determination can properly be made as to whether it scandalizes the court or not. It will not do simply to pluck words or phrases out of their context as a basis for establishing a case of scandalizing. M.C.B. Maphalala JA articulated this principle at paragraph [47] of his judgment in these terms.

*“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. In the case of **Director of Public Prosecutions v. The Belize times Press Ltd and Another** (1988) LRC (Const) 579, the Court dealt with this issue. The respondent published an article entitled “predicament of change”, allegedly attacking various organs of the State including the Supreme Court. The Director of Public Prosecutions applied ex parte for an order of committal against the respondent and its editor for contempt of the Supreme Court and its judges in respect of the article. The respondents were found guilty of contempt. His Lordship Contran CJ observed at pp 583-4:*

“In order to determine whether or not leave ought to be granted not only the passage appearing under the subhead ‘the courts’, but every passage or sentence touching the Supreme Court that appeared in the article were taken into account ...It is not possible to come to an intelligent decision on isolated passages or words and leave the rest. The words have to be read in context of the totality of the article in order to find out what the writer intended to convey in his treatment of the subject of the Supreme Court, its judges and the administration of Justice.”

COMPARATIVE STUDIES

[40] Counsel for the appellants GJ Marcus SC must be highly commended for the commendable degree of research which went into his 78 page Heads of Argument. In dealing with a question such as Freedom of the Press which affects nearly every country on earth, it is inevitable that authorities from other common law jurisdictions, and even from civil law systems, should be considered because of the universality of interest in all matters concerning fundamental rights and freedoms. Unsurprisingly, Mr. Marcus cited cases from the United States of America which is rightly viewed as the bastion of freedom in countries of the free world.

[41] Professor Ronald J. Krotoszynski, Jr., is Professor of Law and the Alumni Faculty Fellow at Washington and Lee University School of Law in Lexington, Virginia. In his scholarly work entitled ‘The First Amendment in Cross Cultural Perspective’, he conducted ‘A Comparative Legal Analysis of the Freedom of Speech’ by studying Freedom of Speech in the United States, Canada, Germany, Japan and Freedom of Expression in the United Kingdom. At page 10 of his book he writes:

‘The radical differences reflected in the free speech jurisprudence of the United States, Canada, Germany, Japan, and the United Kingdom offer a strong cautionary note against unlimited universalist claims for any particular understanding of freedom of expression.’

That is why, in enquiring whether free speech rights have been infringed in a given jurisdiction, the jurisprudence of other jurisdictions must be considered with the Professor’s cautionary note in mind.

[42] This is how he discussed the on-going debate concerning the ‘Central Meaning of the First Amendment at pages 1 – 2 of his book:

“Since Justices Oliver Wendell Holmes and Louis D. Brandeis began forcefully articulating a strong theory of the Free Speech Clause, judges, government officials, and legal scholars have struggled to reach a viable consensus regarding the “central meaning” of the Free Speech Clause of the First Amendment to the United States Constitution. The text of the First Amendment contains a mere forty-five words, only a few of which directly address the freedom of speech:

‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances'.

Although the Clause itself is sparingly worded, some of the nation's most talented legal thinkers have, over the years expended tremendous intellectual capital in efforts to establish a persuasive theory that justifies protecting speech over other constitutional interests, such as equality or community, and that defines the metes and bounds of the free speech guarantee in a convincing fashion.

None of these efforts has succeeded in ending the ongoing debate, which rages on with a ferocity that seems only to build over time. Recent controversies involving laws against hostile workplaces, hate crimes, campus speech codes, and provocative Internet sites have only made the consideration of these issues more pressing. Should the state be permitted to criminalize or impose civil liability, for "mere" speech, if the speech sufficiently degrades or alienates particular persons or groups within the community? Conversely, if one supposes that a meaningful commitment to equality mandates bright lines demarcating the limits of free speech, how far should one be willing to go in deciding what kinds of speech fall outside the bright lines?

[43] Professor Krotoszynski correctly observed at page 10 that:

“The radical differences reflected in the free speech jurisprudence of the United States, Canada, Germany, Japan, and the United Kingdom offer a strong cautionary note against unlimited universalist claims for any particular understanding of freedom of expression.”

[44]The learned Professor describes the Japanese Constitution in this way at page 9:

“Chapter 5 analyzes the free speech jurisprudence of the Supreme Court of Japan. The Japanese Constitution, like the United States Constitution, contains a facially unlimited free speech guarantee (unlike the Constitutions of either Canada or Germany). Accordingly, it should not be particularly surprising that one finds that the scope of free speech in Japan is significantly broader than in either Canada or Germany. Nevertheless, the Japanese conception of free speech is less broad than in the United States; it relates to political speech and does not extend to commercial speech or erotica. Chapter 5 suggests that even a nation strongly committed to the freedom of speech need not protect all forms of speech (a proposition that, at least arguably, should be self-evident, even to a student of exclusively domestic, U.S. free speech law, but evidently is not so).”

[45] Under the rubric 'The Marketplace of Ideas' the author cum professor illustrates that in the United States there is no universal consensus as yet concerning the true boundaries of the Freedom of Speech paradigm or

concerning the kinds of speech that should be protected within those frontiers. This is how he put those ideas at pages 14 – 15:

“The principal objection to this conception of the Free Speech Clause is that in practice it proves to be both over inclusive because it mandates the protection of “low value” speech, including both racist and sexually explicit speech. The marketplace metaphor is also under inclusive because it permits the marginalization of speakers who lack the financial or political wherewithal to disseminate their views; market forces will drown out voices that deserve to be heard.

These objections notwithstanding, the marketplace metaphor has proven durable, both at the Supreme Court and within the legal academy. The theory has an intrinsic appeal because it is completely view-point neutral: The marketplace metaphor denies government the power to pick and choose which speakers shall be heard and which shall be silenced. In a pluralistic nation populated by persons hailing from all points of the compass, government neutrality regarding the modalities and content of free expression arguably serves the citizenry very well. The marketplace of ideas metaphor generally requires government to avoid making subjective value judgments about either the specific content of speech or the means of communication. Alternative theories of the First Amendment require government officials (whether legislators, executive branch personnel, or judges) to make inherently subjective determinations about the nature of

particular speech activity: For instance, is the speech political, and does it properly relate to the project of democratic self-governance?

Of course definitional difficulties haunt the marketplace metaphor too. Is flag burning speech or conduct? Does nude dancing come within the protection of the First Amendment? Should commercial speech enjoy the same First Amendment protection as noncommercial speech? The resolution of these questions involves the exercise of judgment, which necessarily includes an element of subjectivity. Even if one makes this concession, however, the marketplace metaphor offers a powerful and internally coherent account of the First Amendment and its role in facilitating the free exchange of ideas and information.”

[46] One of the principal characteristics of the Free Speech in Germany has been described by Krotoszynski as Militant Democracy and the Primacy of Dignity as a Preferred Constitutional value. Unsurprisingly the book illustrates marked differences concerning the nature and scope of free speech rights in the United States of America and Germany. By way of illustration he points out at page 98 that:

“A person or group advocating the violent overthrow of the government does not enjoy any right to advocate such action without facing both criminal and civil penalties. This represents a marked

*break with the tradition in the United States, as represented by such cases as **Brandenburg v. Ohio** and **NAACP v. Claiborne Hardware Company**.*

Thus without even getting beyond the text of the Basic Law, it becomes very clear that the German conception of free speech is at great variance with the conception that prevails in the United States. Again, this is not necessarily a bad thing. Perhaps the United States fails to value adequately the dangers that speech advocating violent overthrow of the government represents. Perhaps the U.S. Supreme Court also has failed to recognize sufficiently the relative importance of personal honor or protection of youth. It is far too early in the analysis to draw any firm conclusions. That said, a very preliminary consideration of the issue establishes quickly that the German conception of free speech radically departs from baseline notions in the United States."

At page 104 he writes:

"Professor Stanley Fish is undoubtedly correct to posit that speech is never free, but in Germany the realm of "free speech" is significantly narrower than in the contemporary United States. That said, whether this represents a better adjustment of competing constitutional values is a question over which reasonable minds may differ."

[47]In a series of landmark opinions, the German Constitutional Court has firmly embraced dignity as a preferred constitutional value over the freedom of speech. Strangely enough, dignity claims even survive the grave since a dead actor's dignity has greater constitutional importance than a living author's interest in publishing his book. At page 129 the text reads:

'It is certainly true that "free speech" is not truly free anywhere. Every nation maintains some limits on the scope of lawful expression. For example, an attempt to "joke" with an airport security guard will lead to criminal punishment very quickly in the United States. But the scope of permissible speech in Germany seems significantly more narrow than in the contemporary United States. The government has arrogated to itself the power to ban bad ideas and organizations that attempt to disseminate bad ideas. The system reflects scant trust in the good sense of the German people to separate wheat from chaff in the marketplace of ideas'.

THE CONSTITUTION OF THE USA

[48]The American Constitution is the product of the various compromises which had to be made by that assemblage of geniuses who framed it. Though it is the oldest written constitution in the form in which constitutions are now drafted, it is not original in a manner of speaking since the founding fathers drew heavily from existing sources such as magna carta, and from the writings upon matters of good governance and fundamental freedoms then existing in Europe and elsewhere.

[49] Though the founding Fathers were all steeped in contemporary learning, they were also original thinkers. They were determined that the new Republic should enjoy the amplitude of rights and freedoms which the British had sought to deny them. The terms of this constitution are broad and expansive: more so, than in any other democratic constitution anywhere.

[50] It is for that reason that American decisions – though of inestimable value in many ways – must be read against the background of the letter of the American Constitution itself, and of the social, cultural and political environment in which those constitutional provisions have been interpreted and applied by succeeding generations of American judges right up to the level of the United States Supreme Court.

[51] Most persons, seeing a copy of the United States Constitution for the first time are struck by the fact that it is so small in physical size. It is truly a miracle of condensation of the monumental freedoms which it embodies. The almost limitless right to freedom of ‘speech, and the press’ is expressed in exactly 14 words:

“Congress shall make no law... abridging the freedom of speech, or of the press.”

[52]] Those powerful fourteen words are not, on their face subject to any limitation or reservation of any kind. Yet, even in the U.S.A, there have been limits placed by the courts upon the untrammelled exercise of the right to free speech, and upon the freedom of the press. True, these restraints have been limited in nature and extent. In considering the submissions of counsel that the U.S. first amendment freedoms should be used as a model for the exercise of those freedoms in Swaziland, due regard must be had to the vastly different wording of the provisions in the U.S. Constitution as distinct from those in the Swaziland Constitution.

[53]Indeed the only other country which approaches the U.S. in the scope and scale of her first amendment freedoms is her neighbor to the North Canada, where the relevant constitutional and statutory provisions are vastly different from those in Swaziland.

THE UNITED KINGDOM

[54]Although the constitution of the United Kingdom is said to be unwritten, there exists a formidable mass of legislation dealing with matters which fall under the ambit of most written constitutions. One of these recent pieces of legislation is the Human Rights Act of 1998. This measure, reflecting the United Kingdom's gradual and

perhaps reluctant absorption into the European legal and cultural community, codifies certain provisions of the European Charter on Human Rights and Fundamental Freedoms. Professor Krotoszynski observes at pages 184 – 185 that:

‘The Human Rights Act thus provides an express and textual guarantee of the freedom of speech in Great Britain by making Article 10 of the European convention domestically enforceable. In relevant part, Article 10 provides that “[e]very one has the right to freedom of expression,” including “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

Significantly, Article 10 also directly limits the scope of the right to freedom of expression by mandating balancing exercises that weigh other social values against the free speech right:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights or others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁷

Obviously, a sufficient censorial government could deploy these limitations to justify very broad restrictions on the exercise of the right to free speech.’ Emphasis added.

In the United Kingdom, there are also pieces of legislation e.g. regarding ‘hate speech’ which might not pass constitutional muster in the U.S.A.

SUMMARY PROCEDURE

[55] One can hardly do better than to commence a discussion of the captioned subject than by referring to Lord Denning’s famous passage from one of his most well known and quoted books: *The Due Process of Law*. Lord Denning described the procedure applicable to contempt of court cases this way.

“It has its peculiar features. It is a criminal offence but is not tried on indictment with a jury. It is tried summarily by a judge alone, who may be the very judge who has been injured by the contempt. The features have led to some concern...”

[56] Maphalala JA addressed the question of summary procedure at paragraphs [42], [43], and [46] in the *court a quo* where he wrote:

“[42] It has been recognized in various jurisdictions that contempt of court should be dealt with summarily and speedily. This has been the case in England, New Zealand, Australia, South Africa and even this country. The Director of Public Prosecutions or the Attorney General after being delegated by the Director obtains a rule nisi calling upon the respondent to show cause why he should not be committed for contempt. This was the situation in **AG v. Newspaper Publishing PLS** (1987) ALL ER 276; **AG v. Leveler Magazine Ltd** (1979) 1 ALL ER 745; **AG v. Times Newspaper Ltd** (1973) 3 ALL ER 54; **Solicitor General v Radio New Zealand Ltd** (1994) 2 LRC 116; **Reg v. Gray** (1900) 3 ALL ER Rep 59 (16 TLR 305), *In re; Dornner* 1891 (4) SAR 64; *In re Neething* 1874 Buch 133; **Rex v. Editor of the New Stateman**, *Ex Parte* director.

[43] In the case of **Attorney General v Crocket** (*supra*) the Attorney General obtained a rule nisi calling upon the respondents to show cause why he should not be committed for contempt. The respondent had sworn to an affidavit which he sent to the Registrar in which he accused a magistrate in violent language of bias and malice. *De Villiers JP* in his judgment accepted that the offence of contempt may always be dealt with summarily by a superior court but observed at pp 911-912:

“If the contempt is not committed in *facie curiae*, the only course open to the magistrate is to lay an information before the Attorney General, who will then determine whether or not it is to go before a judge or jury; and later, it has been repeatedly

pointed out by judges in England and in South Africa that from its very nature a contempt of court should be dealt with speedily and summarily, if the contempt is notorious ... but, if the facts are doubtful and complicated, the trial should take its ordinary course.”

[46] *Similarly, in Malaysia the courts have dealt summarily with cases of contempt of court, His Lordship Vincent Ng JC observed the following in **Lee Gee Lam v. Timbalan Monteri Dalam Negeri** (1994) 1 LRC 203 at pp 210-211:*

“It may be seen from these passages that contempt is of two kinds: VIZ (a) that which interferes with the due course of justice and pollutes the stream of justice in so far as it concerns parties to a cause, as for instance, when comments are made on a pending case, and (b) that which is calculated to bring a judge into contempt or lower his authority or to interfere with the lawful process of the court. There can be no doubt therefore that any act which is calculated to undermine the authority of the court and to disturb the confidence of the citizen in the unquestioned effectiveness of its orders ... would be contempt.”

[57] In the light of the several authorities cited from a variety of kindred common law jurisdictions where the adoption of the summary procedure has been

upheld by the appellate courts, this ground of appeal is singularly lacking in merit and must therefore be rejected.

THE ROLE OF THE ATTORNEY GENERAL

[58] The contention that the Attorney General lacked jurisdiction to have carriage of the prosecution in the instant case is best addressed by reference to the Constitution itself. It is common cause that the Director of Public Prosecutions is empowered by Section 162 (5) to exercise the powers under subsection (4) in person or by subordinate officers acting in accordance with the general or special instructions of the Director.

[59] Subsection (6) provides that:

'In the exercise of the powers conferred under this Chapter, the Director shall-

(a) have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process; and

(b) be independent and not subject to the direction or control of any other person or authority.'

Significantly, and particularly in a small Kingdom such as Swaziland, with limited human, financial and material resources subsection (7) provides that:

‘Without derogating from the provisions of subsection (6) the Director shall in the exercise of the powers under this Chapter, consult the Attorney-General in relation to matters where motional security may be at stake.’

The above subsection, be it observed, does not preclude the Director from consulting the Attorney General in relation to matters where national security may not be at stake.

[60] It has been argued by counsel for the appellant that, since the Attorney General is not one of the subordinate officers of the Director, the Director is not empowered to delegate any of his prosecutorial functions to the Attorney general. This Court can take judicial notice of the fact that in almost every session of this Court, the Director of Public Prosecutions is represented by ‘Outside’ Senior Counsel or ‘Outside’ Counsel to deal with particular cases. This may be necessitated by the complexity of a particular case and/or by the limitation of the human and material resources available to the Director at the particular time. No objection, as far as I am aware, has ever been taken to this necessary practice.

[61]What is more, section 77 (5) (c) of the Constitution requires Attorney General to:

'represent the Government in courts or in any legal proceedings to which the Government is a party;'

Distilled to their essence, the arguments of the appellant are that:

- i. The offices of the Attorney General and the Director of Public Prosecutions are so hermetically sealed that there can be no interaction between them save that which is specifically provided for in the Constitution.
- ii. The functions of the Attorney General to represent the Government in courts to which Government is a party do not include the representation of the prosecution in contempt of court of proceedings.

[62] This Court rejects those arguments in their entirety. No justification has been shown for limiting the capacity of the Attorney General in that way. This ground of appeal accordingly fails.

THE OFFENCES

[63] A critical reading of the article ‘Will the judiciary come to the party?’ discloses that only the following passages could possibly give offense to the most sensitive and fastidious eyes. They are:

- *“Essentially what the eminent Justices of the Supreme Court were telling us in the 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.*
- *More importantly, whereas it is a well known facet of the separation of powers that it is the judiciary which is the arbiter of a dispute between the state and its people, its inclination being to protect those without power, in the case of Swaziland the judges essentially said they would not participate in so (sic) an important an exercise.*
- *To dismiss 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.*
- *Since time immemorial to question the decisions of judges in this country has been seen as disrespectful, at best, and crime at worst. But, today we live in a constitutional state, regardless of what the majority judges of the Supreme Court might choose to say.”*

[64] As can readily be observed, when the whole article is read, the first paragraph follows the second: but there is intervening material between the second and third and between the third and fourth paragraphs which have been isolated for microscopic scrutiny.

[65] The article begins in mild and sedate tones quoting the words of Albie Sachs J who played such a critical role in both the physical as well as the institutional construction of the Constitutional Court in South Africa. That is a Court full of symbolism featuring both physical as well as functional transparency. Its construction upon the site of the infamous No. 4 prison in Johannesburg, employing some of the materials which confined both Gandhi and Mandela, is a monument to the triumph of the human spirit over adversity and oppression, and a beacon of hope for justice under the rule of law in the recently emancipated Republic.

[66] The article cites Judge Bernard Ngoepe, discusses the recent appointment of four new judges, identifies the need for more judges, and the role which all judges would be expected to play in the operation of the new constitution of 2005. Citing a passage from a judgment of this Court, the writer critiqued it in the first two paragraphs cited above in language which is particularly

mild. The criticism of the judges, such as it was, is bland and eminently permissible within the context of Swaziland's constitutional freedom of the press guarantees.

[67] The third paragraph employs the epithets 'criminal', 'rubbished' and 'treasonous'. However, judging from the overall thrust of the article, the expressions criminal and treasonous, hyperbolic perhaps, are merely reflective of the writer's view that the judgment did not sufficiently uphold the fundamental rights enshrined in the constitution, and was unduly critical of academics. Such expressions of opinion, or of disagreement with the views set out in a judgment of this court, do not in my respectful view, satisfy the requirements of scandalizing the court in terms of the various definitions liberally set out in this judgment.

SPEAKING MY MIND

[68] Whereas the article on *The Nation* November 2009 reflected a critical balance and modulation, an even temper and, with the exception of the expressions discussed in paragraph [67], an acceptable exercise of the freedom of the press guaranteed by the Constitution, its counterpart in *The Nation* February 2010 adopted a note of stridency and belligerence. It

conducted a full scale attack both *ad hominem* upon the person, and upon the office of the Acting Honourable Chief Justice. It also mounted a scurrilous and unwarranted attack upon the judiciary as a whole, and upon the administration of justice within this Kingdom.

[69] In the first line of the piece, the object of the writer's vitriol is un-mistakenly identified. That object was "Acting Chief Justice Michael Ramodibedi." The Acting Chief Justice was then said to have gone 'into an unprecedented show of beating his breast, Tarzan-style, calling himself a "Makhulu Baass.'" In the same breath, the writer gratuitously likens the object of his spleen to the fictional character Tarzan who was created by the American writer Edgar Rice Burroughs in an era when Africa was still being described as the dark continent, and Tarzan was depicted as the Lord of the Jungle who, with his wife Jane, the chimpanzee Cheetah, and the elephant Tantor lorded it over the 'primitive' 'natives' in their own continent. It is no wonder therefore, that the wind of change to which reference has been made earlier, also blew away Tarzan himself, but not necessarily all of his representations of supremacy over 'savage' African 'natives', into obscurity and oblivion.

[70] The Expression “Makhulu Baas” has been described in the Founding Affidavit of the Attorney General as being ‘but common currency in Southern Africa.’ The word ‘Baas’ is defined in the Concise Oxford Dictionary as ‘a supervisor or employer, especially a white man in charge of coloureds or blacks. The expression ‘Makhulu’ has not been defined in that Dictionary. As the Attorney General submits, the expression ‘Makhulu Baas’ as used in Southern Africa may be compared to the following expressions defined similarly in the Concise Oxford and in current and common usage in other parts of the world. These are: Boss, Boss Man, Big Boss, Big Chief, Big Kahuna, Big Wig, Chief, Gaffer, Gang Master, Governor, Honcho, King Pin, Skipper, and Top Dog.

[71] Notwithstanding the existence and usage of epithets broadly similar to Makhulu Baas in several parts of the world, this writer accuses the learned Acting Chief Justice of employing:

‘a word he dug up from the cesspit of apartheid South Africa’

He then admonishes the Acting Chief Justice thus:

'if Ramodibedi suffered from a hang over of apartheid he should not take it out on us.'

[72] Before getting to that point however, the writer had earlier described his subject as 'behaving like a high school punk.' A punk is defined in the Concise Oxford Dictionary as 'a worthless person: a thug or criminal; (in prison slang) a passive male homosexual; bad, worthless.' The meaning of the word criminal is too well known to require any resort to the dictionary. One could hardly heap any greater opprobrium upon a person than by referring to that person as a criminal, or accusing him or her of behaving like a criminal. Bad enough as that accusation was in itself, worse was to follow as the passage reproduced hereunder manifestly illustrated.

[73] It has been argued on behalf of the appellant Bheki Makhubu that he did not intend to scandalize the court. But the offence of contempt of court was evidently uppermost in mind when he daringly and defiantly wrote early in the piece:

'Before I get slapped with a charge of contempt of court, let me have my say.'

[74] That say was to declare that:

'Justice Ramodibedi, whatever he might think of himself, sunk to such a terrible low that day. He stooped to the floor. What extraordinary arrogance!'

Continuing in his self-righteous posture the writer continues contemptuously:

'Those of us who take a keen interest in general issues know that a person of Ramodibedi's standing should behave with decorum. His office is one of men and women whose integrity is beyond reproach. Judges, by tradition, do not behave like s street punks'

Here the writer disparages both the Acting Chief Justice, the office of the Chief Justice and brings the administration of justice into further disrepute by his clear inference that the Acting Chief Justice has behaved like street punks. Charging him with behaving like a high school punk is bad enough. But denigrating his behaviour to that of street punks is incalculably worse. The word street, as used in the phrase 'like street punks', adds to the opprobrium heaped upon the Acting Chief Justice by the use of the word 'punks'. The extra condemnation of the word 'street' is an aggravating factor similar to its use in such expressions as 'street children' street urchin', 'street walker' and 'on the streets.'

[75] But the writer did not stop there. He went on to heap additional calumnies upon the Acting Chief Justice, and upon the system and administration of justice as whole within this Kingdom with the following excerpts from the piece.

- *'Not only did the Acting chief Justice lower his own stature, but he brought the whole house down.'*
- *I do not know Justice Ramodibedi from a bar of soap.*
- *Decorum Your Worship, decorum.*
- *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?*
- *The judicial system in this company is in shambles.*
- *This is why you have such a high incidence of murder yet no-body ever seems to stand trial.*

- *This business of throwing his authority around just does not add any value to him or anyone else.*
- *He – The Acting Chief Justice –believes he is bigger than the rest of us.*
- *Instead of bullying his colleagues, Justice Ramodibedi would best be advised to sit down with them for a quick word and ask how Swaziland functions.*
- *He – The Acting Chief Justice – will also learn that once upon a time there was also another man, just as arrogant.*
- *Justice Ramodibebi 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 every one you are the boss. It is downright rude.*
- *He will then realize that Swazis are not fools.*
- *Again I say, Justice Ramodibedi must not misinterpret the silence to his remarks or the think that in getting his way he has beaten the judges of the High Court into line.*
- *Its important, Your worship! It is very important!*

Clearly, not all of the above excerpts from the article, taken in isolation, will by itself amount to scandalizing of the Court. But they all, when read together with the rest of the article, contribute significantly to the contemptuous tenor, tone, temper and thrust of the piece, thus exacerbating and compounding the contemptuous character of the article read as a whole.

[76] In **R v Gray** [1900] 2 QB 36 a journalist was found to be in contempt by scandalizing the court for describing Darling J as “an impudent little man in horsehair, a microcosm of conceit and empty – headedness” and adding that “no newspaper can exist except upon its merits, a condition from which the bench, happily for Mr. Darling, is except.” That language, for which the journalist was rightly convicted in Gray’s case was mild, polite, and even genteel, compared with the vituperative cadences of the article in this case.

The respondent in his Heads of Argument submitted that:

“5.5 The February 2010 (Count 2) article was certainly in even worse light than the November 2009 (Count 1) article. Worse because it was direct, personal and virulent in its attack upon the then Acting Chief Justice, whose identity it did not even bother to hide. Whilst it may be true that the Acting Chief Justice may have called himself ‘Makhulu Baas’, the article went way out to distort and

denigrate the usual meaning of the expression and thereby trashed the person behind that name, that is, that Acting Chief Justice, the head of the Judiciary. The vitriol that the expression generated at the instance of the Nation editor is just unbelievable.”

This Court is in respectful agreement with those sentiments.

[77] One final observation. Having plunged his contemptuous knife into the heart of the judiciary to its inglorious hilt, the author, as if infused with fiendish glee, could not resist the almost sadistic urge to give it one final twist by twice addressing the acting Chief Justice, whose office lies at the pinnacle of the judiciary of this Kingdom, by the title of ‘Your Worship’ which is the fitting form of address for judicial officers who are members of what Lord Diplock described as the Lower Judiciary. The author disdained even to afford the Honourable Acting Chief Justice the courtesy of his proper form of address. The writer’s guilt of the offence of scandalizing the court has, on the evidence dripping from his own scurrilous pen, been overwhelmingly established. His conviction by the trial judge cannot therefore be faulted.

SENTENCE

[78] According to the record, paragraph [146] of the judgment of the court *a quo* analyses the Article in the second count. The final sentence reads:

“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.”

[14] 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.*
- (a) 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.*

(b) Failing payment of the fine of E200,000.00 (two hundred thousand Emalangi) 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.

(c) 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.”

[79] There is no separate judgment on sentence and what has been described by counsel for the appellants in his written Heads of Argument as a GROSS IRREGULARITY IN THE PROCEEDINGS apparently did take place. For there is a gaping lacuna between the findings of guilt and the recitation of the orders reproduced above. The complaint of the appellants is that:

“6.1 Having sanctioned the summary procedure, the Court below imposed excessively severe sentences on the appellants –

6.1.1 Without advising them that they had been found guilty of contempt;

6.1.2 *Without affording them any opportunity whatsoever to adduce evidence in mitigation;*

6.1.3 *Without hearing any argument whatsoever on sentence.*

6.2 *This Court has recognized that a misdirection arises from the failure of a trial court to call for evidence in mitigation either under oath or affirmation or unsworn from the dock before passing sentence.*

Manqoba Ndzimandze and Another v The King
Case No. M56/2012 (2013) SZSC 67 (27 March 2013) at para 8.

6.3 *It is submitted that to condemn a man unheard is an irregularity so serious that it does not simply vitiate the sentence imposed, but the proceedings as a whole.*

6.9 *Given the seriousness of this deviation from the most basic principles of fairness and justice, it is submitted that the proceedings are vitiated entirely. This was not a situation in which the learned Judge separated conviction and sentence. He dealt with them as one and thus it is not feasible to separate the one from the other.*

The irregularity strikes at the very heart of the fairness of the proceedings as a whole.

6.10 If this submission is rejected, at a minimum the sentence has to be set aside and the matter remitted to the High Court for sentence.”

[80] At the end of the hearing of the oral arguments in open court, the presiding member of this Court invited counsel for the parties to make written submissions on the matter of sentence for our consideration in the event that the convictions were upheld. Counsel for the respondent submitted in writing that:

- “3. In our humble submission the sentence imposed by the Learned trial judge Hon. M.C.B. Maphalala was in all the circumstances harsh. We assume that the accused were first offenders. We do not underestimate the seriousness or gravity of the attacks on the Supreme Court Judges and the then Acting Chief Justice. But we believe that on balance in the exercise of the freedom of expression and the need to protect the authority and independence of the court from scandalisation.*
- 4. Accordingly we respectfully submit that in all the circumstances – even assuming that appellants had mitigated – the sentence*

should not exceed six months imprisonment or E30,000.00 fine, subject to any portion of the sentence being suspended.

Ordinarily it would seem the publishing company shoulders the larger portion of the penalty. The penalty for the 1st Appellant may not be more than E50,000.00 also subject to any portion suspended.”

[81] The author of the impugned article in *The Nation* of February 2010, Mr. Bekhi Makhubu, deposed to a plaintive affidavit on behalf of both appellants. I have no doubt but that the court *a quo* would have arrived at a very different sentence if prosecuting counsel had alerted him to the necessity to hear the appellants in mitigation of sentence. The averments in the affidavit would have provided the necessary material in mitigation for his due consideration. Armed with all the materials which the learned trial judge did not have before him, this Court is now in a position, having heard both sides, to fashion the appropriate sentence. The trial judge also suffered the disadvantage of sailing, so to speak, in unchartered waters. No case from a Swaziland Court was available for his guidance.

[82] In **Dhookarika v The Director of Public Prosecutions** [2014] UKPC 11 at paragraph 60, their Lordships of the Privy Council observed that, as in this case:

‘The transcript shows that the court proceeded to sentence immediately after delivering its judgment on the merits. There were a number of points which could have been advanced on his behalf in support of the conclusion that a custodial sentence was not necessary. The experience of this case shows that the prosecuting authorities should be careful to remind the trial court of the need to hear and consider submissions that go to possible mitigation of the sentence before sentence is pronounced.’

[83] In **Dhookarika**, the DPP argued before the Board that ‘sentence of 3 months imprisonment was appropriate’. In the instant case, as has been already observed, the respondent has submitted that the sentence should not exceed six months imprisonment or a fine of E 30,000 subject to any portion of the sentence being suspended. He submitted that an appropriate penalty for the corporate defendant might not be more than E 50,000, Also subject to any portion being suspended.

[84] There being no rebutting evidence by the respondent, this court has accepted the sworn affidavit evidence presented on behalf of the appellants. Upon its

face, that evidence appears to be eminently plausible and therefore acceptable. The essential elements of the appellants' plea in mitigation of sentence are:

- The corporate appellant is a small company whose sole business is publishing The Nation magazine.
- It employs six people.
- It publishes an issue once a month.
- It prints 3,000 copies.
- Not all copies are sold.
- Its profits are minimal.
- The fines imposed by the trial court could result in the closure of the company, the loss of the employees' jobs, and the resultant loss of revenue to the Government.
- The human appellant is a married family man with family commitments.
- The joint family earnings barely cover the essentials of the family's basic needs.

- The possible term of two years imprisonment for him is excessive.
- He is currently suffering pre-conviction imprisonment on other charges of a similar nature.
- That imprisonment has affected both his personal life and his business adversely.
- The cost of his legal representation has been astronomical and unaffordable.
- He pleads for a noncustodial sentence because of his previous good character.
- The articles were written with a view to contributing to the process of advancement of the Constitution.
- Incarceration will hamper his on-going law studies by correspondence course with the University of South Africa.

Having considered the submissions made by both sides, this Court will vary the orders on sentences of the trial court as indicated below.

CONCLUSION

[85] The two articles in *The Nation* which are the subject matter of these appeals illustrate the ancient principle that all good things must be enjoyed in

moderation. No freedom is totally and absolutely free. All freedoms are subject to two principal qualifications: the rights of others and the public interest. These two articles, written by the same person illustrate the kind of searching and critical comment which represents the legitimate exercise of the freedom of the press on the one hand, and the kind of article which strays into the impermissible terrain of scandalizing the court.

[86] This court has been moved by the pleas of the appellants in mitigation. We are minded of the humane response of Lord Denning in England when a group of well meaning Welch students - wishing to draw attention to the beauties of the Welch language - committed acts amounting to contempt of court. Lord Denning illustrated to them the error of their ways: and made it clear that such behaviour could not be countenanced in democratic England. Nevertheless, he was moved with the compassion which resides within the breast of every judge. The sentences of Lord Denning's court were accordingly lenient.

[87] No one would want to see the little company which publishes *The Nation* go to the wall. All lovers of freedom and democracy would want to see it continue to comment vigorously upon matters of public interest and concern. But it must do so on the right side of the laws relating to scandalizing the

court. The penalties which this court is obliged to award are designed to encourage all members of the press to enjoy their freedoms within the law. Hopefully, it has struck the correct balance: consistent with what is fair and just to the appellants, and to the public in whose name these prosecutions were brought.

[88] Finally, those who aim criticisms at the courts, and at members of the judiciary at all levels, must bear in mind that personal attacks upon individual members of the judiciary, upon the courts, and upon the system of justice within this kingdom, carry with them the potential for eroding the foundations of the very institutions which they care so earnestly about.

[89] It goes without saying that those institutions underpin and undergird the stability of the social, political, economic and cultural welfare of this nation and impact her standing in the eyes of people of goodwill both at home and abroad. It is to be hoped that the freedoms of speech and of the press will continue to flourish in this land, in an atmosphere which does not necessitate the adjudication of the courts.

ORDER

[90] It is the order of this Court that:

- i. The appeals against the convictions and sentences on count 1 be and are hereby allowed.
- ii. The convictions and sentences on count 1 be and are hereby set aside.
- iii. The appeals against the convictions on count 2 be and are hereby dismissed.
- iv. The appeals against sentences on count 2 be and are hereby allowed.
- v. The sentences imposed by the trial court on count 2 be and are hereby set aside.
- vi. The 1st appellant do pay a fine of E 30,000 within three months from today's date, with liberty to apply for an extension of this period, upon its conviction on count 2.
- vii. In the default of payment of the fine imposed in vi. above by the 1st appellant, the Attorney General is hereby authorized to institute proceedings for the recovery of the said fine as if it were a civil debt owing to The Government.
- viii. The 2nd appellant be and is hereby sentenced to a term of three months' imprisonment.
- ix. The term of imprisonment set out in viii. above be and is hereby suspended for a term of three years, commencing today, upon

condition that the appellant be not convicted for an offence of scandalizing the court during that period.

S.A. MOORE
JUSTICE OF APPEAL

I agree

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

DR. S. TWUM
JUSTICE OF APPEAL

FOR THE APPELLANT : MR. FREULD

FOR THE RESPONDENT : MR. M. DLAMINI

ANNEX A

Cases on scandalising the court

In addition to Mauritius (*Ahnee v DPP* (supra); *Badry v DPP of Mauritius* [1983] 2 AC 297), there have been modern examples of the use of the offence in:

- i) Australia e.g. *Gallagher v Durack* [1983] HCA2; (1983) 152 C.L.R. 238 (High Court of Australia)*; *Re Colina Ex P. Torney* [199] HCA 57; (1999) 200 C.L.R. 386 (High Court of Australia); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *R. v Hoser & Kotabi Pty Ltd* [2001] VSC 443 (November 29, 2001); [2003] V.R. 194 (Supreme Court of Appeal of Victoria)*; *Director of Public Prosecutions v Francis and Anor* (No 2) [2006] SASC 26*; *Attorney General for the State of Queensland v Colin Lovatt QC* [2003] QSC 279*; *Fitzgibbon v Barker* (1992) 111 FLR 191*; *McGuirk v University of NSW* [2009] NSWSC 1058; *Xuarez v Vitela* [2012] FamCA 574*; *Lackey v Mae* [2013] FMCAfam 284*;
- ii) Canada e.g. *R. v Kopyto* (1987) 47 DLR (4th) 213 (Court of Appeal of Ontario); *Nicol, Re* (1954) 3 DLR 690*; *R v Murphy* (1969) 4 (3d) DLR 289*;
- iii) Hong Kong e.g. *Wong Yeung Ng v The Secretary for Justice* [1999]2 HKLRD 293 (CA)*; *Secretary for Justice v Choy Bing Wing* [2011] HKEC 63*;
- iv) India e.g. *Narmada Bachao Andolan v Union of India* (1999) AIR sc 3345 (Supreme Court of India);
- v) Malaysia e.g. *Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321 (Court of Appeal of Malaysia)*;
- vi) New Zealand e.g. *Solicitor-General v Radio Avon Ltd* [1978] 1 N.Z.L.R. 225 (Court of Appeal of New Zealand)*; *Solicitor-General v Smith* [2004] 2 N.I.L.R. 540 (High Court of New Zealand)*; *Attorney-General v Blundell* [1942] NZLR 287*; *Attorney General v Butler* [1953] NZLR 944*;
- vii) South Africa e.g. *The state v Mamabolo* (CCT 44100) [2001] Z.A.C.C. 17; (2001) 3 S.A. 409 (CC) (Constitutional Court of South Africa);
- viii) Belize e.g. *Director of Public Prosecutions v. The Belize Times Press Ltd and Another* (1988) LRC (Const) 579*;
- ix) Singapore e.g. *Shadrake v Attorney General* [2011] S.G.C.A. 26 (Court of Appeal of Singapore)*; *Attorney-General v Wain* [199] SLR(R) 85*; *Attorney General v Lingle* [1995] 1 SLR 696*; *PT Makindo* {formerly known as *PT Makindo TBK v Aperchance Co Ltd* [2011] SGCA 19; *Attorney-General v Hertzberg* [2008] SGHC 218*; *Attorney-General v Tan Liang Joo John* [2009] SGHC 41*; *You Xin v Public Prosecutor and Anor* [2007] SLR(R) 16; *Attorney-*

General v Chee Soon Juan [2006] 2 SLR(R) 650*;

x) Fiji e.g. In re Application by the Attorney General of Fiji [2009] FJHC 8 (High court of Fiji)*;

xi) Swaziland e.g. King v Swaziland Independent Publishers [2013] SZHC 88 (High Court of Swaziland)*;

xii) Zimbabwe e.g. Re Chinamasa (2001) 2 SA 902 (25) 2 (Zimbabwe Supreme Court)*.

* indicates that the offence of contempt by scandalising was successfully invoked.