IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 120/14

In the matter between

REX

Versus

THE NATION MAGAZINE	**1ST ACCUSED**
BHEKI MAKHUBU	**2ND ACCUSED**
SWAZILAND INDEPENDENT PUBLISHERS (PTY) LTD	**3RD ACCUSED**
THULANI RUDOLF MASEKO	**4TH ACCUSED**

Neutral citation: *Rex v The Nation Magazine & 3 Others (120/14*) [2014] SZHC 152 (17 July 2014)

Coram: **M. S. SIMELANE J**

Heard: **14-30 April 2014, 05-28 May 2014,**

2-10 June 2014 and 1-2 July 2014

Delivered: **17 July 2014**

Summary: **Criminal law – Contempt of Court – what constitutes – Contempt of Court in relation to pending criminal matter – interference with the administration of justice – Section 24 of the Constitution - irrelevant evidence.**

SIMELANE J

[1] All four (4) Accused persons are charged on two counts of Contempt of Court. The first Accused is a Magazine, a monthly publication published by the third Accused, Swaziland Independent Publishers (Pty) Ltd, a company carrying on the business of amongst others of publishing the first Accused. The second Accused is the editor of the first Accused and a co-director of the third Accused. The fourth Accused is a contributing writer in the Nation Magazine as well as an admitted attorney in Swaziland.

[2] The Accused persons are charged as follows:-

> **"COUNT ONE**
>
> **Accused 1, 2 and 3 are guilty of the crime of CONTEMPT OF COURT**

In that upon or about 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 in furtherance of a common purpose, did write and publish an article entitled "Speaking my mind" about the case which was first dealt with before the Chief Justice His Lordship Justice Ramodibedi of THE KING VERSUS BHANTSHANA VINCENT GWEBU HIGH COURT CASE NO. 25/2014, a criminal matter currently pending before the High Court of Swaziland and therefore sub judice, which article's passages are quoted:-

(a) 'Like Caiaphus, Ntate Justice Ramodibedi seems to have chosen to use his higher station in life to bully those in a weaker position as a means to consolidate his power. Like Caiaphus, Ntate Justice Ramodibedi seems to be in a path to create his legacy by pushing the small man so that he can sleep easy at night well knowing that he has sent a message to all who dare cross him that they will be put in their right place. Let us not forget that Caiaphus was not only the high priest of Judea. He was the chief justice of all Jewish law and had only the immense power to pass judgment on anyone among his people who transgressed the law. Ditto Ntate Justice Ramodibedi in Swaziland.'

(b) 'When this lowly public servant from Bulunga appeared before him on Monday after a warrant for his arrest had been issued, Gwebu was denied the right to legal representation because, Ntate Justice Ramodibedi is reported to have said, the lawyer was not there when the car was impounded at the weekend.'

(c) 'Like Caiaphus, our Chief Justice "massaged" the law to suit his own agenda.'

(d) 'What is incredible about the similarities between Caiaphus and Ntate Justice Ramodibedi is that both men had willing servants to help them break the law.'

and did thereby unlawfully and intentionally violate the dignity, repute or authority of the said Court before which the matter is pending, and thereby commit the crime of CONTEMPT OF COURT.

COUNT TWO

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

In that upon or about the month of March 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 write and publish an article entitled "Where the law has no place" about the case which was first dealt with before the Chief Justice His Lordship Justice Ramodibedi of THE KING VERSUS BHANTSHANA VINCENT GWEBU HIGH COURT CASE NO. 25/2014, a criminal matter currently pending before the High Court of Swaziland and therefore sub judice, which article's passages are quoted:-

(a) 'The arrest of Bhantshana Gwebu early in the year is a demonstration of how corrupt the power system has become in this country.'

(b) 'We should be deeply concerned about such conduct displayed by the head of the judiciary in the country. Such conduct deprives the court of its moral authority; it is a demonstration of moral bankruptcy. A judiciary that is morally bankrupt cannot dispense justice without fear or favour as the oath of the office dictates.'

(c) 'Many will say that what we saw is nothing but a travesty of justice in its highest form.'

(d) 'In more ways than one, this was a repeat of the Justice Thomas Masuku kangaroo process where the Chief Justice was prosecutor, witness and judge in his own cause.'

(e) 'It would appear as some suggest, that Gwebu had to be "dealt with" for sins he committed in the past, confiscating cars belonging to the powerful, including the Chief Justice himself. It is such perceptions that make people lose faith in institutions of power, when it appears that such institutions are used to settle personal scores at the expense of justice and fairness.'

and did thereby unlawfully and intentionally violate the dignity, repute or authority of the said Court before which the matter is pending, and thereby commit the crime of CONTEMPT OF COURT."

[3] All four (4) Accused pleaded not guilty to both counts and also raised the plea of *lis pendis*. The pleas were confirmed by the defence team.

[4] In support of its case, the Crown paraded two (2) witnesses.

[5] It is not in issue that the Accused persons are the authors of the articles complained of.

[6] PW1 was Msebe Malinga, the Acting Registrar of Companies. The crux of his evidence was that Accused 3 is indeed a company duly registered in terms of the company laws of Swaziland. His evidence in this regard

was uncontroverted. He further handed in Court Exhibit A which is the file R7/12064 which contains the registration documents for Swaziland Independent Publishers (Pty) Ltd, (Accused 3).

[7] It transpired from his evidence that he recorded a statement with the police in his office. This was made an issue by the defence arguing that statements are recorded at the police station. Another issue raised by the defence on this witness was that he recorded the statement on the 27th March 2014 when the Accused persons had already been arrested on the 17th March 2014. The defence team argued that the Accused were arrested to be investigated not that the arrests were pursuant to some investigations.

[8] PW2 was Ms Banele Ngcamphalala, the Deputy Supreme Court Registrar who was Acting High Court Registrar at the commission of the offences. She informed Court that she is aware that there is a pending case of Rex Vs Bhantshana Vincent Gwebu High Court Case No. 25/2014. She further told Court that the matter is still awaiting setting of the pre-trial conference date and allocation of a trial date. She proceeded and handed in Court the Indictment for the said case and same was accordingly admitted in evidence and marked Exhibit B.

[9] PW2 further told Court that she read both publications of The Nation, that is the February 2014 issue and the March 2014 issue respectively. She opined that both issues made reference to the Bhantshana case which was still *sub judice* and stated that a matter that is *sub judice* cannot be discussed until it is finalized. PW2 handed in Court the

February 2014 and March 2014 publications of The Nation Magazine which were respectively admitted in evidence and marked Exhibit C and Exhibit D. PW2 was cross-examined extensively by the defence for some days.

[10] The defence put it to PW2 that the writers were merely putting across their opinion. They further argued that the Accused were at liberty to write about the case of Bhantshana because they were writing about things that had already transpired in the Chief Justice's Chambers on Bhantshana's remand. She maintained that the articles, read in context, were contemptuous as they touched on the integrity of the Courts.

[11] The defence suggested to the witness PW2 that there is nothing contemptuous about criticizing the person of the Chief Justice or any Judge of the High Court.

[12] It was further argued by the defence that it was legally wrong for the witness PW 2 to commission the affidavits by police officers which resulted in the issuance of the Warrants of Arrests for the Accused in the instant matter because she is part of the judiciary and that she works closely with the Chief Justice. The witness maintained that she did not see anything unlawful with this.

[13] It was put to PW2 that it was wrong for the Chief Justice not to afford Bhantshana the right to legal representation. PW2 replied that it was

wrong for the Accused persons to write about this because the authors were not there when Bhantshana was remanded.

[14] It was also put to PW2 that it was wrong for the Chief Justice to issue the Warrants of arrests for the Accused persons in the instant matter because the Chief Justice is the subject of the very articles complained of. PW2 insisted that there was nothing wrong and unlawful for the Chief Justice to issue the warrants as the articles touched on the image, dignity and integrity of the Courts, of which the Chief Justice is the head.

[15] The defence also put it to PW2 that the Chief Justice remanded the Accused in custody not withstanding that no prosecutor had applied that the Accused be remanded in custody.

[16] PW2 replied that even if there was no such application by the Crown the Chief Justice was at liberty to issue such warrants considering that contempt of court proceedings are "*sue generis*", hence the Court can adopt any procedure suitable to the Court. The Court determines the procedure to adopt. The defence further argued that the rules of natural justice must still apply even in contempt of Court proceedings and PW2 replied that the rules of natural justice were adhered to.

[17] The defence further argued that the Accused persons were denied their right to legal representation. This was denied by PW2 stating that the Accused were represented by attorneys when they appeared before the Chief Justice.

[18] It was also argued by the defence that the judiciary should have asked for a retraction if what they reported to have happened in the Chief Justice's Chambers when Bhantshana was remanded was not true. PW2 stated that the judiciary had a right to decide on how best to deal with the issue of the publications.

[19] At the close of the Crown's case the Accused moved an application in terms of Sections 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). This application was vigorously opposed by the Crown. It was my considered view, as per my ruling therein, that there was evidence upon which a reasonable person might convict and that the Crown had made a *prima facie* case. The Accused persons were all called to their defence.

[20] The first defence witness was one Bhantshana Vincent Gwebu. He told the Court that he is employed by the Swaziland Government under the Anti-Abuse Unit. He told Court about his arrest and what he alleges transpired in the Chief Justice's Chambers on his first appearance in Court. He told Court that on his appearance before the Chief Justice his rights to legal representation were not explained to him. He also told the Court that the prosecutor did not have a charge sheet when he was remanded. He told the Court that his lawyer was locked out of the Chief Justice's Chambers.

[21] It is important that I observe here that Bhantshana's evidence that his lawyer was locked out of the Chief Justice's Chambers was contradicted

by his lawyer, Mr Machawe Sithole, who testified in this case as DW3. Mr Sithole categorically told the Court that he was not locked out of the Chief Justice's Chambers but was waiting in the Registrar's office to be directed to where the matter was to be heard. He said that whilst at the Registrar's office he learnt that the matter was to be heard by the Chief Justice in his Chambers. Mr Sithole further stated that he did not bother going to the Chief Justice's Chambers as he expected to be escorted there.

[22] The Accused had reported that Bhantshana's lawyer was locked out of the Chief Justice's Chambers. They launched a serious attack on the Chief Justice and the Judiciary on this score as their articles reveal. In my view the contradiction, in the evidence of Bhantshana and his lawyer on this material issue which formed the crucial basis of the vociferous assault by the Accused, on not only the Chief Justice but the entire Judiciary, renders their evidence precarious and unworthy of belief. I refuse to rely on their evidence. I reject it.

[23] I should interpose at this stage and state that I take judicial notice that the contention by the Accused that Bhantshana was denied his right to legal representation is far-fetched. This, I say because I was in attendance when the said Bhantshana was remanded. That I was in attendance is confirmed by the defence. It is an uncontroverted fact. I was there in my capacity as the then Registrar of the High Court hence I was part of the coram. This, I say without getting into the merits of that matter. I however believe that I have a right to take judicial notice of what transpired in that court. And I so do.

[24] I thus find it absurd for anyone to go out there and mislead the public on what allegedly transpired in that Court when the very person saying this was not in attendance. It is of paramount importance for journalists to verify what they write about. No one has the right to attack a judge or the Courts under the disguise of the right of freedom of expression. Inasmuch as this is a right enshrined in the Constitution, the Constitution itself makes the right not absolute. I will come to this issue in a moment.

[25] The defence also called the evidence of DW2, Quinton Dlamini. He told the Court that he was at the High Court when Bhantshana made his first appearance before the Chief Justice. He told Court that they were not allowed entry in the Chief Justice's Chambers. He told Court that he is the President of NAPSAWU and was in Court because Bhantshana Gwebu is their member. He further informed the Court that the NAPSAWU constitution provides that they should engage legal services for any of their members who was arrested. When tasked to produce evidence to that effect, DW2 failed to produce a copy of NAPSAWU constitution that mandated him to get involved in such matters. He produced the constitution for SNACS and I disregarded same as he did not tell the Court about SNACS and the relationship of SNACS with NAPSAWU. I cannot speculate. DW2 as he claims to be the President had to explain this.

[26] Futhermore, I consider DW2's evidence as to what transpired in the Chief Justice's Chambers hearsay evidence. He was merely telling the

Court about what he heard from Bhantshana to have been what transpired in the Chief Justice's Chambers, otherwise, he admitted that he was not in Court when the matter was dealt with. DW2 further failed to provide proof of subscriptions paid to NAPSAWU by Bhantshana to qualify Bhantshana as such member of NAPSAWU. Before me there is no proof that when he was in Court he had come for a member of the said union. The Court is not expected to conjecture. I reject his evidence.

[27] DW4 was the fourth Accused Thulani Maseko. When he was called to his defence he elected to present unsworn evidence. It is trite that unsworn statements carry less weight than sworn statements. This is so because the veracity of unsworn statements is not tested under cross-examination. No reasonable explanation as required of an Accused was advanced by the Accused *vis-a vis* the charges he is facing before this court. I find that all he said before Court is of no relevance to the charges he is facing. He was just playing to the gallery and talking politics. As an attorney he should know very well what constitutes a defence instead of engaging in gimmicks.

[28] DW4 should be able to distinguish a Court room from a political forum. In this country there are political structures in place for him to say what he said in Court but certainly not in the Court room. I consequently regard his evidence as irrelevant.

[29] To demonstrate the irrelevance of his statement, I will quote from page 2 of his unsworn written submissions, which he read into the record.

"Like many present in court today, I come from very humble beginnings raised by a single great mother with the help of neighbours; I come from the little valleys and mountains of Ka-Luhleko area. I happen to be a member of the Maseko royal house hold. As I speak my people had been denied their traditional and customary right of installing a chief of their own free choice as it happened with the people of Macetjeni and Kamkhweli, and other areas. Chiefs are being forcefully imposed on us so as to serve narrow personal and political interests, at the expense of the people and communities. Those who pretend to be defenders of Swazi Law and Custom are in fact, its greatest purveyors."

[30] Furthermore on page 24 of the said unsworn written statement, he stated as follows:-

"(1) In the short term, in order to restore the integrity of the judiciary, the people of Swaziland have said it loud and clear that the Chief Justice Michael Ramodibedi be immediately suspended and removed from the office of Chief Justice of the Kingdon of Swaziland. His removal should obviously be after following due process in terms of section 158 as read in light of section 21 of the Constitution. What he refused to afford Mr. Justice Thomas Masuku by law, should be afforded to him by law. In any event section 157 (1) of the tinkhundla Constitution stipulates that a "person who is not a citizen of Swaziland shall not be appointed as Justice of a superior court after seven years from the commencement of this Constitution." But the Judicial Service Commission shamefully tells us that Swazis are ill-qualified, ill-equipped and incompetent for the position of Chief Justice. This is an insult to the members of the legal profession and the Swazi Nation.

(2) The people's organs of power, that is, political parties together with organized civil society as well as individual natives of this land, have stated without ambiguity that Swaziland must move forward towards a truly democratic state, with multiparty system as a basis for the formation of government. Sir, the modalities and details of how this is to be achieved must be, and will be negotiated by all interested parties, on agreed terms on the basis of full equality, at a National Convention. The SADC-Parliamentary Forum has suggested and recommended as such.

(3) This obviously calls for a review of the 2005 Constitution as long recommended by the Commonwealth Expert Team on election observation in 2003 and 2008, recently echoed by the African Union through the AU Election Observation Team as well as the SADC Lawyers Association Election Observer Team last year. This will ensure that there is separation of powers and respect of the Rule of Law, an independent judiciary and full respect and enjoyment of all human rights and fundamental freedoms. We deny that the call for a constitutional monarchy is a call to overthrow the monarch in Swaziland. We are calling for a system of government where democratic governance, can and will co-exist with a monarchy whose powers are properly limited by law, under a democratic constitution – so that nobody is above the law, but the law; is the ruler, so as to provide checks and balances. Although we may disagree with the Government under Tinkhundla which is undemocratic we still are His Majesty's citizens and should be heard.

(4) When all is said and done, a democratic Constitution should lead to the holding of free, fair, credible and genuine democratic elections, giving birth to a people's democratic government."

[31] Accused 4's purported defence is clearly a call for regime change. It is a total defiance campaign against all constitutional structures in the country. It is no defence at all *vis a vis* the charges he is facing before this court. He unnecessarily attacked the authorities of this country on the appointments of chiefs, appointment of the Prime Minister and the Chief Justice, claiming that these appointments are not constitutional. He was in an endeavour to turn this court into a political platform. I fail to understand why the accused says these appointments are unconstitutional or their relevance to the issues before Court. For ease of reference the Accused's unsworn statement is annexed to this judgment Marked "A". A fair translation of the closing remarks, namely, **"Amandla!! Aluta Continua!!! Embili ngemzabalazo Embili!!! Phansi nge Tinkhundla Phansi!!."** is forward ever with the struggle. Away with the Tinkhundla system of governance in Swaziland.

[32] The irrelevance of Accused 4's purported defence to the charges proffered stares this Court in the face in its stark enormity. It cannot be countenanced. I reject it.

[33] The fact that such irrelevant evidence is inadmissible and should be rejected is succinctly captured by Section 222 of the Criminal Procedure and Evidence Act 67 of 1938 (as amended) as follows:-

> **"222. No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and cannot conduce to prove or**

disprove any point or fact at issue in the case which is being tried."

[34] DW5 was Accused 2, Bheki Makhubu. The crux of his defence was that in both publications they made a fair and legitimate criticism of the judiciary. The defence by Accused 2 was that he made a simple analogue of Caiaphus in the bible to the Chief Justice because what the two did is the same. He then quoted from a book entitled **"The killing of Jesus"**, a history the story of Jesus's crucifixion as it's never been told before by Bill O'reilly and Martin Dugard page 195 where the following appears:-

"Caiaphas has seen what happens when political revolt breaks out in the Temple courts and remembers the burning of the Temple porticoes after the death of Herod. He believes Jesus to be a false prophet. Today's displays truly shows how dangerous Jesus has become.

The threat must be squelched. As the Temple's High priest and the most powerful Jewish authority in the world, Caiaphas is bound by religious law to take extreme measures against Jesus immediately. "If a prophet or one who foretells by dreams, appears among you and announces to you a sign or wonder." The book of Deuteronomy reads, "that prophets or dreamer must be put to death for inciting rebellion against the Lord your God."

Caiaphas knows that Jesus is playing a very clever game by using the crowds as a tool to prevent his arrest. This is a game that Caiaphas plans to win. But to avoid the risk of becoming impure, he must move before sundown on Friday and the start of the Passover.

This is the biggest week of the year for Caiaphas. He has an extraordinary number of obligations administrative tasks to tend to if the Passover celebration is to come off smoothly. Rome is watching him closely, through the eyes of Pontius Pilate, and any failure on the part of Caiaphas during this most vital festival might lead to his dismissal.

Both nothing matters more than silencing Jesus. Time is running out. Passover is in four short days."

[35] DW5 also argued that Section 24 (2) of the Constitution of Swaziland sanctions them to write as they did.

[36] Now section 24 of the Constitution provides as follows:-

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

(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.

(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 provisions:-

(a) that is reasonably required in the interests of defence, 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,

expect 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." (Emphasis added).

[37] This section must be read together with Section 139 (3) of the Constitution. This section reads as follows:-

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

[37] It is clear to me that Section 24 of the Constitution does not grant an absolute right of freedom of expression. It categorically subjects the rights of freedom of expression to respect for the right of others. It is also obvious that the restrictions placed on maintaining the authority and independence of the Courts are placed because it is in the public interest that the authority and dignity of the Court is maintained.

[38] As **Ramodibedi, P** observed in **Mancienne V Government of Seychelles (10 of 2004) (reported on line under SEYLII) in the Seychelles Court of Appeal at paragraph 33** quotes as follows:-

> **"In my view, the fundamental importance of the right to freedom of expression and of the role of the press and mass media in protecting such right as primary agents of the dissemination of information and ideas cannot be stressed strongly enough in an open democratic society such as ours. However, one must always bear in mind that the right to freedom of expression is not absolute. Therein lies the test. Indeed it must always be realised that the right to speak includes the right not to speak. But more importantly, the right must obviously be considered in conjunction with other competing rights and values equally necessary in an open**

democratic society. The court's task, therefore, in interpreting Article 22 of the Constitution involves balancing all the competing rights and values."

[39] More to the above the code of Ethics of the Swaziland National Association of Journalists to which Accused 2 stated that he subscribes, though he says it is outdated, provides under article 1 (2) on People's Rights to information, **"A journalist should make adequate inquiries, do cross- checking of facts in order to provide the public with unbiased, accurate, balanced and comprehensive information."**

[40] Article 2 (1) of the same Code of Ethics provides as follows: on Social Responsibility, **"In collecting and disseminating information, the journalist shall bear in mind his/her responsibility to the public at large and the various interests in society."**

[41] In my view the Accused persons woefully failed to adhere to their own code of ethics. What the accused persons did by writing on something not factual as I have already demonstrated via the contradictions in the defence as to the allegation that Bhantshana was denied legal representation and his lawyer locked out of the Chief Justice's Chambers is highly unethical in the journalism profession. This has the potential of setting up the public against the Courts and destroying public confidence in the administration of justice.

[42] Such untruths have the potential of prejudicing the criminal case of Bhantshana Gwebu. It is a clear interference with that case in an attempt that denigrates the dignity of the Courts which founds the offence of

Contempt of Court. What the Accused did is an offence called contempt of Court *ex facie curie*. Contempt of Court is defined by **Burchell and Milton** as follows:-

> **"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."**

[43] The offence of Contempt of Court is thus a necessary device to protect the dignity and authority of the Court. It would be wrong for the Courts to allow people to pass judgment on matters which are still pending in Court.

[44] In **Gallagher v Durack 1985 LCR (Crim) 706 at 713 the Federal Court** of Australia found the applicant guilty of contempt of court and sentenced him to three months imprisonment. The applicant was the secretary of a Trade Union and he published a statement that the court had made a decision in their favour because of their industrial action in demonstrating. In justifying his decision Justice Rich at page 44 made the following remarks with which I fully agree:

> **"...the summary power of punishing contempts of court...exists for the purpose of preventing interferences with the course of justice... Such interference may...arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the court as a whole or that of its judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of**

judicial office. The jurisdiction is not given... for the purpose of restricting honest criticism based on rational grounds of the manner in which the Court performs its functions. The law permits in respect of courts, as of other institutions, the fullest discussion of their doings so long as that discussion is fairly conducted and is honestly directed to some defined public purpose. The jurisdiction exists in order that the authority of the law as administered in the courts may be established and maintained."

[45] My view of the fact that the Accused persons were clearly in Contempt is buttressed by the fact that on the face of the articles (February/March 2014), it is clear that findings and or conclusions were made by the authors on the case of Bhantshana Gwebu.

[46] The Accused persons scandalized, insulted and brought to disrepute the dignity and authority of the Chief Justice in the execution of his official duties in connection with Bhantshana Gwebu's case which is still *sub judice.*

[47] This is clear from count 1 where the offending article states as follows:-

'Like Caiaphus Ntate Justice Ramodibedi seems to have chosen to use his higher station in life to bully those in a weaker position as a means to consolidate his power. Like Caiaphus Ntate Justice Ramodibedi seems to be on the path to create his legacy by punishing the small man so that he can sleep easy at night well knowing that he has sent a message to all who dare cross him that they will be put in their place. He goes further to state the following:-

'Like Caiaphus, our chief justice "massaged" the law to suit his own agenda.'

[48] With regards to the above excerpt I agree entirely with the following analogy by the learned Director of Public Prosecutions in the Crown's heads of argument.

The above cited extracts read together with the whole of the article insinuated that the Chief Justice had ulterior and personal motives to issue a warrant of apprehension and remand into custody Bhantshana Gwebu i.e. to consolidate his power, to create a legacy and to send a message that those who oppose him will be sent to jail. Such allegations suggested a grave breach of duty by the Chief Justice, in circumstances which were calculated to undermine the public confidence in the courts, particularly the legitimancy of the sub judice criminal proceedings against Bhantshana Gwebu. In the South African case of In Re Mackenzie, 1932-1933 AD 367 the summary thereof states as follows:

> **'Where a newspaper published an anonymous letter protesting against a decision of the appellate Division, stating that the Court had given an absurd judgment upon no reasons whatever and insinuating ulterior and personal motives for the judgment other than the reasons advanced by the Court, that Court, acting ex mero moutu issued an order calling upon the editor of the newspaper concerned to show cause why he should not be committed for contempt of Court and on the return day ordered him to publish an apology in terms which had been accepted by the Court and pay a fine of R50."**

[49] Furthermore in the South African case In re Philani (1877), [22] this issue was aptly captured as follows:-

> **"[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."**

[50] A reading of the articles also clearly shows that the authors are telling the public that there is no law in our Courts. They also state that there is corruption and no proof of same has been adduced. They portrayed Bhantshana as a hero, when in effect, whether what he did was right or wrong is still to be determined by the Courts as he is facing charges on that matter.

[51] The conduct of the Accused in this regard is clear from the contents of the undisputed article as depicted in count 2 part of which reads as follows:-

> **"The questions must be asked: for how long will the people of Swaziland be robbed of justice by the very institutions that are enjoined by the Constitution to enforce it? What is the value of the Constitution if it cannot be respected even by those who are called upon to ensure that it is respected and applied? Is the law of any value and meaning to the life of an ordinary person who does not belong to the most powerful and most high in society? It does seem that we are living in the law of the jungle where the less**

powerful are subject to the whims and feelings of the powerful, rich and privileged.'

At page 34,

'It is a bang because it is the judiciary that is alleged to have issued the warrant of apprehension, the Chief Justice himself! Bhantshana's arrest has sent shivers among right thinking members of our society. How could a public officer be arrested for executing his duties as a government employee?'

At page 36

'As we understand the criminal offence of contempt of court, the person facing it must have the willful intention to undermine the authority of the court and must be aware that the is so undermining such authority of the court. In this case, here is a civil servant employed to monitor the abuse of government vehicles, exercises his powers as such and lands himself in trouble for contempt!'

At page 37

'It would appear as some suggest, that Gwebu had to be "dealt with" for sins he committed in the past, confiscating cars belonging to the powerful, including the Chief Justice himself."

[52] It is clear that the Accused not only attacked the dignity and integrity of our Courts but they also portrayed Bhantshana as innocent before his criminal case was even tried. Their conduct has the potential of bringing the administration of justice into disrepute among right thinking members of the society. This is decried by law as Contempt of Court.

"According to P.M.A Hunt, the South African Criminal Law and Procedure Vol. II, potentially prejudicial publications constitute the offence of contempt of court ex facie curiae. See page 196. The writer goes further to give examples of potentially prejudicial publications.

> **'Examples of prejudicial publications; theatrical, film, newspaper or magazine comment suggesting that a person is guilty or innocent of the offence charged, or attacking or praising his character; comment on the character, demeanour or credibility of a witness or on the merits of a civil dispute, publication of photograph of the accused where identity may be in issue, publishing during the course of a jury trial a document already ruled by the judge to be in admissible in evidence, exhorting judges to disregard evidence given in the course of proceedings.'**

[53] Reference was made by the defence to the famous case of **Bridges Vs California 314 U.S. 252 (1941).** May I hasten to state that that case is distinguishable from the instant matter in that Contempt of Court is no longer an offence in the United States of America but it is an offence in Swaziland. Both countries have different laws on this issue. The United States of America cannot be used as a bench mark in this circumstance. That country's case law as cited is clearly inapplicable *in casu*. I reject it.

[54] The Defence made heavy weather on why the offence of Contempt of Court should be abolished in Swaziland. Obviously after the order of the United States in Bridges Case. That is not my headache. The fact remains that the offence of Contempt of Court which is a Common Law offence still forms part and parcel of the Laws of Swaziland. It is my

constitutional duty to uphold it. In my view it is good law as clearly recognized by the South African Constitutional Court in the case of **S V Mamabolo**, in order to protect the dignity and authority of the Courts in upholding the rule of law. I subscribe to it as enjoined to do so by Section 24(3)(b)(iii) of the Constitution.

[55] The defence also made a hue and cry about the decision of the Supreme Court per **Moore JA** in the case of **Swaziland Independent Publishers (Pty) Ltd and Another v The King Criminal Appeal No. 08/2013.**

[56] Their take is that in light of the above decision at best the Accused should have been charged for scandalizing the Courts rather than Contempt of Court.

[57] I beg with respect to differ. This is because the facts of this case are easily distinguishable from the facts of that case. In that case the authors of the impugned publication unilaterally took it upon themselves to vilify and derogate not only the image of the Chief Justice but the entire Judiciary. Of note is that the attacks therein were not in relation to a pending case.

[58] This is not such a case. *In casu,* the whole attack on the Chief Justice and the Judiciary is predicated on the Bhantshana Gwebu case which is *sub judice*. The Accused persons sought to interfere with that judicial process. This founds the Contempt of Court.

[59] The Accused persons also argued that they were arrested to be investigated yet procedurally investigations should precede the arrest. Their argument is that the Crown should have concluded investigations before arresting them. That is arguable. In fact, that would be the more prudent course, to avoid a situation where a charge is left hanging over a person's head, whilst the Director of Public Prosecutions embarks on a long drawn out investigation. However, practice; has demonstrated it beyond disputation, that this course is not always practicable in criminal trials. This is due to the fact that situations may arise where the stage of investigation has revealed enough facts to disclose a reasonable basis that a person has committed an offence, in such a situation, an arrest can be made as part of the criminal process, but must be in accordance with the law and Constitution. It is prudent in such situations, that the fundamental rights of the Accused to a trial be strictly observed and the investigation concluded speedily. We cannot shut our eyes to the reality that in some situations, as here, it may be necessary for the investigating agency to arrest a suspect, as a precautionary measure, to prevent an action that might frustrate the ensuing criminal process, like escaping from the jurisdiction.

[60] It was further submitted by the Accused that the Chief Justice was not executing judicial functions when remanding Bhantshana as he was in Chambers, rather he was doing an administrative function. The argument being that the remand warrant was of no legal force and effect. I disagree with this contention because the Chief Justice is a Judge exercising judicial function in open Court or in Chambers. There is no law precluding him from sitting as a Judge even in Chambers and the

orders issued there have the same effect as those issued in open Court. May I hasten to say that all judicial officers do deal with matters in Chambers in all our Courts. This is a norm particularly faced with the infracture challenges in our jurisdiction. It is not extraordinary and unlawful for the Chief Justice or any judicial officer to hear matters at the High Court, either in Court or in Chambers especially at the preliminary stage of cases as here.

[61] The defence team, particularly counsel for the fourth Accused, also argued that the Crown has failed to prove common purpose in that no evidence has been adduced to prove that the Accused acted in furtherance of a common purpose. I reject this contention by the defence on the basis that there is evidence that Accused 3 is the publisher of the Nation Magazine. This is evident further from the testimony of PW2, the defence case presented under oath by Accused 2 and the highlighted area of pages of both magazines in issue. This is found at page 4 of both articles. It is necessary for me to quote same *verbatim.*

> **"EDITOR**
> **Bheki Makhubu**
> **ASSISTANT EDITOR**
> **Nimrod Mabuza**
> **SENIOR EDITOR**
> **Mantoe Phakathi**
> **REPORTER**
> **Nkosingiphile Myeni**
> **ADVERTISING**
> **Phindile Nkambule**

CONTRIBUTORS

SiphoNkosi-Dlamini, ApheleleMaseko,ThulaniMaseko

PRINTERS

TVAAL Printers

REPRODUCTION

TVAAL Printers

DISTRIBUTORS

Flotsam

PUBLISHERS

Swaziland Independent Publishers (Pty) Ltd

P.O Box 4547, Mbabane

Third Floor, Mbabane House

Mahlokohla Street, Mbabane

Swaziland.

Tel.2404 6611/2404 1480

e-mail:thenation@realnet.co.sz

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MISSION STATEMENT

The Nation is Swaziland's leading independent magazine. Our mission is to build and maintain a sustainable organisation that provides analytical news with relevant information on nation-building and developmental issues to satisfy our clients and readers."

[62] PW 2 read this portion which became part of the Crown's case and this evidence remained uncontroverted by the defence. Consequently, I am

inclined to agree with the Crown that all four Accused persons acted jointly and severally in the commission of the offences.

[63] The rule of law is meant to benefit everyone. Some journalists have this misconception that just because they have the power of the pen and paper they can say or write anything under the disguise of freedom of expression. This is a fallacy. It would be an unfathomable phenomenon to say that the right to freedom of expression is absolute with regards to our Constitution. There is justification for the restrictions placed by Section 24 of our Constitution on the right to freedom of expression. The object of the restrictions is for maintaining the integrity and dignity of the Courts and this is in the public interest. It would be absurd to allow journalists to write scurrilous articles in the manner the Accused persons did. Such conduct can never be condoned by any right thinking person in our democratic country.

[64] In light of the totality of the foregoing, I find that the Crown has proved its case against the Accused persons beyond reasonable doubt. I find the Accused persons guilty and convict them for the offences as charged in counts 1 and 2 respectively.

M. S. SIMELANE

JUDGE OF THE HIGH COURT

For the Crown : Mr. N. M. Maseko
(The Director of Public Prosecutions)

For the Accused Persons:
Accused No. 1-3: Advocate L. Maziya

Accused No. 4 : Mr. M. Z. Mkhwanazi