IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 120/14

In the matter between

REX

And

THE NATION MAGAZINE	**1ST ACCUSED**
BHEKI MAKHUBU	**2NDACCUSED**
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 102 (19 May 2014)

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

Heard: **12 MAY 2014**

Delivered: **19 MAY 2014**

Summary: **Criminal Procedure – Application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938 as amended – Contempt of Court – credibility of witnesses – Section 24 of the Constitution.**

RULING IN TERMS OF SECTION 174 (4) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT 67/1938 AS AMENDED.

SIMELANE J

[1] The Accused persons stand 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 Contempt of Court matter currently pending before the High Court of Swaziland and therefore *sub judice*, which article's passages are quoted:-

(a) 'The 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 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 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 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.

<u>COUNT TWO</u>

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 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 Contempt of Court 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 the 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, confisticating 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."

[2] On arraignment before this Court the Accused persons pleaded not guilty to the two charges of Contempt of Court. The Accused person are represented by Advocate L. Maziya for Accused 1, 2 and 3. Mr M.Z. Mkhwanazi appears for the 4th Accused. The Crown is represented by the Director of Public Prosecutions Mr. N. M. Maseko. The Crown then led evidence of two witnesses to prove its case. The Crown witnesses were extensively cross-examined by the defence team.

[3] According to the authorities Contempt of Court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering with the administration of justice in a matter pending before it**. "See South African Criminal Law and Procedure, Volume II revised 2nd Edition by P.M.A. Hunt at page 185 "**

[4] At the close of the Crown's case all four Accused through their legal representatives moved applications to be discharged under the provisions of Section 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938. The applications were vigorously contested by the Crown.

[5] Section 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938, as amended, reads as follows:-

> **"If at the close of the case for the prosecution, the Court considers that there is no evidence that the Accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him."**

[6] **Dunn J** (as he then was) in the case of **King Vs Duncan Magagula and 10 Others Criminal Case No. 431/96** (unreported) correctly observed that the section captioned above is in *pari materia* with Section 174 Act 51 of 1977 of the Republic of South Africa. In that case **Dunn J** laid out the applicable test in such applications as being whether there is evidence on which a reasonable man acting carefully might or may convict. The learned Judge stated as follows:-

> **"The words 'no evidence' have been interpreted by the Courts to mean no evidence upon which a reasonable man acting carefully may convict. (R v Sheri 1925 ADG, S v Mthethwa and Others 1983 (4) SA 262 (C) at 263-H)."**

[7] There is a plethora of authorities which state that the Court has a discretion to discharge and acquit an Accused person at the close of the Crown's case if it finds that there is no evidence upon which it might properly convict or if it finds that the Crown has not made out a *prima facie* case against the Accused persons. Similarly in the case of **Rex V Elizabeth Matimba and Another Case No. 184/98,** The Court referred to an article entitled **"The decision to Discharge an Accused at The Conclusion of the State Case: A critical Analysis, South Africa Law Journal page 286 at 287, where the author A st Q Skeen,** considered the implication of this Section as follows:-

> **"The word "no evidence" have been interpreted by the courts to mean no evidence upon which a reasonable man might convict. The issue is whether a reasonable man might convict in the absence of contrary evidence from the defence and not**

what ought a reasonable man to do. If a prima facie case is established the Accused runs the risk of being convicted if he offers no evidence, but it does not necessarily mean that if he fails to offer evidence the prima facie case will then become a case proved beyond reasonable a doubt. This may mean

(a) that the court has a discretion to discharge the Accused at the close of the case for the prosecution, if the court is of the opinion that there is no evidence that the Accused committed the offence charged or any offence of which he may be convicted on the charge.

(b) that the expression "no evidence means "no evidence on which a reasonable court acting carefully might properly convict.' "

[8] It is clearly stated in the test above that the decision to refuse a discharge is a matter solely within the discretion of the trial Court. This is clearly evident by the legislature's usage of the word "may". The ruling of the Court at this stage is not appealable.

[9] Having ascertained the test to be applied as set out above the question that arises is whether the Crown has made a *prima facie* case against the accused before Court within the ambits of the section.

[10] Now let me proceed to the evidence to see if there is any evidence led by the Crown upon which the Court might reasonably convict the Accused persons.

[11] PW 1 Msebe Malinga's evidence is to the effect that Bheki Makhubu is the Director and share holder for Swaziland Independent Publishers (Pty) Ltd. He stated that he has records to prove same as the Acting Registrar of Companies in Swaziland. He stated that the company is registered under file R7/12064 and the certificate of incorporation is 644/1994. The file for the registration of Swaziland Independent Publishers (Pty) Ltd was admitted and handed in Court as evidence and was marked Exhibit A.

[12] PW 2 Banele Ngcamphalala stated in her evidence in chief that she is aware that there is a criminal matter of Rex V Bhantshana Vincent Gwebu which is currently pending before the High Court. She stated that it was contemptuous of the Accused persons to write about this case because it is still *sub judice*. She further handed in Court the indictment on the case of **The King Vs Bhantshana Vincent Gwebu Case No. 25/2014** and it was marked Exhibit B. She also handed in the two publications of the nation magazine copies which were admitted and marked Exhibits C and D.

[13] The defence contends that the Chief Justice acted improperly in the manner he conducted himself in the case of **THE KING V**

BHANTSHANA VINCENT GWEBU CASE NO. 25/2014. They submit that they made a fair and legitimate comment about the Chief Justice and not the judiciary.

[14] The defence team attacked (PW 1) Msebe Malinga's evidence that he recorded the statement in his office not at the police station as it is the norm. It was further put to PW 1 that the statement was recorded after the arrest of the Accused. They further contended that the arrests were carried out for investigation purposes when the law is clear that you investigate and they effect an arrest pursuant to the investigations.

[15] The defence subjected PW 2 to a gruesome and lengthy cross-examination. They argued that there is nothing contemptuous on the articles rather the authors, being the Accused persons, were making a fair and legitimate criticism of the Chief Justice particularly on the manner in which he presided over the case of **Rex Vs Bhatshana Gwebu.**

[16] They also argued that there was no indictment placed before the Chief Justice when he remanded the said Bhantshana Gwebu. They stated that when a matter is called there should be an indictment.

[17] They further submitted that it was wrong for the Chief Justice to remand Bhatshana Gwebu as he had an interest in that matter.

[18] They also stated that the Chief Justice did not have the power to issue warrants of arrest for the Accused persons in the instant matter. They stated that this is an exclusive preserve for the magistrates.

[19] The defence team implored the Court to interprete Section 174 (4) in line with Section 24 of the Constitution which is on the right to freedom of expression.

[20] They further argued that there was nothing wrong with the Accused persons reporting about the articles as the Accused wrote on events that had already taken place in the Chief Justice's Chambers. The defence Counsel applied that the Accused persons be acquitted and discharged.

[21] The defence attacked the evidence of the Crown on a number of areas, finally contending that the Crown's evidence falls short of the requirements of Section 174 (4) of the Criminal Procedure and Evidence Act. They argued that the Accused should be acquitted and discharged.

[22] The Director of Public Prosecutions Mr. N. M. Maseko argued *au contraire.* He argued that the articles are contemptuous as they scandalize the Courts. The gravaman of his argument being that the matter of Bhantshana Gwebu is still pending in Court hence a prosecutable offence to write about it.

[23] The Crown argued that the articles tend to lower the dignity, repute and authority of the Court.

[24] The Director of Public Prosecution argued that the Accused persons must explain why they say **"where the law has no place".**

[25] The Director of Public Prosecution's contention is that the Accused persons have to explain why they say there is corruption in the Courts in Swaziland.

[26] The Director of Public Prosecution further stated that Contempt of Court proceedings are *sui generis* and the Court has an obligation to protect itself.

[27] The Director of Public Prosecution argued that the articles are potentially prejudicial to the proceedings in the case of **Rex V Bhantshana Gwebu.**

[28] He further argued that the Court has to weigh the articles or publications and make a determination on whether they are contemptuous or not.

[29] The Director of Public Prosecution applied that the Accused persons be called to their defence.

[30] The Director of Public Prosecution further contends that the articles suggest that the said Bhantshana Gwebu whose criminal trial is pending before the High Court is innocent of the offences charged. The articles according to the Director of Public Prosecutions praise Bhantshana's character and unnecessarily attacks the integrity of the Honourable Chief Justice in his official capacity. The articles further attack the integrity of the Court on the ongoing criminal proceedings against Bhantshana Gwebu. They also attack the reputation of the criminal justice system in Swaziland and amounts to prejudicial publications.

[31] The Crown's cardinal witness Miss Banele Ngcamphalala, the Deputy Supreme Court Registrar, has come under severe attack by the defence Counsel on the basis of credibility. It is undesirable for me to deal with her evidence in a graphic manner at this stage.

[32] In any case it is settled law that credibility of a witness plays little or no role at this stage of the proceedings except where the evidence is such that it is completely untrustworthy.

[33] As the Court stated in **S V Mpetha and Others 1983 (4) SA 262 at 265 D-G, Williamson J** stated the position of the law as follow:-

> **"Under the present Criminal Procedure Act, the sole concern is likewise the assessment of the evidence. In my view, the cases of Bouwer and Naidoo correctly hold that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage. If a witness gives evidence which is relevant to the charges being considered by the Court, then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all, it is a very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled while rejecting**

one position of the sworn testimony of a witness, to accept another portion. (See R v Khumalo 1916 AD 480 at 484. Any lesser test than the very high one which, in my judgment, is demanded would run counter to both the principle and the requirements of S. 174."

[34] I am of the considered view that PW2's evidence even though criticized, her credibility and the plausibility of her evidence is not of such poor quality that no reasonable person would not believe at least some of it.

[35] In both counts a common purpose between the Accused person is alleged on the indictment. It is not in issue that the articles containing the material that the Crown alleges in the charges were indeed authored, edited, published and distributed by the Accused persons. They did so jointly and or in furtherance of a common purpose. This is clearly evident in the evidence in chief and under cross examination of PW 2 that the articles were published by the Accused persons. The gravamen of the Accused contention is that the articles are not contemptuous but critical of the Chief Justice in the manner he dealt with Bhatshana Gwebu.

[36] In the February 2014 issue the Accused published an article entitled **"speaking my mind**" written by Accused 1, 2 and 3. They were talking about the case of **THE KING VERSUS BHANTSHANA VINCENT GWEBU HIGH COURT CASE NO. 25/2014**, which matter is still pending before the High Court.

[37] It is further common cause that another article was written by the Accused 1, 2, 3 and 4 in the March 2014 issue of the nation magazine. This article is entailed **"where the law has no place".** Reference here was made to the case of **THE KING VERSUS BHANTSHANA VINCENT GWEBU HIGH COURT CASE NO. 25/2014**, a Contempt of Court matter currently pending before the High Court.

[38] From the totality of the evidence there is a definitive nexus between the Accused persons and the alleged offences. The issue of Section 24 of the Constitution is an issue that can only be decided after the Accused persons have entered their defence. This is because the Constitution itself makes it clear that the right to freedom of expression is not absolute.

[39] I have reached the above conclusion without the necessity of extensively evaluating the evidence, giving reasons or expressing opinion in order not to compromise the defence. As the Court stated in **R V KRITZINGER AND OTHERS 1952 (2) SA 401(W) AT 406-9** where **Roper J** stated as follows:-

> **"I do not think it is expedient for me to give reasons because this would involve a discussion of the evidence and of the law, and it is undesirable that I should commit myself to any expression of opinion upon these matters before the defence is entered upon."**

[40] In conclusion, the Crown has made out a *prima facie* case requiring the Accused persons to enter into their defence.

[41] On these premises I make the following orders:-

(1) That the applications in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938 as amended, be and are hereby dismissed.

(2) That all the Accused persons be and are hereby called upon to enter into their defence.

M. S. SIMELANE
JUDGE OF THE HIGH COURT

For the Crown:	**The Director of Public Prosecutions,**
	Mr. N.M. Maseko
For the Accused Persons:	**Advocate L. Maziya for Accused 1, 2 and 3**
	Mr. M.Z. Mkhwanazi for Accused 4