IN THE HIGH COURT OF SWAZILAND

Crim. Case No. 197/94

In the matter between:

REX

vs

MESHACK MASUKU
PHINEAS MAGAGULA
DAVID MHLANGA
DELLA TSHABALALA
FREEDOM DLAMINI
SALADIN T.K. MAGAGULA
POPPY PIPSTER HLATJWAKO
MALACHI MAKHUBELA
MOSES M.C. GAMA

CORAM: Hull, C.J.

FOR APPLICANT The Director of Public Prosecutions in person

Order

(In Chambers)

(28/10/94)

This is an application made to me in chambers by the Director of Public Prosecutions in accordance with section 88 bis of the Criminal Procedure and Evidence Act 1938.

He seeks a direction from me for the summary trial on indictment of nine persons on a charge of contempt of court.

2/...

The alleged contempt has to do with events that occurred during a strike by the Swaziland National Association of Teachers some months ago.

During the strike the Minister for Labour and Public Service applied for and obtained an interim interdict restraining the union from engaging in strike action from 30th June 1994, pending an application by the Minister to the High Court.

The contempt of court which in respect of which this application to me is now made relates to an alleged breach of that interim interdict - in other words of a court order - by the nine persons whom the Director now wishes to indict.

A contempt of court is at common law in South Africa and Swaziland a criminal offence, punishable by the High Court summarily of its own motion or upon indictment by the Director of Public Prosecutions, where it consists of an unlawful and intentional violation of the dignity, repute or authority of a judicial body, or of interference in the administration of justice in a matter pending before a judicial body (See S. v. Kaakunga 1978 1 SA 1190 SWA). The High Court of Swaziland is of course such a body.

In England, a distinction is drawn between civil and criminal contempts of court. Civil contempts consist of disobedience to court orders. The object of proceedings in consequence of such disobedience, in that country, in cases where the order that has been disobeyed has been made in the course of a civil case, is to enforce compliance with the court's order. It is left to the other party in the civil case to apply the court, by way of a notice of motion - usually for the committal of the offending party to prison, but in any event with the aim of ensuring that that other party does, in the end, comply with the order. The rationale for this, as I understand it, is that in a civil case, the court itself is essentially the disinterested arbitrator in a private dispute and it is for each party, as he sees fit, to ask for whatever aid he requires from the court to achieve his legal rights. A true criminal offence, on the other hand, is prosecuted for reasons of public policy, regardless strictly of the wishes of the individuals involved.

3/...

England also has a concept of criminal contempt of court. This, however, is confined to the case where someone calculatedly undermines the standing of a court of justice or interferes with the administration of justice.

Under the common law of South Africa, and of Swaziland, the idea of a civil contempt of court is also recognised. However, it is clear from the case law that an act which is in the first instance a civil contempt - i.e. disobedience of a court order - may also be a criminal contempt, and punishable accordingly - if the person committing the contempt actually intends to undermine the authority (in the broad sense) of a court of law, or to interfere with the administration of justice: see S.v. Beyers 1968(3)SA 70(AD).

The logic of that conclusion in an appropriate case is in my view, with respect, evident. But in the application of the theory to the facts of a case, in practical terms, there are other considerations. I have no doubt that in many if not most cases in which an alleged contempt of court consists of disregard of a court order, made in the course of a dispute between parties in a civil case, the side that infringes the order does not consciously intend to bring the court itself into disrepute but rather to continue its differences, or contest, with the other party.

Another facet of the matter is that in procuring a court order, a litigant enjoys a freedom, within the measure of parameters of the civil law, in the way in which the order will be worded. In contrast to that, before any person can be held criminally liable for an offence, that offence must be defined in the law itself and it must exist in law independently of the wishes or interests of the particular parties involved.

The rationale for the criminal offence of contempt of court, where it consists of disobedience to a court order, rests not on the wording of the particular order itself, but on proof of the fact that the party disobeying it actually intends to undermine the courts or the administration of justice. In practice, however, whether that is

truly the case will often be a difficult question - and often not the truth of the matter. Hence, to my mind, the wisdom of a concept of contempt that recognises that the real nature of some contempts is civil rather than criminal; or to put it more sharply, the wisdom of recognising that some contempts are really directed towards the opposing party in a civil dispute rather than at a court itself.

The process by which the Chief Justice can, on the application of the Director of Public Prosecutions direct that a criminal charge shall be tried summarily on indictment in the High Court, and may give directions for trial, is an alternative way of proceeding to the procedure - the traditional procedure, as it might be called - whereby before a person could be prosecuted for a serious offence in the High Court, there had to be a preparatory examination before a Magistrate to see whether he had any case to answer.

The reality, in Swaziland in the nineteen - nineties, is that the best way of ensuring that a person accused of an indictable offence (in other words, one which has to be tried in the High Court, of which the contempt now alleged is one example) will receive a speedy trial is where the Chief Justice orders summary trial on indictment. In almost every case these days and as a matter of course, as it has been for some considerable time now, accused persons are tried in the High Court on directions for summary trial on indictment under section 88 bis.

It is nevertheless entirely within the discretion of the Chief Justice to decide whether or not to give such a direction.

In the present case, exceptionally, I have very strong reservations about doing so. Contempt of court, as a criminal offence, is an unusual offence. The underlying reason for the offence is to safeguard the efficacy of the judiciary as a branch of government. Ultimately the question whether a person has committed a contempt of court is the business of the courts themselves - in fact of the superior courts themselves - as an independent branch of government.

That is why the superior courts have jurisdiction, mero motu, to act summarily to deal with contempts.

5/...

The dispute here between the parties, as far as the courts are concerned, was always of a civil nature. If, having obtained an interim interdict against the union, the government was concerned to enforce compliance with it, then on a proper view I think that it ought to have acted promptly. Nearly four months have now passed since the alleged breach. It is well - established that contempts of court should be dealt with swiftly. If this court itself comes to a provisional view in any case that its own process is being defied with an intention to undermine the standing of the judiciary or to interfere with the course of justice, it will act immediately and, where necessary, summarily of its own motion. But I am not persuaded at all, in the circumstances and on the papers, that it is shown that this prima facie was the intention of the persons now accused. On the contrary, unless it is shown prima facie to be otherwise at a preparatory examination, the alleged contempt appears to me really to relate to a difference that existed at the time between the government and the union.

Before the matter proceeds to a criminal trial on indictment in the High Court, I would wish to be satisfied, after a preparatory examination, that prima facie there really are reasons for thinking otherwise.

The application under section 88 bis of the Criminal Procedure and Evidence Act, 1938, for summary trial before the High Court is therefore refused. If it is desired to proceed on the allegation, there will have to be a preparatory examination in accordance with the Act.

DAVID HULL
CHIEF JUSTICE