1156

THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.1935/02

In the matter between:

MADELI FAKUDZE	**Applicant**
VS	
THE COMMISSIONER OF POLICE	**1st Respondent**
THE ATTORNEY-GENERAL	**2nd Respondent**
SUPERINTENDENT AGRIPPA KHUMALO	**3rd Respondent**

CORAM	:	**MASUKU J.**
For Applicant	:	**Adv. L.M. Maziya (Instructed by B.J. Simelane & Associates**
For Respondent	:	**Mr P.M. Dlamini (Attorney-General)**

JUDGEMENT
9/09/02

On the 7th and 10th June, 2002 respectively, the Court of Appeal, per Steyn J.A. and Zietsman J.A., respectively, issued Orders the effect of which was that the Applicant was unconditionally allowed to return to Macetjeni, his home, in the Lubombo District.

Presently serving before Court is an application by the Applicant, in which he seeks on an urgent basis certain relief, it being common cause that the Respondents refused him access to his home, contrary to the letter and spirit of the above-mentioned Court of Appeal judgements. The relief sought is in the following terms: -

1. Dispensing with the rules of the above Honourable Court as to form time limits and manner of service and disposing of this application by may (sic) of urgency.

2. Committing the 1st and 3rd Respondents to jail for thirty (30) days each for contempt of the Appeal Court judgements dated 7th and 10th June 2002, annexed to the Founding Affidavit.

3. Directing the Respondents to pay costs jointly and severally the one paying the other to be absolved on the Attorney and own client scale including counsel's fees calculated on the same scale.

4. Further and/or alternative relief

This application first served before Court on the 21st June 2002, after which it was postponed on several occasions and was also removed from the roll on another until a hearing date was secured before me on the 26th August 2002. I am however not privy to the reasons for such an urgent matter not being heard earlier.

History

This matter has a rather depressing and unsavoury history. It has been the subject of adjudication by the Appeal Court and this Court on several occasions, in all of which the Applicant has emerged triumphant but could not taste the fruits of his triumph. So ungratifying were the constant visits by the Applicant to the Courts that Steyn J.A. in Case No.8/2002, referred to above, prefaced the judgement in the following language: -

> *"The judges of the Court of Appeal trust that the judgement delivered in the two appeals before us at this session of the Court of Appeal, being the case cited above and Case No.6 of 2000, will bring to an end a most regrettable episode in the constitutional development of this country. This Court has gained the clear impression that the executive has taken every conceivable step, both legitimate and illegitimate to delay and ultimately attempt to thwart the orders issued by the courts arising out of the unlawful ejectment of the parties involved."*

The fact that I am seized with this matter now is clear testimony that the wise injunctions by the highest Court in the land were regarded by the Executive as being of no consequence and a total waste of time. This is, to put it mildly, regrettable.

On the 3rd August 2000, removal orders were issued against Chief Mliba Fakudze, the Applicant, Mahawukela Fakudze, Makhuphuka Thwala and their dependants from Macetjeni and kaMkhweli areas. This Court granted them an injunction preventing their removal. This injunction was subsequently erroneously, as found by the Appeal Court withdrawn by the High Court and on appeal, the Court of Appeal restored the High Court injunction. The effect of the Court of Appeal Order was to allow the Applicant, amongst others, to return to Macetjeni, pending the finalisation of the main matter by the High Court.

On the 8th June 2001, the Government appealed against the above Order but later abandoned the appeal. This led to the Court of Appeal ordering that the Applicant amongst others, be allowed to return to Macetjeni. In an attempt to exercise his rights to return to Macetjeni in terms of the Court Order, certain members of the security forces impeded the Applicant. This culminated in an application by the Applicant before this Court on the 9th November 2001 in which the Court interdicted and restrained the Commissioner of Police and/or any member of the security forces from preventing the Applicant from returning to his home.

Another attempt by the Applicant to return was again thwarted by the security forces. The Applicant, in the face of those developments moved a fresh application for committing the 1st Respondent herein and one Abraham Dladla to prison for contempt of the Court Order of the 9th November 2001 and ancillary relief. Matsebula J. granted this Order and in the process mulcted the Respondents therein with costs on the punitive scale.

Dissatisfied with Matsebula J's judgement, the Government noted an appeal against this judgement. The appeal was dismissed by Steyn J.A. with other Honourable Judges of Appeal concurring. It is in that judgement that the wise injunctions quoted verbatim above were pronounced. The effect of this judgement was to allow the Applicant to return to his home unconditionally and unimpeded.

It is worth mentioning that at around the same time, the main matter in the Macetjeni/KaMkhweli debacle served before the Full Bench of this Court and which declared that the Swazi Administration Order, 1998 was invalid. The Court further found that in any event, the provisions of Section 28 (3) of and (4) the Order had not been complied with in ejecting the Applicant and his compatriots. The removal orders were therefor declared unlawful. An appeal was noted to the Court of Appeal against the said judgement and it was dismissed by the Court of Appeal, upholding the High Court judgement on setting aside of the removal Orders for non-compliance with Section 28. The Court of Appeal did not find it necessary to pronounce upon the validity of the Swazi Administration Order.

The upshot of this judgement was to also allow the Applicant to return to Macetjeni as the removal Orders on the basis of which he was ejected in the first place had been set aside by the High Court Full Bench, which judgement was endorsed by the Appeal Court.

Applicant's Depositions

In his Founding Affidavit, the Applicant states that armed with the two judgements of the Court of Appeal referred the above, he proceeded to his home on Tuesday 18th June 2002. He was accompanied by his legal team, comprising Attorney Ben J. Simelane and Advocate Maziya. On arrival at the homestead, they opened the gate and drove in soon after which they were confronted by Sergeant Fakudze, a police officer, who was accompanied by three armed members of the security forces.

Fakudze enquired as to why the Applicant was inside the premises whereupon the Applicant informed him that he had returned to his home on the strength of judgements of the Court of Appeal. Fakudze ordered the Applicant and his team to leave the premises whilst he (Fakudze) was communicating with his superiors. The Applicant's team refused to leave after explaining the implications of the Court of Appeal judgements. By then, a group of residents had joined the Applicant and his legal team and one boy had started clearing the yard. He was asked by Fakudze to stop clearing the yard until he (Fakudze) had consulted his superiors. The boy obliged.

Fakudze went ostensibly to contact his superiors. He returned some five (5) minutes later,

intimating that his superiors were on their way. After a period of thirty (30) minutes, the 3rd Respondent (Khumalo), came driving, a motor vehicle. He was in a belligerent and recalcitrant mood. He asked why the Applicant was in the homestead and when he was told of the Court of Appeal judgements, he said everyone should leave the premises in order to discuss the matter further and this was done. He then ordered a soldier to lock the gate to the Applicant's homestead.

Khumalo then told the Applicant that his presence was undesirable at Macetjeni and that the 1st Respondent had not told him to allow the Applicant or the other evictees to return. When approached about the Court Judgements and when asked to read them, Khumalo flatly refused to even look at them. He insisted that every one should leave immediately. When attorney Simelane explained to Khumalo the unlawfulness of his actions, he exhibited signs of grave agitation and remained unswayed in his resolve not to allow anyone to enter and remain in the premises under any circumstances whatsoever. He mentioned further that the Applicant's presence would be interpreted as dereliction of duty on his part. He then called all the security forces aside and told them that if the Applicant and his team refused to leave he would sanction the use of force. This threat persuaded the Applicant's attorneys to suggest that Applicant leaves the area, which he then did.

The Applicant states further that he has tried all the means at his disposal to return to his home but the Government is hell-bent on frustrating his return, Orders of Court in his favour notwithstanding. The Applicant contends further that the 1st and 3rd Respondents are aware of but are wilfully disobeying the Court judgements. The allegations of the events of the 18th June 2002 are confirmed by Attorney Simelane in supporting affidavit.

Respondents' case

The Respondents have joined issue and have raised points *in limine*. Furthermore, they have raised issues in opposition to the grant of the relief sought by the Applicant. The points *in limine* raised are the following:-

(a) that this application has been brought prematurely, in view of application No.1847/02 in which the Attorney-General seeks a declaratory Order. It is contended, on the Respondent's behalf that that application has to be disposed

of first as it seeks amongst other things to stay the return of the evicted families, pending its finalisation.

(b) that prayer 2 cannot be granted because the officers in question, i.e. the 1st and 3rd Respondents were actually doing what is complained of in their official capacities. They cannot therefor, be committed in their personal capacities as the Respondents are unaware of any principle in terms of which a public officer could be arrested.

On the merits, the Respondent's main contentions are the following: -

(a) that there is a high likelihood of anarchy arising in the area if the Applicant were to be allowed to return and further, that there is a well-founded apprehension of violence and bloodshed in both Macetjeni and kaMkhweli areas all emanating from the return of the Applicant and the other evictees. A memorandum containing a catalogue of incidents of violence allegedly reported has been annexed in support of the expressed fears and apprehensions. It is marked annexure "AG4".

(b) that the King has declared that the return of the evictees to the respective areas will pose a threat to national security in light of the contents of annexure "AG4" referred above.

(c) that a certificate made in terms of the provisions of Section 2 of the Evidence (State Interest) Order No.22 of 1976, which permits the members of the Royal Swaziland Police to act in the manner they have done was to be prepared by the Attorney-General for the King's signature.

(d) that the requirements for committing the 1st and 3rd Respondents for contempt have not been satisfied, in as much as it has not been shown that the Respondents harboured an intention to deliberately flout the Court judgements.

I must however point out that the last issue was not raised in the papers but only in argument. It now behoves me to consider these points and the various arguments raised by the parties' legal representatives. I propose to deal with the points *in limine* first.

A. POINTS *IN LIMINE*

(a) Stay of this application pending finalisation of Case No.1842/02

It was urged on the Respondents' behalf that this application has been brought prematurely in view of the fact that Case No. 1842/02 has not been determined and that the Applicant and the other returnees can safely return once the rightful chief or chiefs of the two areas have been declared by this Court.

Mr Maziya strongly opposed this prayer arguing that that application is not before Court and that it does not seek to secure any interim relief that would have a bearing on this matter. Mr Maziya further argued quite forcefully, that in any event, the Applicant herein is not a party to those proceedings and that it would therefor be a travesty of justice for his matter to be stayed pending the finalisation of a matter in which he does not appear to have an interest.

In considering the sustainability of this point *in limine,* it is in my view necessary to advert to the prayers sought therein. In that application, the Attorney-General and the Minister for Home Affairs pray for an Order: -

(1) Staying the execution of the Court of Appeal judgements on cases 6/2002 and 8/2002 respectively, on an interim basis pending the outcome of these proceeding in order to facilitate expeditious, peaceful and effective compliance there with.

(2) Declaring that the Swazi Administration Order, 1998 is a valid law of full legal force and effect.

(3) Declaring the rightful chief of Ka-Mkhweli and Macetjeni among the Respondents herein

(4) Further and/or alternative relief.

The Respondents in that matter are Mliba Fakudze, Mtfuso Dlamini and Maguga Dlamini. I called for that file to be brought to me and established that the matter was removed by consent from the roll on the 19th July 2002. There appears to be difficulty with service of the papers, particularly on the 1st and 2nd Respondents Mliba Fakudze and Mtfuso Dlamini, who were evicted and are said to be somewhere in the Republic of South Africa. Their papers were served on their erstwhile attorneys Mr B.J. Simelane and P.R. Dunseith who have filed affidavits in which they declare that they have no mandate to receive the process nor to act for the aforesaid Respondents. It is clear therefor that there was no service of the papers on those Respondents, which may have led to the removal of the matter from the roll. It is also worth noting that no interim or any Order for that matter was granted on this application.

I agree with Maziya that this point of law ought to be dismissed. Firstly, as recounted above, there is no such application pending before this Court as it was removed from the roll. There is no indication at all as to whether it will be reinstated and if so when. Secondly, there was no attempt to obtain any interim relief and none was granted. It is also doubtful whether it would be proper for this Court to stay the execution of Orders of a higher Court. Thirdly, the present Applicant has not laid any claim to chieftainship and he is not a party to the proceedings, whereas the Order sought for stay would affect his interests.

Fourthly, there is in my view no sound reason for attempting to create a nexus between the Applicant's right to return to his rightful home and the declaration of the rightful chiefs. The Applicant's return as far as I can ascertain has nothing to do with who is declared Chief of Macetjeni. The Court of Appeal Orders reflected that his return was clearly unconditional and it would be folly for this Court to attempt to set down prerequisites for his return. Without deciding this issue, it is very doubtful whether this Court or any other for that matter is the proper forum to decide on the rightful chiefs as these are matters ordinarily for Swazi customary law.

The question of balance of convenience appears to be pertinent in this wise. The Applicant has suffered untold harm in being refused by the Respondents to return to his home on several occasions. He states that his home is in a serious state of disrepair and that he is leading a nomadic life which translates itself in part, in the Applicant having no means of

sustenance as the access to his ploughing fields is also denied. There is in my view no harm whatsoever that the Respondents or the Government for that matter would suffer if the Applicant were immediately allowed to return. He has not been linked to any violence or improper conduct in the area. Every passing day during which the access to his home remains denied brings untold trauma and suffering, particularly in the face of favourable Orders of the High Court and the Appeal Court.

I am of the view, in light of the foregoing that this point should be dismissed and I so order.

(b) Is it proper to arrest public officials for contempt in respect of defiance of Orders of Court done in their official capacities?

The Attorney-General strenuously argued that the 1st and 3rd Respondents committed the actions complained of in the official and not in their personal capacities such that it would be improper to arrest them therefor. It was further argued that they derived no personal benefit by acting in the manner they did and that they should not be punished therefor. This appears to me to be a novel proposition and in support of which no authority was cited.

In opposition, Mr Maziya referred the Court to a recent Court of Appeal judgement in **ELIAS VONKO DLAMINI VS THE COMMISSIONER OF TAXES AND TWO OTHERS CIV. APPEAL CASE NO.15/01.** In that case the Senior Regional Officer (Pigg's Peak) one Gcokoma A. Dlamini, the 3rd Respondent therein, had been ordered by this Court to furnish certain information in his aforesaid capacity to the Commissioner of Taxes and he did not. Contempt proceeding for his defiance were instituted and these were set aside by this Court. The Court of Appeal overturned this Court's order and upheld the Appellant's appeal.

In the course of the judgement, Zietsman J.A. stated the following at page 3 of the judgement:-

> *"The fact that the State may be indemnified against execution or attachment to satisfy a judgement does not mean that an official of the State cannot be committed for contempt of court if he fails to comply with a Court Order. A committal for contempt is not an attachment."*

This was recognised by Jafta J. in **MJENI VS MINISTER OF HEALTH AND WELFARE 2000 (4) SA 446 (Tk HC)** at **452, C, G-H** in the following language:-

> *"Quite clearly and just like any other party, the State is bound to comply with orders of the courts. It has a duty to honour them whenever it is directed to do something. A deliberate non-compliance or disobedience of a court order by the State through its officials amounts to breach of that constitutional duty. Such conduct impacts negatively upon the dignity and effectiveness of the Courts. An effective judiciary is an indispensable part of any democratic government."*

It is clear from the foregoing that there is nothing untoward in committing public or other officials for disobeying or refusing to comply with Court Orders. Public Officials are the hands and feet of the State and if they refuse to comply with Orders of Court, then the State cannot comply with those Court Orders. Public Officials must know and it should be clear that if an Order is granted calling upon them to do or to refrain from doing a thing in their official capacity, they are bound to comply therewith. They should also know that their failure or refusal to comply therewith attracts some penalty, namely, contempt proceedings.

To insulate public officials from committal for contempt would give rise to an unacceptable situation in which they would be placed on a high pedestal and would be granted the status of being above the law when the State they serve and act for is not. This would clearly constitute a recipe for disaster insofar as respect and dignity of the Courts is concerned. Such a notion should be quickly dispelled lest it takes root in the minds of public officials. Officials who serve the interests of State to the extent that they deliberately disobey Court Orders must know that they will be required to make a personal sacrifice i.e. loss of their freedom and for which they are unlikely to be compensated by the State.

There is no merit in this point *in limine*. It must accordingly fail.

B. MERITS

I shall now proceed to consider the matter on the merits. A good starting point would be declaring the law applicable to contempt of Court.

The Law Applicable to Contempt of Court

In **CRAW AND ANOTHER VS JARVIS 1982 – 86 SLR 218** at **219,** Dunn A.J. (as he then was) stated that an applicant for contempt must show:-

(a) that an order was granted against the respondent;
(b) that the respondent was either served with the order, or was informed of the grant of the order against him and could have no reasonable ground for disbelieving the information; and
© that the respondent has either disobeyed the order or has neglected to comply with it.

See also **MADZANDZA E. ZWANE VS BHEKI G. SIMELANE & COMPANY AND THREE OTHERS HIGH COURT CASE NO.2195/01** (per Masuku J.) (unreported) and Herbstein and Van Winsen, "The Civil Practice of the Supreme Court of South Africa", 4th Edition, Juta, 1997 at page 825. See also **CONSOLIDATED FISH DISTRIBUTORS (PTY) LTD VS ZIVE & OTHERS 1968 (2) SA 517** at **522** together with the authorities therein cited.

At the commencement of the proceedings, the Attorney-General conceded that the requirements in (a) and (b) of the CRAW judgement had been satisfied. His main contention was that it was the third that had not been fulfilled. Mr Maziya on the other hand submitted that the Applicant had succeeded in meeting all the requirements.

I shall now deal with the points raised on the merits.

(a) Likelihood of anarchy arising if the Applicant returns.

The Respondents argued that the return of the Applicant to Macetjeni would culminate in serious violence, anarchy and bloodshed in the area. It was argued that the Police are under a legal duty to prevent this materialising and that they find it unsafe to allow the evictees back to their respective areas for the time being. It was further contended that the Police are aware of incidents of violence in both areas and which occurred before and after the eviction

of the evictees. In this regard, a long list of incidents is recorded. It is further contended that the return will pose a threat to national security. The question to be answered is whether all these issues justify the 1st and 3rd Respondent refusing the Applicant from exercising the rights conferred on him by the Court judgements.

The Attorney-General referred the Court to the provisions of Section 7 (1) of the Police Act, 1957 which provide the following:-

> *"The Force shall be employed in and throughout Swaziland for preserving the peace and detection of crime, and for the apprehension of offenders against the peace, and for the performance of such duties shall be entitled to carry arms and members of the Force shall have all the powers and duties which are conferred and imposed upon them by any law in force in Swaziland."*

He argued that it is necessary for the Police to prevent the evictees from returning in order to keep the peace in Swaziland as required by the above Section and that if the evictees are allowed to return, then the Police would have failed to comply with the provisions of this sub-Section. This argument however flies in the face of the provisions of sub-section (2) and (3) of the same Section which provide the following:-

> *(2) Every member of the Force shall be an officer of the law proper for the service or execution of any summons or warrant or other process directed to him, and every such summons, warrant or process directed to any member of the Force, and every such other member shall have the same rights power and authority for and in the service or execution of such summons, warrant or process as if it had originally be directed to him.*
>
> *(3) Every member of the Force shall promptly obey and execute all orders and warrants lawfully issued to him by any competent authority, collect and communicate intelligence affecting the public peace prevent commission of offences and public nuisances detect and bring offenders to justice apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient grounds exist and keep such books and records and render such returns as the Commissioner may from time to time direct."* (my own emphasis)

The two Sub-Sections in my view suggest the contrary. They enjoin officers, including the 1st and 3rd Respondents to execute warrants and Orders of Court. They do not provide for any exceptions in which Police Officers may refuse or neglect to comply with Court Orders. It is my view that Courts are "competent authority" for purposes of Section 7 (3). If it is the view of the Police that compliance with an Order of Court would endanger public peace and national security, they are not at large to take the law in their hands and flout the Order of Court. They would be expected to bring appropriate proceedings to Court seeking appropriate relief. It would be dangerous to leave the Police to be arbiters regarding whether or not to enforce or comply with Orders of Court. There is no law that I know of which expressly or impliedly authorises the Police Force to refuse to comply with Court Orders. None was cited to me. If the Police find themselves between the rock and a hard place, as stated by the Attorney-General, theirs is to approach the Court for it to unlock the dilemma and certainly not to opt to disobey Court orders.

Furthermore, I am of the firm view and conviction that the prevention of the Applicant and the other evictees in the face of the Orders of Court from the two areas is not the proper not way to preserve peace in the two areas. It is common cause that armed members of the Police Force, the Army and Correctional Services have been stationed in both areas, ostensibly to prevent the breach of peace and to apprehend any person who would attempt to engage or would engage in criminal activity or breach of peace. The armed forces placed there must prevent people in the areas from disturbing the peace and if necessary to arrest those responsible. It is unfair and unacceptable to deprive the Applicant and other evictees of the enjoyment of their homes in the name of preventing anarchy and maintaining peace. More importantly, there are no allegations that the Applicant or the other evictees have engaged in any activity that amounts to the breach of peace or conduct that would cause anarchy. The Applicant is not above the law. If he attempted to engage in any illegal activity, he would have to be dealt with according to law.

I should also mention that the memorandum annexed "AG 4" is open to attack as it appears to be the basis upon which the Court must find a reasonable apprehension exists that there will be a breach of peace. This memorandum appears to have been drafted in a quest to address the deficiencies raised by Steyn J.A. at page 8 of Case No.8/2002, namely that there

was no information on which a reasonable apprehension could be based that a threat to national security existed or may arise if the Court Order is implemented.

The memorandum itself, particularly in the form in which it was presented does not constitute evidence. Furthermore, it was not drafted in the ordinary course of duty but was written on the 26th of June 2002 to the Attorney-General clearly for purposes of meeting the deficiencies referred to above. It is also noteworthy that the events in issue date as far back as 1998. Some, if not most of the events recorded do not appear to be criminal nor a danger to public peace or national security e.g. welcoming Applicant by people carrying hoes, spades e.t.c. delivering morning apparel at a Police station in protest against evictions. Whilst baring one's buttocks, if done in a public place may amount to public indecency, it certainly does not threaten public peace or security.

In any event, it is the duty of the Police to investigate these issues, bring the culprits to book and have the Courts deal with them. Preventing the Applicant is certainly not the answer. The armed forces stationed in those areas must do their job of ensuring that peace is maintained and dealing with wayward persons according to law.

In view of the foregoing, I find that this point must be dismissed.

(b) Interests of National Security

In paragraph 10.4 at page 7 of the Answering Affidavit, the 1st Respondent states the following:-

> *"I have since been made aware that the King has declared that the return of the evictees at kaMkhweli and Macetjeni Areas will pose a threat to national security, in light of the evidence contained in annexure "AG4" and other incidents of violence and threats of violence allegedly perpetrated in the area some of which do no appear in RCCI dockets. The Attorney-General has been asked to prepare a certificate signed by His Majesty the King to be produced before this Court in due course. I refer to the Confirmatory Affidavit of the Acting Attorney-General annexed here to for an amplification of the point."*

The relevant contents of the confirmatory affidavit of one Sabelo Johannes Khayelihle Matsebula read as follows at paragraph 4.

> *"I wish to state that the King in his wisdom has ordered my office to prepare a certificate in terms of the above-mentioned legislation for his signature. However, because the Attorney-General is currently out of the country this certificate has not been presented to the King for signature. However, it is ready as per the instruction and I have been made to understand that it will be taken to the King as soon as the Attorney-General arrives back home on the 28th of June 2001."*

It is however common cause that such certificate was never filed before Court even after the return of the Attorney-General at the end of June. In this regard, the Attorney-General fairly conceded that he could not argue the question of the certificate and the issue of national interest. This is a laudable step that the Courts always expect from their officers, the Attorney-General included.

A few issues need to be mentioned however regarding the paragraphs quoted above. Firstly, the 1st Respondent provides no basis or evidence for his assertion that the King declared the return of the evictees will pose to threat to national security. It is accordingly inadmissible standing on its own as it does. Secondly, it is not immediately clear as to the circumstances in which and the procedure by which the King can make the declaration alleged. No authority for such powers was cited to the Court.

It is my view that the provisions of Section 2 (1) of the Evidence (State Interest) Order, 22/1976 are irrelevant and inapplicable to the instant case and I am not surprised that the prepared certificate never saw the light of day. The said Section provides the following:-

> *"Notwithstanding any other law, no person shall be compellable and no person shall be permitted or ordered to give evidence or furnish any information in any proceedings in a court of law or before any tribunal, body or institution established by or under any law as to any fact, matter or thing or as to any communication made to or by such person, and no book or document shall be produced in any such proceedings if a certificate purporting to have been signed*

by His Majesty the King or any other person authorised by him thereto is produced to the Court, tribunal, body or institution (as the case may be) to the effect that such fact, matter, thing, communication, book or document affects the interest of the State or public security and that the disclosure thereof will, in the opinion of the King or the person so authorised by him be prejudicial to the interests of the State or public security."

From the legislative nomenclature, it is clear that the Section applies in situations where it is sought to bring evidence or information in a court of law or before a tribunal or such other body established by or under any law, where a certificate purporting to have been signed by His Majesty the King or any person authorised by him is produced in the court tribunal or other body to the effect that such matter, thing, communication, book or document required for production affects the interest of the State or public security and that disclosure thereof will in the King's opinion or opinion of the authorised person be prejudicial to the State's interests or to public security.

It is immediately clear *in casu* that there are no proceedings before any Court, tribunal body or institution where information whether in a book or other document or form is required to be produced. Furthermore, it is clear that the interpretation sought to be attached to this Section is that the King can sign a certificate declaring certain areas as threat to national security. That is clearly an abuse of the provisions of the Section in question and amounts to a serious attempt to clutch at straws. The point relating to national security declaration by the King would have to fail. As I stated, the Attorney-General rightly did not persue it. This point was incidentally thrown out by Steyn J.A. and I would not deviate.

© Have the 1st and 3rd Respondents disobeyed or neglected to comply with the Orders of Court?

In the case of **ELIAS VONKO NDZINISA VS THE COMMISSIONER OF TAXES** (supra) at page 3, Zietsman J.A. stated the position in the following language:-

"Once it is established that there has been disregard of the order of court the respondent, to avoid committal, must show on a balance of probabilities that the disregard was not wilful. It has also been held that the disobedience of the

order must not only be wilful, but also ***mala fide.*** *"*

It is not in dispute *in casu* that the Court Orders were not complied with. All that is left for the Respondents to show is that their disregard was not wilful and there was no *mala fides* in their disregard of the aforesaid Orders.

The Attorney-General submitted that the state of mind of both 1st and 3rd Respondents was not that of persons who wilfully disobeyed the Orders of Court. He argued that what was uppermost in their minds was the threat to national peace and security which would be occasioned by their compliance with the Order. Furthermore, the Court was urged, in assessing their state of mind, to consider the incidents of violence referred to in annexure "AG4" which had a bearing on their state of mind in acting in the manner in which they did.

In assessing the correctness of the Attorney-General's submissions, one need not go further than the Answering Affidavits filed in this matter. Paragraphs which are relevant in this regard include paragraphs 7,8.9,10.2 and 10.6 and 10.7 of the 1st Respondent's Answering Affidavit. These paragraphs read as follows:-

> "7. I admit that the natural effect of the Court's judgement is that the evictees are at liberty to go back home. However there is more serious problem making it difficult for the evictees to simple return to their original place of residence without a possibility of Anarchy and bloodshed happening at the area. My office has a legal duty to ensure that nothing of that nature happens and thus whilst we are still making the return of the evictees to be as peaceful as possible it is necessary that their return be delayed for the time being.
>
> 8. Though I do not dispute the contents of these paragraphs as such I wish to state that my office had not authorised the officers in charge of the Macetjeni and KaMkhweli Police Posts to allow the evictees back to their former places of residence, thus they were right, in terms of Police Principles and claim of command to disallow Applicant back home.
>
> 9. I admit that the arrival of the Applicant attracted a large number of community Members who identify with and even pay allegiance to Mliba Fakudze as their Chief. This further shows that there is a high likelihood of anarchy in the area if I were to allow

Applicant and the other evictees back to Macetjeni area. When Applicant arrived he was given a hero's welcome which is usually accorded to the King. This was done despite the fact that he was not a chief but an ordinary resident then one can deduce from this that if an ordinary citizen returns back and is accorded a hero's welcome, which revives the Chieftaincy dispute in the area then how worse will this be if the former Chief Mliba Fakudze returns. I refer this honourable Court to annexure "AG2" attached hereto being a confirmatory Affidavit of the third Respondent herein, Agrippa Khumalo which shows that this isolated incident of the return of the Applicant revived the feelings of hostility between the factions of the community that pays allegiance to the currently reigning chief and the former Chief, Mliba Fakudze.

10.2. I am not deliberately refusing to obey the Court Orders and judgement both this court and the Court of Appeal, but I am worried about the state security considerations which in my submission, are very paramount as compared to the right to a home which is alleged to be infringed against the Applicant herein. There is evidence of anarchy in the Macetjeni and Kamkweli areas, which the Police are aware of. There are many incidents prior and after the eviction of Applicant and to show the level of bloodshed and anarchy I have attached a memorandum from the station commander of Siphofaneni Police Station dated 26th June 2002 "AG4" which shows the different incidents that were reported formally to the Police and have R.C.C.I numbers. These are incidents, which were actually reported and amount to about less than half the incidents that actually occurred and for which no R.C.C.I dockets were opened.

10.6. I submit further that this Court will not be justified in committing myself and the 3rd Respondent to jail for whatever period because what we are doing there is not only for the good of the people currently residing in the area but even for the Applicant's own good. In as much as he may have a right to be home, he also has a right to live there peacefully and not at his own risk, and if the latter is not guaranteed, as it is not in this matter, there is no wisdom in being at that place, even if such a refusal of the right to be home amounts to a flout of order of the Highest Court.

10.7. I submit therefore that the act of not allowing Applicant home is in utmost good faith and is calculated not to protect a particular faction over the other but to ensure that the members of all the factions involved in the Chieftaincy dispute enjoy their right to life and not to be exposed to life threatening situations only in the name of a Court Order of the highest Court.

10.7. In as much as I fully appreciate and fully subscribe to the principle of Supremacy of the Law over the executive I submit and I and verily advised that everyone has to enjoy any of his rights afforded by law whilst he lives and if ever there is anything like a hierarchy of rights the right to life must certainly be on top of that list or hierarchy."

I must mention that this Affidavit contains hearsay material as the 1st Respondent was not present when the events of the 18th June 2002, as recorded in Founding Affidavit unfolded. It is also clear that the 3rd Respondent was not present at least when the Applicant arrived and was welcomed. The depositions made by the Respondents in this regard must therefor be viewed subject to this observation i.e. they are hearsay and should be struck out.

What is implicit from the contents of this affidavit, subject to what I have said about the hearsay nature of some of the allegations, is not the depiction of a pious man who did not intend to disobey the Court Orders. As I have said above, there were legal channels to follow if there was any difficulty associated with compliance. In this case, there was not even an attempt to comply with the Orders by the Respondents. The 1st Respondent's behaviour in particular, must not be viewed in relation to this application but also the previous Orders of Court which were contravened with astounding nonchalance. I have underlined the paragraphs, which in my view reflect the intention to disobey the Court Orders and from which *mala fides* can be inferred. I will however comment on a few of those.

So brazen was the Applicant's contumacy of this and the Appeal Court's Orders that he had the audacity to state the following at paragraph 9 quoted above:-

"...This further shows that there is a high likelihood of anarchy, ***if I were to allow Applicant and the other evictees back to Macetjeni."***

These depositions are those of a man who regards himself as the person who is the only and ultimate authority to decide whether or not he allows the evictees to return. He has in fact substituted himself for the Courts, such that Court Orders may not be enforced if he has any qualms about them. This smacks of highhandedness not to be expected from a Commissioner of Police if one takes into account the provisions of Section 7 (3) of the

Police Act (*supra*) I come to no other conclusion than that wilfulness is implicit from the 1st Respondent's own words and actions. *Mala fides* must necessarily be inferred *in casu*.

Regarding the 3rd Respondent, it is worth considering that he associated himself with the 1st Respondent's depositions and reasons for defying the Court Orders. His state of mind is consistent with wilfulness as stated in paragraph 15 of the Founding Affidavit. There the Applicant states that the 3rd Respondent came to the Applicant's home in a "fighting mood". When told about the Court judgements as being the Applicant's reason for being on the premises he:-

(i) said everyone should leave the premises for discussions;
(ii) ordered a soldier to lock the gate;
(iii) that Applicant's presence was undesirable as he had not been told by the 1st Respondent to allow the Applicant or the other evictees to return;
(iv) he flatly refused to read or even look at the Court judgements exhibited to him;
(v) he was extremely agitated when informed that what he was doing was unlawful as it was contrary to Court Orders. He stated that he would not allow the Applicant in under any circumstances; and
(vi) he threatened the use of force against the Applicant if he and his attorneys did not leave the area.

All these are allegations that the 3rd Respondent did not challenge in his Answering Affidavit. For that reason, they stand uncontroverted and must be accepted as true. It may be argued, looking at the 3rd Respondent's conduct that he was acting on the 1st Respondent's Orders but he said the 1st Respondent did not tell him to stop the Applicant. In any event, it is improper for officers to carry out unlawful Orders from their superiors as an instruction to disobey an Order of Court would be unlawful.

What the 3rd Respondent did *in casu* went beyond what would have been the 1st Respondent's instructions, particularly after being shown the Court orders. After being shown these, his refusal to read them and his statement that he would not allow the Applicant in under any circumstances are actions attributable to him as an individual. He even threatened persons on the property on the strength of a Court Order with the use of

force. His state of mind is clearly indicative of wilful defiance that should count against him as an individual. The Applicant further drew the Court's attention to earlier episodes under Case No.2813/01 where the 3rd Respondent did a similar thing. No response to this paragraph was forthcoming. It would be a travesty if this Court were to act oblivious to the 3rd Respondent's previous actions as deposed to by the Applicant. It would engender a sense that he can transgress Orders of Court with impunity, an impression that must be erased very swiftly.

In view of the foregoing, I am of the view that wilfulness has been shown and therefor *mala fides* must as of necessity be inferred as both as 1st and 3rd Respondents were aware of the Court Orders but wilfully refused to comply with the terms thereof.

The Attorney-General had another string up his bow in relation to the 3rd Respondent. He argued that the 3rd Respondent, if the Court finds he is guilty of contempt will be committed whereas there was no order issued against him and which he defied. At first glance, this sounded like a formidable proposition. Mr Maziya, in his eloquent reply stated that the initial Order granted on the 9th November 2001 interdicted the Commissioner of Police and or any of its security forces from preventing the Applicant returning to and residing at his home. It is in respect of this order that Matsebula J. found the 1st Respondent guilty but suspended the committal pending compliance. Against that Order, an appeal was lodged resulting in the judgement by Steyn J.A. Clearly therefore the intention of the order was that it should apply to all security forces including the R.S.P. and of whom the 3rd Respondent is a member. I agree.

Furthermore, if the Attorney-General's contention were to be upheld, it would lead to a very undesirable situation which would allow Police Officers to continuously defy Orders of Court. All they would need to do once an Order for Police Officer X not to prevent the Applicant from returning and residing at his home was issued would be, to then post Officer Y at his home to prevent him. When another Order for Officer Y is issued against Y, then Officer Z would be posted as the next impediment. This would constitute a licence for the Police to delay enforcement of Court Orders to the detriment of the successful parties and the dignity of the Courts and would reduce the procedures and Orders of this Court into a mere farce and an object of derision. I find that it was not necessary, in view of the foregoing to obtain an Order specifically against the 3rd Respondent and this point will not

be sustained. The 3rd Respondent's actions and words and in particular, his refusal to read the Court judgements, being a senior Police Officer of considerable experience must return to haunt him.

Jafta J. in the **Mjeni** case (*supra*) stated the following at page 454:-

> *"I would like to stress that contempt of Court proceedings can only succeed against a particular public official or person if the order has been personally served on him or its existence brought to his attention and it his responsibility to comply with the the order but he wilfully and contemptuously refuses to comply with the Court Order."*

These have been fulfilled in this case.

In view of the foregoing, I rule that the Orders prayed for in 2 and 3 of the Notice of Motion dated 19th June 2001 be and are hereby granted. There is no reason why costs on the punitive scale should not be granted in view of the Respondents high handed behaviour – See in **RE: ALLUVIAL CREEK LTD 1929 CPD 532** at **535**. I further order, as applied for by Mr Maziya for the provisions of Rule 68 (2) of the Rules of Court as amended should apply. I considered whether it would be proper to suspend the committal pending compliance and found it inappropriate in view of the Respondents contumacy of Orders of this Court exhibited in previous applications. As stated by James R. Lovell, "one thorn of experience is worth a wilderness of warning."

In denouement, it is necessary that I decry this state of affairs where Orders of the Courts are being deliberately not enforced by the Executive. It is a sad day for any country when such episodes are witnessed, whatever the purported justifications. It is an injury to the Judiciary, indeed, the entire Government and nation that may never heal. It robs the Court, sometimes irredeemably, of its esteem and dignity, reducing it to a toothless institution which issues inconsequential orders that may be defied at will and with impunity. The Courts, in such situations, end up conducting "mock trials" and issuing academic judgements, which reduces the whole judicial machinery to a mere farce.

Jafta J. in the **Mjeni** case *(supra)*, had this to say at page 453 A – C

"An independent but ineffective judiciary would be little help to litigants. Successful litigants against the State need institutionalised mechanisms to enforce their rights once those rights are declared and defined pursuant to proper adjudication by the courts of law. A complete denial of such mechanisms would render meaningless the whole process of taking disputes to courts for adjudication and that is a recipe for chaos, and disorder. The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the Court Order."

It may be well to reiterate some comments that I made in **MADELI FAKUDZE VS COMMISSIONER OF POLICE AND OTHERS HIGH COURT CASE NO.2815/01.** There I stated as follows at page 10:-

"I find it appropriate to throw a word of caution regarding this and other related matters that have been enrolled in this Court and in which it appears that there is flagrant disregard and disdain, if not overt disobedience of Court Orders perceived to be unpalatable. This is a recipe for lawlessness. The road to chaos does not begin with gargantuan leaps but a few steps in direction of wilful disobedience of Court orders, particularly by State agents, who are not only to be exemplary in their conduct but are actually custodians and enforcers of the law, including Orders of Court. No efforts should be spared in ensuring that the rule of law, about which so much has been said, is observed, for therein does the peace and prosperity of this country and its economy in great measure lie. The road to anarchy is a one-way street and a return to normalcy may well night be impossible. If you sow seeds of disobedience of Orders of Court, you reap anarchy, a fruit that no one can enjoy, including those who sowed those seeds."

The task that this and other Courts all over the world are charged with is not an easy one although it is essential for all. This was recognised by Leon AD JP in **HURLEY AND ANOTHER VS MINISTER OF LAW AND ORDER 1985 (4) SA 708 (D & CLD)** at 715 in the following lapidary remarks:-

"Firstly, it is perhaps necessary to remind oneself, from time to time, that the first and most sacred duty of the court, where it is possible to do so, is to administer justice to those who seek it, high and low, rich and poor, black and white; to attempt to do justice between man and man and man and state..."

Lord Atkin in **LIVERSIDGE VS ANDERSON (1942) AC 206 (HL)** stated the following in the minority judgement and which has since been held to be correct:-

"In this country, amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war and in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority, we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to see that any coercive action is justified in law."

Beadle C.J. in **MADZIMBAMUTO VS LARDNER-BURKE N.O. AND ANOTHER 1968 (2) SA 284 (R.A.D.)** at 314, records the events surrounding Judge A.G. Macgrath of South Carolina who in a dramatic ceremony, descended from the Bench into the body of the Court and there *coram publico* formally divested himself of his judicial robes and declared "the temple of justice is now closed".

It is hoped that the present trend of events will not lead to Judges following the example set by Macgrath J. of "closing the temple of justice", although his reasons for closing the temple of justice were different.

I would have failed in my duties if I did not condemn in the strongest possible terms, the import of a phrase in paragraph 4 of the 3rd Respondent's affidavit where he stated the following:-

"I therefore fully associate myself with the evidence and reasoning of the Commissioner of Police and ask this Court not to adopt a simplistic arm chair approach to the mater but be executive minded in this matter."

This paragraph is a highhanded aberration from what is expected of litigants. It is evidence that the Courts are perceived to be an appendage if not an instrument of the Executive. The Court is implored not to consider the matter according to the dictates of the law as required of Judges of this Court in the solemn oath they took. This unfortunately is not a reflection of the brazen contempt with which this Court is perceived, not only by the 3rd Respondent but his legal advisers as well. Such language, insinuation and suggestion from litigants which seeks to direct and influence how the Courts should handle their business is totally out of order and deserves severe censure. It is not and will not be tolerated and deserves to have been struck out as it is clearly scandalous, if not vexatious and embarrassing at the same time.

Having said all the above, it should be remembered, not blithely, the timeless words of Dyzenhaus, in his article entitled, "Judges, Equity and Truth", SALJ Volume 102 Part II, 1985, who stated as follows:-

> *"That the government might have been powerful enough to eventually override in someway the Court's assistance is irrelevant. The Court's job was to determine the true legal answer and while truth can be defeated by power, it is not determined by power."*

T.S. MASUKU
JUDGE