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THE HIGH COURT OF SWAZILAND

Case No.3699/02

In the matter between:

THE ATTORNEY-GENERAL	Applicant
And	
RAY GWEBU	1st Respondent
LUCKY NHLANHLA BHEMBE	2nd Respondent

CORAM : MATSEBULA J., MAPHALALA J., MASUKU J.

For Applicant	: Mr P.M. Dlamini (Attorney-General)
For 1st Respondent	: Mr T.R. Maseko
For 2nd Respondent	: Adv. L.M. Maziya (Instructed by B.J. Simelane & Associates)

JUDGEMENT
19th December 2002

THE COURT

Relief Sought

Presently serving before Court is a declarator, filed under a Certificate of Urgency by the Attorney-General (hereinafter referred to as "the Applicant"). The terms of the relief sought are as follows:-

1. Waiving and condoning the non-compliance with the usual requirements prescribed by the Rules of Court regarding time limits, use of form, period of Notice to service of process and hearing this matter as one of urgency.

2. Issuing an order declaring that Decree No.2 of 2002 has been automatically revived after the nullification of Decree No.3 of 2001 by the Court of Appeal under Court of Appeal case numbers 19/2002 and 20/2002.

3. Declaring that the Respondents herein do not have a right to be admitted to bail in terms of the provisions of the said Decree No.2 of 2001.

4. Suspending or staying the hearing by this Court of all bail applications moved by above named Respondents under case Number 11/2002 and 75/2002 respectively, and others that may be moved by any one else pending the finalisation of this application or a referral of this matter to the Court of Appeal in the event this Honourable Court deems it appropriate.

5. Further and/or alternative relief as this Court may deem proper and expedient.

The Notice of Motion is accompanied by the Founding Affidavit of the Attorney-General, the contents whereof do not require close or any scrutiny at this stage, regard had to issue which is the subject of this decision as will become evident later in this judgement.

Background

On the 22nd November, 2002, a Full Bench of the Court of Appeal for Swaziland issued a judgement in favour of the above-named Respondents and in which the validity of Decree No.3. of 2001, which denied applicants the right to apply for bail in respect of certain offences was put to the test. The penultimate paragraph (in part) and the last paragraph of the said judgement delivered by Browde J.A. read as follows:-

> "The new Constitution has not yet been put in place; and therefore, counsel's submission that Decree No.3 is invalid and that it does not affect the High Court's unlimited jurisdiction as defined in the King's Proclamation, in my judgement is sound and must be sustained.
>
> In the result the appeals are upheld Decree No.3 of 2001 is declared to be invalid

and the cases of the two appellants are remitted to the High Court to decide whether or not to admit them to bail."

Following this and another judgement in which an order for committal of the Commissioner of Police and another officer for contempt of Court was upheld, the Prime Minister, purportedly on behalf of the Government issued a statement which was notoriously published in both the electronic and print media in this Kingdom, rejecting the judgements and further stating that Government would ignore these judgements and would ensure that they are not enforced. Reference to this statement shall be made later in this judgement.

We say purportedly on behalf of the Government because it is common cause that Government consists of three arms; the Executive, Legislative and the Judiciary. The statement was certainly not reflective of the Judiciary's position regarding the said judgements. It would also appear, subject to correction, that Parliament was also not involved in the drafting of the statement

As a result of their appeal being upheld, the Respondents moved separate applications before this Court for each one of them to be admitted to bail. These applications, which are opposed by the Crown are still pending. As the Court was to embark on hearing these applications, the Applicant filed the declarator quoted in full above. In response thereto and from the bar, the Respondents' legal representatives raised the following point of law, namely that the Applicant is guilty of contempt of the Courts by issuing the statement read by the Prime Minister and therefor has unclean hands. It was their argument that the application be dismissed with costs and in the meantime the Government be called upon to purge the contempt. That is the legal question which is the subject matter of this judgement.

Parties' Submissions

In support of their contention, the Respondents urged the Court to find that the statement by the Prime Minister is contemptuous in a manner that disqualified the Applicant from touching the pure fountains of justice. Reliance was placed on the following cases –

DI BONA VS DI BONA 1993 (2) SA 628 (CPD) at 689; PHOTO AGENCIES (PTY) LTD VS THE ROYAL SWAZILAND POLICE AND ANOTHER 1970 –76 SLR 398 at 407 and S VS NKOSI 1963 (4) SA 87 at 88. Reference to some of these cases will be made later in this judgement.

The Applicant raised the following points which deserve attention.

(a) That there is no evidence before Court that the Government has refused to comply with any Order of Court;

(b) That contempt of Court, if it is established in respect of one matter, may not be used as a bar against the offending party in another matter unconnected with the matter in respect of which that same party is in contempt;

The Law Applicable

According to the learned authors Herbstein and Van Winsen, "The Civil Practice of the Supreme Court of South Africa, "4th Ed, Juta & Co. 1997, at page 815, contempt of Court can be distinguished between criminal and civil contempt. Regarding this distinction, the authors proceed to state the following: -

"Criminal contempt may be constituted by conduct that is disrespectful to the court such as wilful insult, the interruption of court proceedings or other conduct of that nature amounting to misbehaviour and is punishable at common law. It is irrelevant whether the conduct takes place ***in facie curiae*** *or out of court.... Conduct that is calculated to bring the administration of justice in general into contempt likewise amounts to criminal contempt of court, as, it seems, does conduct interfering with the course of justice.*

Civil contempt is the wilful and ***mala fide*** *refusal or failure to comply with an order of court. Committal to gaol for civil contempt of court is a mode of procedure aiming at enforcing orders of court in civil proceedings, and at bringing to its logical conclusion an order given by a judge that the court finds has been deliberately disobeyed."*

One of the most fundamental and cardinal principles of our law is the right to be heard, popularly known as the *audi alteram partem* principle. Dealing with this principle, the Court of Appeal said the following in **SWAZILAND FEDERATION OF TRADE UNIONS VS THE PRESIDENT OF THE INDUSTRIAL COURT AND ANOTHER APPEAL CASE NO.11/97** (unreported) at page 10.

> "The ***audi alteram parterm*** *principle i.e. that the other party must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18th century English Judge to be a principle of divine justice and traced to the events in the Garden of Eden, and has been applied in cases from 1723 to the present time."*

Fundamental as the above principle may be, the Courts may however refuse to hear a party who is in contempt until such time that he/she has purged the contempt. In **DI BONA VS DI BONA AND ANOTHER 1993 (2) SA 682 CPD at 688, C—D, and F-G** Rose Innes J. stated the following:-

> "*The general rule is that orders of Court must be obeyed. Were this not so, the protection of the rights of persons and the resolution of disputes by recourse to the Court which is established for that purpose, would be of little, if any effect and the community would be deprived of the proper administration of justice. Contempt of an order of Court is therefore a grave matter .... The consequences of the rule are that anyone who disobeys an order of Court is in contempt of Court and may be punished by arrest of his person and by committal to prison and, secondly, that no application to the Court by a person in contempt will be entertained until he or she has purged the contempt. The rule that a person in contempt of Court will not be heard is not an absolute one.*"

The decision whether or not to preclude a person in contempt of Court from being heard is a matter which lies in the Court's discretion, dependent upon the peculiar facts and

circumstances attendant upon that case. Exercising the discretion adversely to a party in contempt, is not a light matter and one factor that weighs heavily upon the Court is that it is capable of working grave hardship and injustice to that party.

In the PHOTO AGENCIES (PTY) LTD case *(supra)* the Applicant, who had, in breach of and in order to circumvent an embargo of sale of arms to the apartheid South African regime imposed by the United Nations Security Council, imported arms which were confiscated by the police and was denied access to halls of justice. The Applicant therein applied for the consignment of arms to be delivered to it. Nathan C.J., quoting with approval MULLIGAN V MULLIGAN 1925 WLD 164 had this to say at page 407C:-

> *"Before a person seeks to establish his rights in a court of law he must approach the Court with clean hands; where he himself, through his own conduct makes it impossible for the processes of the Court (whether civil or criminal) to be given effect to, he cannot ask the Court to set its machinery in motion to protect his civil rights and interests. Were the Court to entertain a suit at the instance of such a litigant it would be stultifying its own processes and it would moreover, be conniving at and condoning the conduct of a person who through his flight from justice, sets the law and order in defiance."*

The Court held that the Applicant in that case had dirty hands and dismissed it's application with costs.

In dealing with this very issue, Lord Denning made the following timeless remarks in **HADKINSON VS HADKINSON (1952) 2 ALL ER 571 at 574 – 5: -**

> *"It is a strong thing for a Court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which the Court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing a compliance. Applying this principle I am of the opinion that the fact that a party to a cause has disobeyed an order of Court is not of itself a bar to his being heard, but if his disobedience is such that so long as it continues it impedes the course of justice in the cause by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may*

make, then the Court may, in its discretion, refuse to hear him until the impediment is removed or good cause is shown why it should not be removed."

The question that shall ultimately have to be considered is whether this is a proper case in which there is contempt of Court by the Applicant and if so, whether that contempt constitutes an impediment to the course of justice, either by making it more difficult for the Court to ascertain the truth or to enforce the orders it may make.

Before embarking upon that enquiry however, it is imperative to consider the Applicant's first point. This approach is adopted in order to decide whether or not the statement is properly before Court before its full contents can be recorded in this judgement. We proceed to address that legal point.

(a) There is no evidence before Court that the Government has refused to comply with any Order of Court.

The Attorney-General argued that the Respondents are not entitled to the Order they seek because there is no admissible evidence before Court tending to show that the Government is in contempt. In this regard, it was argued that there is no affidavit before Court showing this and no one was called into the witness box to testify positively in order to persuade the Court to find that there is contempt on the Government's part. It was further argued that whilst it may be correct and accepted that the Prime Minister's statement is contemptuous, such statement is not before Court and it cannot therefor be used as a basis for adjudging the Applicant to be in contempt.

The alternative argument regarding the statement was that it did not go far enough to constitute civil contempt and in the Attorney-General's language, it amounted to an inchoate criminal contempt in that there is evinced a clear and settled intention to defy the Orders of Court, thereby constituting the requisite *mens rea.* The *actus reus* is however starkly absent, so the argument continued.

The Court *mero motu* raised the question of the contempt cases involving the Macetjeni/KaMkhweli matters, which in part formed the basis for the Prime Minister's statement. In response, the Attorney-General pointed out that the Court of Appeal

judgement in **THE COMMISSIONER OF POLICE AND ANOTHER VS MADELI FAKUDZE CIV. APP.** 38/02, had an in-built mechanism for enforcement, and which, it was submitted, had not been utilised by the Respondent.

It is correct that the statement has not been filed as evidence by the Respondents. The Attorney-General was however hard pressed to concede that it is common cause that such statement was published by the Prime Minister. He conceded this point eventually.

The proper approach to be adopted regarding this statement was stated by the Court of Appeal in the S.F.T.U. case *(supra)* at page 21, where their Lordships referred to **R VS TAGER 1944 AD 339 at 343,** where Watermeyer C.J. stated the following lapidary remarks:-

> *"The doctrine of judicial notice is, by all the authorities on the law of evidence which I have consulted... still today rightly confined within very narrow limits. Thus Phipson says that Judges and juries can only take notice of matters so notoriously or clearly established that evidence of their existence is unnecessary.. Although, however, Judges and juries may in arriving at decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess... they may not...act on their own private knowledge or belief regarding the facts of the particular case.... Wigmore in sec 2569 (a) draws the same distinction: It is not to use on the Bench, under the guise of judicial knowledge, that which he knows as an individual observer. The former is in truth 'known' to him merely in the peculiar sense that it is known and notorious to all men, and the dilemma is only the result of using the term knowledge in two senses. Where to draw the line between knowledge by notoriety and knowledge by personal observation may sometimes be difficult, but the principle is plain."*

In casu, the fact that the Prime Minister had issued a statement is, to use the language above, so notoriously or clearly established that evidence thereof is unnecessary. All that the Court required was a copy of that statement and which the Attorney-General, kindly availed to the Court. His assistance in this regard is appreciated. So notorious was the fact of the issue of this statement and its calamitous effect that the Judges of the Court of

Appeal resigned *en masse* due to its debilitating effects on the rule of law, the esteem of the Courts and the integrity of the Judges who sit in them. It is in these circumstances that the statement, to which reference had been made in Court was introduced.

All that needs to be done is to look at the statement in its entirety in order to ascertain whether it is in any way contemptuous of the Courts and if so, whether the contempt meets the rigours so carefully set out by Lord Denning in the **HADKINSON** case *(supra)* i.e. whether the contempt impedes the course of justice by making it difficult for the Court to enforce orders which it may make. It is necessary in this regard to quote the contents of this statement in its entirety. This will in part be for the sake of posterity and a timeless reminder to the succeeding generations of the dark days faced by the Judiciary in this country at the hands of the Executive. The statement reads as follows:-

"PRESS STATEMENT 22/02

BY HIS EXCELLENCY,
THE RIGHT HONOURABLE PRIME MINISTER

DR B.S.S. DLAMINI

28th November 2002

COURT OF APPEAL JUDGEMENTS – DECREE NUMBER 3 OF 2001, AND THE CONTEMPT OF COURT CASE AGAINST THE POLICE

Government wishes to express its disappointment at the recent judgements of the Court of Appeal in respect of Decree No.3 of 2001, and the contempt of court case against the Police.

The effect of the Court of Appeal judgements would be to strip the king of some of his powers and Government is not prepared to sit idle and allow judges to take from the King powers which were granted to him by the Swazi Nation. Contrary to what has been said in one of the two judgements, the Court of Appeal is, in effect, emasculating the legitimate authority of the King – an authority which has been accorded to Swazi kings since time immemorial.

A Decree in the Kingdom of Swaziland is, by definition, neither debatable nor negotiable. The judges of the Court of Appeal themselves have not acted in accordance with our domestic law when saying that Decrees are null and void. Their judgement, in fact, challenges their own appointment, itself made under Decree.

Furthemore, Government takes the view that the judgements are not in the interest of the country and, in particular, that measures such as the removal of the non-bailable offences legislation, and the return of the people to Macetsheni and KaMkhweli, would lead to chaos and anarchy.

Regarding the 1973 King's Proclamation to the Nation, it is Government's view that no judge can question the decision of King Sobhuza II, made nearly 30 years ago – a decision with which the Swazi Nation has been satisfied over a very long period of time. Decisions such as that should not be questioned in the courts. Furthermore, the Court of Appeal judges made certain disparaging remarks about King Sobhuza II. Government rejects this and wishes to state that Swazis themselves will renounce any attempt to rewrite Swazi history in this respect.

It is Government's belief that the judges of the Court of Appeal have been influenced by forces outside our system and that they have not acted independently. Whilst Government deplores these judgements of the Court of Appeal, it recognises that judges are human and, therefore, subject to error.

In summary, therefore, Government does not intend to recognise the two judgements of the Court of Appeal. The laws of this country will remain as they are – in other words, as if the judgements of the Court of Appeal judges , in these respects, were not effective.

It, therefore, needs to be emphasised that the non-bailable offences legislation remains in force. There will be no release of individuals detained in prison for an offence to which that legislation relates. The appropriate Government agencies have been duly informed and have been instructed to ignore the Court of Appeal ruling.

Similarly, Government does not accept the judgement of the Court of Appeal in respect of the actions of the Police Commissioner and his officers, who acted properly in accordance with Swazi Law and Custom. The nation shall not allow a situation of lawlessness that could definitely lead to bloodshed if the evicted persons were to be allowed to return to the areas concerned. Therefore, the judgement in this regard will not be obeyed. The Government agencies responsible for implementing the Court of Appeal Judgement have, therefore, been instructed not to comply with it.

This statement should not be viewed as interference with, or contempt for, the rule of law. It should be acknowledged that we are currently in a transitional stage and Government's position on the above issues will be addressed in the new Constitution which the Swazi Nation now eagerly awaits.

The non-bailable offences legislation was introduced by His Majesty the King, responding to the clear wishes of the Swazi Nation, as has been the case with the other Decrees. It is known that His Majesty is currently in seclusion and his wisdom is greatly needed in addressing the situation that has arisen. Therefore we are all expected, in the meantime, to respect our culture and custom and its regard for peace, tranquillity and security during this period while we await His Majesty's direction.

Thank you.

Office of the Prime Minister **28th November 2002"**

Before analysing this diatribe by the Prime Minister, it is necessary to point out that it reflects a total misunderstanding and misconstruction of the Court of Appeal judgement on the part of the Prime Minister. In fact, the Court of Appeal never declared the 1973 Proclamation null and void. At page 19, Browde J.A. stated following:-

> *"There is no doubt, however and this was conceded by Mr Maziya, that the King's Proclamation has operated since 1973 – it has been effective since then. Thus, whether or not if it is an exaggeration to say that the 'whole nation' supports it, to attempt to now restore the 1968 Constitution would not only be impracticable but may well result in sinking this Kingdom into an abyss of disorder if not anarchy.*
>
> *In my judgement this explains why courts have declared regimes to be valid even though created unlawfully – it is a question of facing the reality rather than causing confusion in the public mind and possibly political mayhem."*

It is necessary that we mention that whilst commenting upon and, valid criticism of judgments of Court is welcome, particularly from legal academics and commentators for the building up and enrichment of our jurisprudence, this must be done decently and with moderation. To cast aspersions on the persons of and to wantonly and scurrilously criticise

the Judges and the judgments they issue is totally out of order, whoever the critic may be. In this regard, we refer to Kahn, "Essays in Honour of Michael McGregor Corbett Chief Justice of the Supreme Court of South Africa;" Juta & Company, 1995, where the following appears at page 40:-

> *"Criticism of judgments, particularly by academic commentators, is at times acerbic, personally oriented and hurtful... But we are all to a degree captive to the age in which we live. And modern norms relating to freedom of expression and the discussion of matters that were formerly tabooed must be recognised and taken into account in settling limits in this sphere. To some extent what in former times may have been regarded as intolerable must today be tolerated... This, too, will help to maintain a balance between the need for public accountability (of the judiciary) and the need to protect the judiciary and to shield it from wanton attack".*

In the December, 2002 Issue of DE REBUS; the President of the Zimbabwean Law Society (ZLS), Mr. Sternford Moyo in the recent International Bar Association meeting in Durban, South Africa had this to say about this issue: -

> *"While the ZLS believed that the critical evaluation of judicial decisions was essential in a democratic society, it had to be both 'temperate and respectful'. Mr. Moyo said that government 'statements of defiance' in respect of judicial decisions affected the independence of both judges and legal practitioners."*

The statements of the Prime Minister are therefor misguided and unfortunate. Reverting to the issue at hand, it will be noted that we have underlined certain portions of the statement, which are in our view *prima facie* offensive and downright contemptuous of the Courts of this country.

To suggest that the Judges of the Court of Appeal have "not acted in accordance with domestic law when saying that Decrees are null and void" and that "it is Government's (sic) belief that the judges of the Court of Appeal have been influenced by forces outside our system and that they have not acted independently" is a scandalous and scurrilous statement, which questions the probity, integrity and the dignity of the learned Judges.

The statement continues, "In summary, therefore, Government does not intend to recognise the two judgements of the Court of Appeal. The laws of this country will remain as they are in-other words, as if the judgements of the Court of Appeal judges, in these respects, were not effective. It therefore needs to be emphasised that the non-bailable offences legislation remains in force. There will be no release of individuals detained in prison for an offence to which that legislation relates. The appropriate Government agencies have been duly informed and have been instructed to ignore the Court of Appeal ruling...The Government agencies responsible for implementing the Court of Appeal judgement have therefore, been instructed not to comply with it."

These statements are *a fortiori* contemptuous of the Court and reflect the Executive's disdain of Court Orders not to its liking. They violate the dignity, repute and authority of the Courts. Furthermore, the statement calls upon officials, who are according to the statutes of this Kingdom enjoined to comply with or to enforce Court Orders, not to. That the whole body of existing legislation must be jettisoned for the sake of political expediency is a cause for grave concern.

This statement does more as it stands. It does in our view have the effect of impeding the course of justice by making it difficult for the Courts to enforce its Orders. *In casu*, if a person is admitted to bail by this Court in line with the Court of Appeal judgement as it is bound thereby, the Executive has, in terms of the statement told the whole world that the Court Order will not be enforced. This is a subversion of justice. The Executive has actually violated Orders of Court as exemplified in the Macetjeni-kaMkhweli matters. We cannot therefor regard these statements and threats as idle talk. Injunctions by the Courts have been viewed with disdain. This is totally unacceptable and amounts to taking retrogressive steps, leading back to the survival of the fittest epoch.

It is apparent from the foregoing that the statement in question has all the hallmarks of criminal contempt and evinces very strongly an intention to commit civil contempt. Should a litigant who engages in such conduct be heard without purging its contempt? Notwithstanding the Executive's contemptuous attitude exhibited in the statement, it has the temerity to continue to seek relief in the very Courts that it has treated with contumacy.

The question is whether in view of the weight of authority that the doctrine applies to disobedience of civil judgments it should also apply to matters of *prima facie* criminal

contempt. In our view, this is a permissible route to take and appears to have been adopted in the SOLLER, case dealt with below. In the PHOTO AGENCIES case, (*supra*) a new scenario, presented itself and the Court used existing legal principles to settle the issue. The existing principles in our view have to be extended to deal with *prima facie* criminal contempt in this case. The crucial question as we do so, in our view should be the effect of the contempt on the Court procedures and processes. If they are stultified thereby, then it is our view that the offending party must be precluded from entering the halls of justice until the contempt has been purged.

In **SOLLER VS SOLLER 2001 (1) SA 570 at (CPD) at 573,** Thring J. stated the following regarding the Applicant, who wrote a derogatory and insulting letter to a Judge regarding her conduct of a matter and later sought relief from that Court: -

> *"It is not lightly that this Court will close its doors to a litigant. However, a litigant who has contemptuously turned his back on those doors and has repeatedly treated with (sic) contumely the Judges who sit within them, as the applicant has done, must not be surprised if, when he attempts to re-enter the halls of justice to seek relief, he finds the way barred to him until he has purged, his contempt (sic) for the very tribunal which he now seeks justice."*

Such must be Applicant's fate in this matter. As conceded by the Attorney-General, the statement was not addressed to the learned Judges of Appeal only, but to the entire Court system, this Court included, as the judgements against which the disparaging remarks were made emanated from this Court. This is a vote of no confidence in the Courts by the Executive, which must be immediately withdrawn. It is our finding, subject to the consideration raised by the Attorney-General which is addressed below, that the application be deferred until the contempt is purged. This is one case in which considerations of public policy which weighed heavily in the PHOTO AGENCIES case, require that the Respondents' point be upheld.

(b) The contempt to relate to same cases.

In a novel proposition, the Attorney-General argued that for contempt to arise, resulting in the application of the doctrine of "clean hands", the Applicant against whom the doctrine is raised must seek fresh relief before the same Court. This argument must be thrown out with both hands because it would be a licence to contemptuous litigants to seek and obtain justice from the very Courts they abhor and treat contumely. There would be no meaning to this doctrine if it were to be applied in the manner propagated by the Applicant. All that would be required would be for one to institute an application and to contemptuously deal with the Court and its procedures. Faced with the doctrine in respect of that case, you would still be allowed to move other applications, with your contemptuous mind intact, in relation to other matters.

In this regard, it would mean that the Courts would have no regard for the dirty hands but would be blind to and only lay the emphasis on the clothes worn by the contemptuous party. This would make nonsense of the doctrine and would stultify its purpose by the most simple stratagem. A party who acts in a contemptuous manner before a Court or tribunal has dirty hands. These hands, so long as they remain unpurged are dirty and the dirt thereon does not attach to a case as much as it does to the person, whichever case he is prosecuting. This argument will therefor not be upheld.

A related issue would be with regard to the fact that the party who issued the offensive statement was not the present Applicant but the Prime Minister. This in our view bears no importance as the Applicant in *casu*, is in the employ of the Executive and has deposed as follows in paragraph 1 of his Founding Affidavit:-

> *"I am an adult Swazi male Employed by the Government of Swaziland as the Attorney-General of the Kingdom of Swaziland. I am a Principal Legal Advisor to Government as such I am entitled to depose to this affidavit ex officio...I do represent herein the interests of the Government of the Kingdom of Swaziland in this matter and more especially the office of the Director of Public Prosecutions who is tasked with the duty to handle bail applications generally."*

It is therefor apparent that the Applicant acts for and on behalf of the Government headed by the Prime Minister. In terms of the Rules, and the Government Liabilities Act, 1963 the Applicant can be cited in his nominal capacity. No significance can in the circumstances

attach to the fact that the Applicant is not the Government. We hasten to add that this was not however argued by the Applicant. There is, in view of this finding no reason why the Prime Minister cannot be ordered to purge his contempt.

A Government that publicly and unabashedly declares that it will defy Court Orders, whatever the purported justifications; and there are none in *casu,* must be ashamed to stand tall in the Community of Nations, Continental and Regional *fora.* Such conduct deserved to be frowned upon. Governments must be exemplary in both word and behaviour. For a Government to make such a bald declaration and be quick to warn its citizens not to do so is hypocrisy of the highest order. It is an exemplification of the phrase, "Do not do as I do, but do as I say."

This statement has drawn wide condemnation as can be seen from a statement by Their Lordships the Chief Justice and Deputy Justice of South Africa, dated 3rd December, 2002, which in part reads as follows: -

> *"The decision of the government of Swaziland to ignore the judgments of its highest Court is in effect a declaration that the government of that country does not respect the role of the Courts and the judiciary and does not consider itself to be bound by the law. When that happens Courts are not able to discharge their duties of upholding the law without fear or favour. Citizens are no longer protected by the law and there is a grave risk of lawlessness and arbitrary action."*

The situation being nurtured and birthed by the statement cannot be put better. It suffices that we repeat the timeless words which fell from the lips of Wilmot J. in **R VS ALMON (1765) 97 ER 94,** some 200 years ago. In that case one Almon published libels upon the court of the King's Bench and Lord Mansfield C.J. in relation to the conduct of that court in the General Warrants cases. He was proceeded with summarily in that court but the proceedings eventually failed on technical grounds. Wilmot J. however preserved the judgment he had prepared and this has since been regarded after delivery of the judgement as a leading authority on this aspect of the law. The learned Judge stated the following trenchant remarks:-

> *"The arraignment of the justice of the Judges, is arraigning the Kings Justice; it is an*

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

These words are apposite in this situation in view of the statement and its intended effect on the doctrine of separation of powers and the rule of law. It bodes ill for the respect of the Courts and His Majesty's Judges and in effect, the respect for the King and his justice. Quick and effective remedial action is therefor called for.

© **Court Order**

The Prime Minister will therefor be afforded an opportunity to purge his contempt. He is to issue a press statement of the same magnitude and file an affidavit before Court in which he: -

(a) unconditionally retracts each of the objectionable statements issued of and concerning the judgements in issue as underlined above;

(b) unreservedly apologises appropriately to each of the Judges of the Court of Appeal and the Judiciary at large, in particular, for questioning their probity;

(c) withdraws the instruction to all 'Government agencies' not to comply with the Orders of Courts; and

(d) undertakes that Government will abide by these and other judgements of the Courts of Swaziland without exception.

It is further ordered that this is to be done within seven (7) Court days from the date hereof. Should he default in issuing the statement and filing the affidavit as stated above, within the stipulated time limits, and until the Orders above are complied with, no application in which the Government is an Applicant, Plaintiff or Petitioner shall be heard and no papers to be filed by the Government shall be accepted by Courts of Swaziland until a Full Bench of this Court holds that the Government has purged its contempt. Provided that the above conditions shall not apply to criminal proceedings pending or to be instituted before the Courts of Swaziland.

This is without prejudice to right of the Director of Public Prosecutions to institute appropriate criminal proceedings possible against the Prime Minister in terms of our law.

The application is postponed *sine die.* Costs are reserved for future determination.

J.M. MATSEBULA
JUDGE

S.B. MAPHALALA
JUDGE

T.S. MASUKU
JUDGE