



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 53/2010

In the matter between:

THE KING

APPLICANT

AND

**SWAZILAND INDEPENDENT
PUBLISHERS (PTY) LTD**

FIRST RESPONDENT

EDITOR OF THE NATION

SECOND RESPONDENT

Neutral citation: *The King v Swaziland Independent Publishers (PTY) Ltd & Another*
(53/2010) [2013] SZHC88 (2013)

Coram:

M.C.B. MAPHALALA, J

For Crown

Attorney General
Majahenkhaba Dlamini

For Respondents

Advocate G. Marcus
Instructed by Attorneys
Sigwane & Partners

Summary

Contempt of Court by Scandalizing the Court – an application was made by the Director of Public Prosecutions for an order committing and punishing respondents for contempt – the application relates to two articles written and published by the respondents – the Court found that the said articles were intended and that they did have a tendency to bring the administration of justice into disrepute – section 24 of the Constitution relating to the right of freedom of expression and opinion discussed - the court found that judges and courts are open to criticism provided that the criticism is fair and legitimate and does not exceed accepted boundaries – the respondents found guilty of Contempt by Scandalizing the Court.

**JUDGMENT
17 APRIL 2013**

[1] An application was lodged by the Attorney General calling upon the respondents to appear before this Honourable Court on a date and time to be determined by this court to show cause, if any, why they should not be committed and punished for criminal contempt of court as a result of an article written by the second respondent and published by the first respondent and contained in the Nation Magazine of November 2009 entitled:

“Will the judiciary come to the party: Chief Justice Richard Banda need to rally his troops behind the Constitution of 2005?”

- (a) Which article was intended to interfere or was likely to interfere with the due administration of justice;
- (b) Granting that the *rule nisi* be served on the respondents by an officer of the Attorney General.
- (c) Alternative relief as the court may deem fit;
- (d) Costs of the application

[2] The *rule nisi* was granted by this Court on the 9th March 2010, and the respondents were called upon to appear in Court on the 21st April 2012 at 0930 hours to show cause, if any, why they should not be committed and punished for criminal contempt as a result of the said article written by the second respondent and published by the first respondent in the Nation Magazine of

November 2009 as alleged. The parties were further ordered to submit their heads of argument on or before 15th April 2010.

[3] Prior to the institution of these proceedings, the Director of Public Prosecutions issued a “Delegation of Authority to Prosecute” upon the Attorney General in terms of the powers conferred upon her under section 162 (5) of the Constitution of Swaziland Act No. 1 of 2005 as read with section 3 of the Director of Public Prosecutions Order No. 17 of 1973 and section 4 (c) of the Criminal Procedure and Evidence Act No. 67 of 1938. In terms of the “Delegation”, the Attorney General was authorised to prosecute the respondents for the Criminal contempt of court in respect of its article “Will the Judiciary come to the Party”. It was dated 24th February 2010.

[4] Section 162 of the Constitution establishes the office of the Director of Public Prosecutions and provides, *inter alia*, that the Director shall have the power to institute and undertake criminal proceedings against any person before any Court other than a Court martial in respect of any offence alleged to have been committed by that person. Section 162 (5) in particular, provides that the powers of the Director may be exercised by him in person or by subordinate officers acting in accordance with the general or special instructions of the Director.

[5] Section 3 of the Director of Public Prosecutions Order No. 17 of 1973 established the office of the Director of Public Prosecutions immediately after the repeal of the Independence Constitution of 1968; it provided, *inter alia*, that the powers, duties and functions vested in the Attorney General under the Proclamation (Decree No. 5) in so far as criminal proceedings are concerned shall from the date of coming into force of this Order, be vested in the Director of Public Prosecutions.

[6] Section 4 (c) of the Criminal Procedure and Evidence Act No. 67 of 1938 provides, *inter alia*, that the Attorney General may conduct prosecutions by any person delegated by him. It is common cause that in terms of the Independence Constitution of 1968, the Attorney General was not only the Principal legal advisor to the Government in respect of civil matters but he was also in charge of the prosecutions of criminal proceedings. The Director of Public Prosecutions Order No. 17 of 1973 as well as the Constitution of Swaziland Act No. 1 of 2005 have realigned the functions and duties of the Attorney General as well as the Director of Public Prosecutions; and, for the Attorney General to lawfully prosecute the criminal contempt proceedings against the respondents, a delegation of authority by the Director was required.

[7] In his founding affidavit the Attorney General contended that he was the applicant in these proceedings and representing the Director of Public Prosecutions. The first respondent is the official publisher of The Nation, an

independent monthly magazine; it is a registered company with limited liability and duly incorporated in terms of the laws of the country. The second respondent is the Manager and one of the directors of the company, he is also the Editor of The Nation Magazine.

[8] The applicant has alleged that in The Nation Magazine of November 2009, at pages 18 to 21, the second respondent wrote an article which was published by the first respondent. The lead title of the article is “Will the judiciary come to the party”? The sub-title of the article is “Chief Justice Richard Banda needs to rally his troops behind the Constitution of 2005”.

[9] The applicant quoted the summary of the article which appears immediately after the title of the article, and it states the following:

“The appointment of these new judges to the High Court and Industrial Court would be a turning point to Swaziland’s Judiciary. While the judiciary has stayed away from the Constitutional process that is taking place in the country, ordinary people will now look to the new justices to help the people get used to understanding what it really means to live in a Constitutional State”.

[10] The Attorney General argued that after reading the article, he got the impression that it was critical of both the Supreme Court and the High Court;

that it amounted to contempt mainly of the Supreme Court and to a lesser degree the High Court. According to him the article scandalises the Judiciary

[11] He alleged that on the 21st December 2009, he wrote a letter to the second respondent pointing out to him the contemptuous nature of the article in the event the respondents would wish to apologise to the Chief Justice; the respondents had fourteen days within which to respond, but they did not respond to the letter let alone acknowledging receipt of the letter. Since the Attorney General was doubtful whether the second respondent had received the letter, he served him for the second time and asked him to sign for the receipt of the letter; however, no response was received from the second respondent.

[12] The Attorney General has further cited certain passages of the article which, he argued, provided further evidence that the respondents were in contempt of the Courts. Paragraph 5.1 of the founding affidavit states the following:

“5.1 Some of the passages in the article which attracted my attention that the article could scandalise the courts and that its author and publisher were in contempt of the courts read:

(1) The Judiciary despite being the custodian of the ideals of a Constitutional State, has yet to show its hand and join the party towards creating a society whose values are based on the ideals of the rule of law.

- (2) **Could the appointment of the four eminent jurists signal a change of how the judiciary seeks to participate in our changing society.**

- (3) **The main reason why the judiciary has been slow to adapt to the values brought about by the new order of 2005 has to do with the events of November 28, 2002 when the government, led by the current Prime Minister overthrew a decision of the Court of Appeal which sought to stop the eviction of some Swazis from Macetjeni and kaMkhweli.**

- (4) **When Jan Sithole, Mario Masuku and a group of prodemocracy organisations, approached the Supreme Court early this year to ask for the judges' opinion on whether the Constitution allowed for political parties the Justices, in the majority decision, were dismissive of the question to the point of being contemptuous to Swaziland's stance in relation to the Constitution.**

- (5) **Justice P.A.M. Magid, sitting together with Justices M.M. Ramodibedi, J.G. Foxcroft and A.M. Ebrahim delivered a stunning majority judgment that equated Swaziland in 2009 with the medieval politics of England.**

- (6) **This, it turns out, was the sole basis on which they refused to unpack the Constitution and interpret it in a manner that brings Swaziland in line with the 21st century values which we all live by today.**

- (7) **They went further to compare Swazi politics to the very repressive and failed political systems of East Germany and the Soviet Union when Justice Magid declared: Democracy is, I would suggest, like beauty, to be founding in the eyes of the beholder. Similarly, I suggest with Swaziland.**

- (8) Essentially what the eminent Justices of the Supreme Court were telling us in this judgment was that they could not be bothered to interpret the Constitution; that if Swaziland wants to create a repressive society, then so be it.
- (9) Again, the message sent by the judges here is that, whereas it is well known that academics play a crucial role in shaping the law, Swaziland has become so irrelevant to the world as we live in today to the extent that academic thinking has no place in our society.
- (10) If one reads this judgment in its abstract form, you have to agree with Justice Albie Sachs's quote earlier: every judgment is a lie, not in its content, but in the story it tells.
- (11) If we are to understand that the promulgation of the Constitution of 2005 sought to change our way of life insignificantly, then it is fair to say that the judgment is out of order. This point is particularly reinforced by the fact that the issues brought to the Court at the time had much to do with the question of fundamental rights.
- (12) To discuss off-hand the question of fundamental rights, as the Court did, is criminal. To rubbish academics, as the judges did, simply because their views would not promote the agenda in this judgment is treasonous. (My emphasis)
- (13) The question, thus arises again: what does the appointment of these judges mean, in real terms, to jurisprudence in Swaziland?
- (14) Can Justices Sarkodie, Hlophe, Maphalala and Mazibuko do what justice Ngoepe said was to 'bring new minds to bear on issues not simply to rubber-stamp prior judgments; be their masters voice?

(15) What ordinary Swazis now need is for the judiciary to begin to show us that this Constitution is ours and that we can use it to better our lives.

(16) The tradition among judges of higher Courts has always been one of big men who live mysterious lives away from ordinary folk; men to be feared and revered, whose standing in society is much above even those of highest authority. In other countries, like South Africa, that thinking has changed....

(17) This country desperately needs to see a judiciary that works to improve the people's lot. It is up to these men to join people like Justice Masuku in making this a better country.

(18) As the controversial Judge John Hlophe of South Africa is quoted to have once said: '*Sesithembele kunina ke*'.

(19) The judiciary, judges and lawyers need to play their role in the Constitutional dispensation."

[13] The Attorney General at paragraph 5.2 of the founding affidavit proceeded to state what he understood the article to mean:

"5.2 In reading the article, the understanding which I got, and I submit, the understanding which the ordinary Swazi reader (of the article) is likely to get, is that the article means, *inter alia*-

(1) That the Supreme Court judges have failed the people of Swaziland by keeping aloof, leading mysterious lives and not being involved in the political aspirations of the Swazis.

- (2) That the Supreme Court judges cannot be trusted to do justice in Constitutional cases since “they could not be bothered to interpret the Constitution”; are not interested in upholding fundamental rights; their judgment (in Supreme Court case No. 50/2008) was deliberately wrong and “out of order” because they had an extraneous or illicit agenda to promote in that case since they had not forgotten “the events of November 28, 2002”.**
- (3) That the Supreme Court judges (and the judiciary in general) are not independent or impartial in the administration of justice.**
- (4) That Supreme Court case No. 50 of 2008 was so badly or incompetently handled that their Lordships did not only commit a crime but are also guilty of (high) treason, in their “stunning majority judgment”.**
- (5) The new or recently appointed judges are urged to break new ground and “turn the court around” in the sphere of fundamental rights.**
- (6) That the new judges should join the struggle for multiparty democracy and help the political organizations in the country to achieve through the courts what they (political organisations) have so far failed to achieve by themselves.**
- (7) That the people of Swaziland must turn their back (lose confidence) in the currently constituted Supreme Court and have faith in or pin their hopes on the newly appointed judges.**

[14] The Attorney General concluded by stating that in his understanding of the article its author seeks to influence the judiciary to adopt a particular attitude in their future dealing with fundamental rights cases. He further argued that the article impugns the honour, dignity, authority, independence and impartiality of

the judges of the Supreme Court and the High Court by “poisoning the Fountain of Justice before it begins to flow”; and, that the article is contemptuous of the Courts.

[15] The Attorney General brought a second application on the 22nd March 2010 in respect of the same parties under criminal case No. 68/2010. He sought the following orders:

- “(a) Calling upon the respondents to appear before this Honourable Court on a date and time to be determined by this court to show cause, if any why, the respondents should not be summarily committed and punished for criminal contempt of court as a result of an editorial written by the second respondent and published by the first respondent and contained in The Nation of February 2010 entitled: Speaking my Mind”, which editorial was intended to interfere or likely to interfere with the due administration of justice.**
- (b) Granting that the rule nisi be served on the respondents by an officer of the Attorney General.**
- (c) Alternative relief as the Court may deem fit.**
- (d) Costs of the application.**

[16] In his founding affidavit the Attorney General alleged that in The Nation magazine of February 2012, page 7, an editorial comment under the name of the second respondent was published by the first respondent. The editorial is entitled “Speaking My Mind”. The article relates to an event on the 15th

January 2010 where the Acting Chief Justice, as he then was, was speaking in his official capacity as head of the Judiciary during the official opening of the Legal Calendar. The Attorney General argued that the editorial went far beyond to strike at the private person of the then Acting Chief Justice.

- [18] The Attorney General further argued that the following paragraph in the said article is more of a threat to the physical well-being of the Chief Justice than a friendly warning; and, that the editorial is intimidating if not terrorising to the judge giving rise to a clear case of contempt of court. The paragraph states the following:

“The good thing for Justice Ramodibedi is that Swazis, because of their long, rich and strong traditions, will teach him what culture really is. They will not sit him down and give him a lesson though. Because he is a well educated man, on the road trip back home to Lesotho when his time is up, Justice Ramodibedi will reflect on his tenure in Swaziland and he will become the man he is most certainly not right now. But, above all, he will know the Swazi people, hitherto mistakenly believed by the rest of the world to be submissive to blind authority. He will then realise that Swazis are not fools. Again I say, Justice Ramodibedi must not misinterpret the silence to his remarks, or think that in getting his way he had beaten the judges of the High Court into line. For I say again – and I beg the good judge to know and understand this saying – awulali Ngwane Kulala emehlo! It’s important, Your Worship! It is very important! Bheki Makhubu 1 February 2010.”

[17.1] The Attorney General argued that the editor's comment is not just a criticism but a violent and scurrilous attack on the integrity, authority and standing of the Chief Justice; and, that the article seeks to undermine and lower the dignity and office of the learned judge.

[18] The comment in the magazine, in part reads as follows:

- 3.2. (1) **When Chief Justice (name given) stood before his peers and the country as a whole at the official opening of the High Court last month, and went into an unprecedented show of beating his breast, Tarzan-style, calling himself a 'Makhulu Baas', I almost wept. I am not sure whether I almost wept for the man himself or the levels to which our judiciary has sunk.**
- (2) **Here is a man, honoured by King Mswati III ... behaving like a high school punk.**
- (3) **Justice (name given) whatever he might think of himself sunk to such a terrible low that day. He stooped below the floor. What extra-ordinary arrogance!**
- (4) **Those of us who take a keen interest in general issues know that a person of Ramodibedi's standing should behave with decorum Judges, by tradition, do not behave like street punks.**
- (5) **Ramodibedi's choice of words was very interesting. He calls himself a 'Makhulu Baas', a word he dug up from the cesspit of apartheid South Africa. He now comes to this country to use it**

against us.... If Ramodibedi suffers from a hang-over of apartheid he should not take it out on us. (My emphasis)

- (6) What is most disturbing about Justice (name given)'s behaviour is that he was exercising his authority mainly on his colleagues, the judges of the High Court. Not only did the Acting Chief Justice lower his own stature, but he brought the whole house down.
- (7) I do not know Justice (name given) from a bar of soap... I do know some of the judges he thought he was giving a dressing down and can say that in the time they have practised on the Bench, they have behaved in a manner only to be expected of people of their standing. Decorum, Your Worship, decorum!
- (8) Because people of Justice Ramodibedi's standing are appointed to office by King Mswati III, I will probably never know how he was selected to this position. I can say, though, that from his remarks he is a man who does not inspire confidence to hold such high office. How can we respect a man who speaks such language as he did? (My emphasis).
- (9) As it were the judicial system in this country is in shambles. This is why you have such a high incidence of murder yet nobody ever seems to stand trial.
- (10) Justice (name given) is a guest in this country. Anyone who understands cultural etiquette will know that you do not just walk into another man's homestead and beat your breast telling everyone you are the boss. It is downright rude.
- (11) Because he is a well educated man ... he will become the man he is most certainly not right now.

(12) But above all, he will know the Swazi people hitherto mistakenly believed by the rest of the world to be submissive to blind authority (sic). He will then realise that Swazis are not fools.

(13) Again I say Justice (name given) must not misinterpret the silence to his remarks or think that in getting his way he has beaten the judges of the High Court into line.”

[19] The Attorney General further argued that the second respondent used language which was despicable, derogatory and demeaning directed to the Chief Justice. He argued that the word “Makhulu Baas” is common currency in Southern Africa; and, that the second respondent had decided to read the expression in bad faith in order to pour scorn and ridicule to the Chief Justice. According to him this was contemptuous.

[20] The Attorney General contended that the editorial seeks to drive a wedge between the Chief Justice and the other Judges of the High Court by alleging that the other judges have behaved in a manner only to be expected of people of their standing. He averred that this implied that the behaviour and sense of propriety of the Chief Justice was less than exemplary.

[21] He argued that the attack on the Chief Justice was reckless and without any justification and that it was intended to show that the Chief Justice does not deserve the position and honour conferred upon him by the King. He contended that these allegations are not only tendentious but clearly

mischievous intended to demean, disparage and discredit the learned judge and encourage the general public and in particular the other judges of the High Court to disrespect him. He argued that further evidence of the contemptuous attitude of the respondents was the allegation that the Chief Justice is a man who does not inspire confidence to hold such a high office.

[22] He decried the fact that the respondents described the head of the judiciary as a “high school punk” or a “street punk”. He described such a language as very demeaning and that it constitutes a declaration of unmitigated and unsolicited contemptuous ridicule for the person and office of the Chief Justice.

[23] He argued that the publication is not only hostile and scandalous of the Chief Justice but that it was also personal and insulting. He contended that the publication seeks to set the Chief Justice at loggerheads with the people of Swaziland and the authorities of the country. It was further argued that the publication constitutes an impeachment of the King’s wisdom and goodness in the choice of his judges. Furthermore, that the editorial excites in the minds of the people a general dissatisfaction with all judicial determinations and that it indisposes their minds to obey them.

[24] The Attorney General, in conclusion, argued that the editorial does not constitute a fair, temperate and legitimate criticism to which our courts are generally open; and, that it interferes with the performance not only of the

Chief Justice but the other judges in dispensing justice. According to his analysis, the editorial constitutes the offence of criminal contempt of scandalising the court by the scurrilous abuse of the Chief Justice and the judiciary as a whole.

[25] It is common cause that a *rule nisi* in respect of the second article was issued on the 22nd March 2010; the respondents were ordered to appear in court on the 21st April 2010 to show cause, if any, why they should not be committed and punished for criminal contempt of court as a result of an editorial written by the second respondent and published by the first respondent and contained in The Nation of February 2010 entitled: “Speaking My Mind”, which editorial was intended to interfere with the due administration of justice. It was further ordered that an officer in the Attorney General’s Chambers should serve the order upon the respondents. The court also ordered that Criminal case No. 53/2010 be consolidated with Criminal Case No. 68/2010 under Criminal case No. 53/2010.

[26] On the return day, being 21st April 2010, there was an urgent interlocutory application filed by the Editors’ Forum (Intervening Party) for an order directing that the applicant be joined as a third respondent in the proceedings under Criminal case No. 53/2010. A consent order was issued that the applicant be joined in the proceedings as a friend of the court. The parties in the main application further agreed to a consent order that the matter be removed from

the Roll to take its normal course, and that the matter be referred to the Registrar of the High Court to allocate a date of hearing in the next session.

[27] The application is opposed by the respondents. The second respondent deposed to an opposing affidavit on behalf of both respondents. Three points in *limine* were raised: firstly, that the procedure used in the present case is both unlawful and unconstitutional. He argued that ordinarily criminal proceedings are attended by a range of safeguards designed to protect individual rights, and, that his rights have been violated because he has not been furnished with a charge sheet and/or an indictment; and, that ordinarily, he would be entitled to request further particulars in terms of the ordinary rules relating to the criminal procedure. He further argued that in terms of the ordinary rules of criminal procedure he would be entitled to raise objections to the charge or indictment on a variety of grounds before being called upon to plead. He also argued that the procedure adopted in the present case is inherently unfair and prejudicial and that it violated his constitutional right to be presumed innocent, and, that the onus is upon him to prove his innocence contrary to section 21 (2) (a) of the Constitution.

[28] The second respondent argued that section 21 (2) (b) of the Constitution guarantees to an accused person the right to be informed “in sufficient detail of the nature of the offence or charge; he argued that this is not the case in this matter. He further argued that there is no basis in law why the ordinary

criminal procedure has not been followed; and, that the procedure adopted in this matter was a radical departure from the fundamental safeguards enshrined in the Common law, the Criminal Procedure and Evidence Act as well as the Constitution. He called for the orders to be discharged on that basis.

[29] He further argued, in *limine*, that the Attorney General lacks jurisdiction to institute the proceedings. He argued that it is the Director of Public Prosecutions who has the power to institute criminal proceedings in accordance with section 162 (4) of the Constitution. He contended that in terms of section 77 of the Constitution, the Attorney General is the Principal Legal Advisor to the Government and the King, and, that he does not have the power to prosecute in his own right or under delegated authority.

[30] The second respondent argued that it is not competent for the Attorney General to represent the Director of Public Prosecutions in terms of the Constitution. In the alternative he argued that there has been no lawful delegation of authority by the Director of Public Prosecutions. He contended that the Director of Public Prosecutions in the performance of his duties is enjoined in terms of section 162 (6) of the Constitution to have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process. Furthermore, that the Director should be independent and not be subject to the direction or control of any other person or authority. To that extent he argued that the procedure adopted in this matter constitutes an abuse

of the legal process which the Director is enjoined to prevent. According to the second respondent, if the Director had instituted these proceedings, he would not have adopted this procedure. He called for the dismissal of the two cases.

[31] He also argued in *limine* that the contents of the two articles do not constitute contempt of court. He averred that in light of section 24 of the Constitution which guarantees the freedom of expression as well as the relevant case law in comparable jurisdictions, the respondents have not committed the offence of contempt of court. He argued that the opinions expressed in the articles fall within the bounds of legitimate comment and criticism which is not only tolerated but protected in other comparable jurisdictions.

[32] The second respondent regards himself as a loyal and patriotic citizen who is committed to the promotion of democracy in the country. He contends that in his capacity as Editor of The Nation, he has always sought to act in the best interests of the country; and, to present his readers with a range of opinions to enable them to be better informed and sensitive to important issues which affect their lives. He avers that when he is critical of individuals or institutions in his writings, it has not been out of personal ill-will or animosity but it was to advance what he believed to be legitimate and constructive criticism. He emphasised that this has informed his approach in both of the articles which form the subject-matter of the present proceedings. He believes that the judiciary performs a critical function in all societies and that this

country is no exception. He contends that judges are not above criticism where the criticism remains within certain limits; and to that extent, he argued that his articles constitute legitimate and constructive criticism which should be protected by the law.

[33] The Editor argued that judges wield significant power; that in criminal proceedings, they have the power to deprive individuals of their liberty, and, in civil proceedings, judges have the power to make significant decisions which affect the lives of those who appear before them. He contends that judges exercise this power not by election but by appointment; and, that once appointed judges enjoy significant security of tenure and their independence is constitutionally guaranteed. He avers that it is for these reasons that judges the world over recognise that they are subject to criticism; and, that it is particularly the case in this country in light of the constitutional guarantee of freedom of expression.

[34] He denies any intention on his part to bring the Judiciary into disrepute or to scandalise the judiciary as suggested by the Attorney General. He contends that his intention is to ensure that judges perform their constitutionally mandated position. He concedes that he did not respond to the letters by the Attorney General because he was advised that the Attorney General has no *locus standi* to institute the present proceedings. He denies that the passages highlighted in the articles scandalize the courts or that they disclose any

offence as alleged. He argued that on a fair and objective assessment of the articles read in their context and as a whole, no offence is disclosed or is any offence intended. However, he admits that the Chief Justice was acting in his official capacity as head of the judiciary on the occasion of the official opening of the Legal Calendar but denies that the first article is intimidating to the judge or that it constitutes contempt of court.

- [35] With regard to the second article, the respondent accepts that the Chief Justice describes himself as “Makhulu Baas”. He contends, however, that it is such a description that has made him the legitimate target of criticism in the following respects: firstly, that the phrase “Makhulu Baas” means “big boss”, and that it was vulgarisation constructed by mine bosses in apartheid South Africa to enable them to issue commands to black workers. Secondly, that the phrase constitutes a language which is demeaning to black workers and was a product of arrogance emanating from mine bosses who considered black workers and their languages unworthy of dignity and respect. He contends that the mining dialect has ceased to be spoken today, and even when in use it was not used outside the mining context. He argued that the mining dialect with its pidgin vocabulary cannot be referred to as a common and current prose within the region. He contends that given that there is no dispute that the Chief Justice so described himself, such criticism as was levelled against him fell within legitimate bounds particularly because such description does not relate to his

judicial functions; and, that he does not have to be a “Makhulu Baas” in order to legitimately discharge his duties.

[36] In his submissions the Attorney General argued, in respect of count 1, that the article tended or was calculated to bring the said judges into contempt or to lower their authority or to interfere with the due administration of justice. In respect of count 2 the Attorney General argued that the article was intended to violate or impugn the dignity, repute or authority of the Chief Justice; and that it was calculated or intended to bring into contempt, public obloquy, and disrepute with the due course of the administration of justice. He argued that the two articles read in their entirety show that the respondents are guilty of contempt of court of the species called ‘scandalising the court’. He contended that this court has an inherent and statutory jurisdiction to hear and decide this matter. He referred the court to section 139 (3) of the Constitution which provides the following:

“139. (3) The superior courts are superior courts of record and have the power to commit for contempt to themselves and all such powers as were vested in a superior court of record immediately before the commencement of this Constitution.”

[37] It is common cause that the crime of contempt of court may take a variety of forms; however, all contempt of court involves an interference with the due

administration of justice either in a particular case or as a continuing process as well as impeding, and perverting the course of justice. The punishment for contempt of court is to keep the streams of justice clear and pure. Contempt of court is a criminal offence but it is not tried on indictment. It is tried summarily by a judge. In terms of the law judges who are scandalised can punish the offender, not to protect themselves as individuals but to preserve the authority of the Court. Contempt of Court is punished because it undermines the confidence not only of the litigants but also of the public as potential litigants in the administration of justice by the Courts. See *A.G. v. Times Newspapers Ltd* (1973) 3 All ER 54 at 73.

[38] Lord Diplock puts it more succinctly in the case of *A.G. v. Times Newspapers Ltd* (supra) at page 72:

“The due administration of justice requires, first, that all citizens should have unhindered access to the constitutionally established courts of criminal and civil jurisdiction Secondly, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and, thirdly, that once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.”

[39] Any conduct which tend to imply bias or other judicial misconduct on the Courts and judges, and, which tend to impugn their integrity, independence or authority constitutes contempt of court; an underlying result would be the loss of confidence in the Courts and system of justice by members of the public. This would lead, inevitably, to anarchy and revolution. However, it should be borne in mind that the objective of the law of contempt is not to shield the judiciary or the judicial system from criticism. Similarly, it is not intended to protect the decision of a judge in a particular case from appropriate comment. In every case of contempt by scandalising the court, it has to be shown that justice had been flouted and not the individual court or judge. The conduct complained of must be calculated to undermine the public confidence in the proper functioning of the courts. See the case of *Solicitor General v Radio New Zealand Ltd* (1994) 2 LRC 116 at 121.

[40] *Lord Russell CJ in R. v. Gray* (1900) 3 ALL ER Rep 59, 62 (16 TLR 305 described contempt by scandalising the Court itself in the following respect:

“Any act done or writing published, calculated to bring the court or a judge of the court into contempt or to lessen his authority is a contempt of court. That is one class of contempt. Another class is any act done, or writing published calculated to obstruct or interfere with the due course of justice, or the lawful process of the court. That is another class of contempt. The former class belongs to that category which Lord Harwicke characterised as “scandalising the court itself. But that description of that class is to be taken subject to one qualification - and/or important

qualification. Judges and courts are alike open to criticism if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good. No court could or would treat that as contempt ...; but it is to be remembered that... the liberty of the press is no greater and no less than the liberty of every subject of the Queen.”

[41] His Lordship further defended the summary nature of contempt proceedings and held that it was not new but as old as the Common Law itself. However, he cautioned that this jurisdiction should be exercised with scrupulous care; and, that it should be exercised where the case is clear. If the case is not clear, the Attorney General should proceed in accordance with the Criminal Trial Procedure.

[42] It has been recognised in various jurisdictions that contempt of court should be dealt with summarily and speedily. This has been the case in England, New Zealand, Australia, South Africa and even this country. The Director of Public Prosecutions or the Attorney General after being delegated by the Director obtains a *rule nisi* calling upon the respondent to show cause why he should not be committed for contempt. This was the situation in *AG v. Newspaper Publishing* PLS (1987) ALL ER 276; *AG v. Leveler Magazine Ltd* (1979) 1 ALL ER 745; *AG v. Times Newspaper Ltd* (1973) 3 ALL ER 54; *Solicitor General v. Radio New Zealand Ltd* (1994) 2 LRC 116; *Reg v. Gray* (1900) 3 ALL ER Rep 59 (16 TLR 305), *In re; Dornner 1891* (4) SAR 64; *In re Neething 1874* Buch 133; *Rex v. Editor of the New Stateman, Ex Parte Director*

of Public Prosecutions (44TLR 301); *Attorney General v. Crockett* 1911 TPD 893.

[43] In the case of *Attorney General v. Crockett* (supra) the Attorney General obtained a rule nisi calling upon the respondents to show cause why he should not be committed for contempt. The respondent had sworn to an affidavit which he sent to the Registrar in which he accused a magistrate in violent language of bias and malice. *De Villiers JP* in his judgment accepted that the offence of contempt may always be dealt with summarily by a superior court but observed at pp 911-912:

“If the contempt is not committed in facie curiae, the only course open to the magistrate is to lay an information before the Attorney General, who will then determine whether or not it is to go before a judge or jury; and later, it has been repeatedly pointed out by judges in England and in South Africa that from its very nature a contempt a court should be dealt with speedily and summarily, if the contempt is notorious ... but, if the facts are doubtful and complicated, the trial should take its ordinary course.”

[44] In the same case of *Attorney General v. Crockett* (supra) at p. 914 *Wessels J* explained the necessity for dealing with contempt in a summary nature:

“Now the principle upon which the Dutch courts punished for contempt of court was that it was in the interests of the State to keep the

administration of justice untainted and to quash any attempt to defeat and obstruct the due course of justice.”

[45] *Bristowe J* in the same case of *Attorney General v. Crockett* (supra) at p. 925-6 observed the following:

“Probably in the last resort all cases of contempt ...are to be referred to the necessity for protecting the fountain of justice, maintaining the efficiency of the courts and enforcing the supremacy of the law. The jurisdiction cannot be used to gratify the spleen or vindicate the wounded feelings of a particular individual. It is exercised in the interests of the public, because the court of law exists for the sake of the public and it is for the public benefit that their authority should not be impaired and that the judges themselves should be protected from all external influences which might persuade or terrorise them. Nothing turns on the circumstances that in the present case the offensive matter was contained in any affidavit.... Matter which is in itself a contempt of court cannot be protected because it is put into the form of an affidavit.”

[46] Similarly, in Malaysia the courts have dealt summarily with cases of contempt of court. *His Lordship Vincent Ng JC* observed the following in *Lee Gee Lam v. Timbalan Menteri Dalam Negeri* (1994) 1 LRC 203 at pp 210-211:

“It may be seen from these passages that contempt is of two kinds: V1Z (a) that which interferes with the due course of justice and pollutes the stream of justice in so far as it concerns parties to a cause, as for instance, when comments are made on a pending case; and (b) that which is calculated to bring a judge into contempt or lower his authority or to

interfere with the lawful process of the court. There can be no doubt therefore that any act which is calculated to undermine the authority of the court and to disturb the confidence of the citizen in the unquestioned effectiveness of its orders... would be contempt. Ofcourse, this is not to say that every act will necessarily be treated as contempt by the court in whom the drastic and summary jurisdiction is vested, not for the personal glorification of a judge in his office, but for the effective maintenance of the strong arm of judicial administration.”

[47] It has also been accepted that in determining whether a publication is contemptuous, regard must be had to the passage as a whole and not to isolated paragraphs of the publication. In the case of *Director of Public Prosecutions v. The Belize Times Press Ltd and Another* (1988)LRC (Const) 579, the Court dealt with this issue. The respondent published an article entitled “predicament of change”, allegedly attacking various organs of the State including the Supreme Court. The Director of Public Prosecutions applied ex parte for an order of committal against the respondent and its editor for contempt of the Supreme Court and its judges in respect of the article. The respondents were found guilty of contempt. *His Lordship Contran CJ* observed at pp583-4:

“In order to determine whether or not leave ought to be granted not only the passage appearing under the subhead ‘the courts’, but every passage or sentence touching the Supreme Court that appeared in the article were taken into account It is not possible to come to an intelligent decision on isolated passages or words and leave the rest. The words have to be read in context of the totality of the article in order to find out what the

writer intended to convey in his treatment of the subject of the Supreme Court, its judges and the administration of Justice.”

[48] At pages 584-585 the learned Chief Justice dealt with the essential requirements of the contempt of scandalizing the court, and he stated the following:

“...before a discretion can be exercised in favour of an applicant who wishes to institute proceedings in respect of contempt of court of the type described as scandalising the court by scurrilous abuse of the court as a whole and imputing to it partiality, there must be: firstly, a clear *prima facie* case in the sense that there must be a case to go before a criminal court that it is so clear at first sight that it is beyond argument that there is a case to answer; secondly, the contempt must be a serious one, so serious that it is proper for the criminal law to be invoked; and thirdly, the question of the public interest must be taken into account; so that the judge has to ask himself the question: does the public interest require the institution of contempt proceedings?”

[49] At page 587 His Lordship again reiterated the need to consider the article as a whole when determining the existence of contempt. He observed the following:

“Where the contempt is published in a newspaper article, and the whole article is produced for the perusal of the court, the whole article is in evidence and in the determination of guilt or otherwise, the court must look at all the passages in the article in order to be satisfied whether or

not the written publication was calculated to bring the court into contempt or lower its authority or bring it into disrepute and disregard.”

[50] *His Lordship Conran CJ* at pp589-590 further supported and justified the summary nature of the offence of contempt and he stated the following:

“The proceedings here are summary and not an ordinary trial. The respondents have been ordered to appear to show cause why they shall not be punished for contempt. In this particular type of contempt, the only evidence required ... is the article itself, and the only opinion that matters... is the opinion of the court after hearing arguments. There were no witnesses for the prosecution to cross examine as to fact and the issue of breach of this provision of the Constitution does not therefore arise.”

[51] It is true that in the United States of America, the offence of Contempt by Scandalising the Court is no longer recognised. In *Bridges v. State of California* 314 US 252 (1941), all the members of the Supreme Court were agreed that there is no such offence in the United States of America. In South Africa the authority to punish the offence of scandalising the court summarily, was given in 1874 by the Cape Supreme Court *in re Neething* (1874) 5 Buch 133. *Kotze CJ in In re Phelan* (1877) *Kotze* 5 at 7 described this offence as follows:

“No principle of law is better established than this: that any publications or words which tend or are calculated to bring the administration of

justice into contempt, amount to contempt of court. Now nothing can have a greater tendency to bring the administration of justice into contempt than to say, or suggest, in a public newspaper, that the judge of the High Court of this territory, instead of being guided by principle and his conscience, has been guilty of personal favouritism, and allowed himself to be influenced by personal and corrupt motives, in judicially deciding a matter in open court.”

[52] In Zimbabwe in *Re Chinamasa* (2001) 2 SA 902 (25) 2 at 910-911 His Lordship Chief Justice Gubbay observed the following:

“There are two modes of conduct which fall within the scope of criminal contempt. First, there is contempt in facie curiae which encompasses any word spoken or act done within the precinct of the court that obstructs or interferes with the due administration of justice, or is calculated to do so. Secondly, the offence may be committed ex facie curiae by words spoken or published or acts done which are intended to interfere with, or are likely to interfere with, the fair administration of justice. An example of this type of contempt is that described, as ‘scandalising the court’. It is committed by the publication, either in writing or verbally, or words calculated to bring a court, a judge of a court, or the administration of justice through the courts generally, into contempt. It need not be an attack directed at any specific case, either past or pending, or at any specific judge. It is sufficient if it is a scurrilous attack on the judiciary as a whole, calculated to undermine the authority of the courts and endanger public confidence, thereby obstructing and interfering with the administration of justice.”

[53] The learned Chief Justice acknowledged at page 1305 of his judgment that there are some legal writers and a few judges who have been vehement in their criticism of the recognition of scandalising the court as an offence. They argue that the basic assumption embodied in the offence that public confidence in the administration of justice would be undermined by comments that tend to lower the authority of the court is highly speculative. They contend that an intelligent and sophisticated public should evaluate the merits of the comments rather than the judiciary which in effect acts as both prosecutor and judge. Furthermore, they hold the view that courts like other public institutions should be open to lively and constructive criticism and that they do not need special rules for protection.

[54] After acknowledging that the contempt of scandalising the court is still a recognised common law offence in Zimbabwe, he quoted with approval *Cory JA in R. V. Kopyto* (1988) 47 DLR (4th) 213 (ONt. CA) at 227 as a proper response to the criticism levelled against the continued existence of the contempt of scandalising the court. *Cory JA* said the following:

“The courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens but also for the resolution of disputes between the citizen and the State in all its manifestations. The more complex society becomes the greater is the resultant frustration imposed on citizens by that complexity and the more important becomes the function of the courts. As a result of their

importance the courts are bound to be the subject of comment and criticism. Not all be sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered that are not felicitously worded. Some criticism may be well-followed, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy. Rules of evidence, methods of procedure and means of review and appeal exist that go far to establishing a fair and equitable rule of law. The courts have functioned well and effectively in difficult times. They are well-regarded in the community because they merit respect. They need not fear criticism nor need they seek to sustain unnecessary barriers to complaints about their operations or decisions.”

[55] In conclusion His Lordship stated that the recognition of the contempt of scandalising the court is not to preserve the dignity of the court but to protect public confidence in the administration of justice. He further observed that this contempt is not intended to protect the tender and hurt feelings of the judge; similarly, that it does not extend to hostile criticism on the behaviour of a judicial officer unrelated to his performance on the bench, and, that such attack should be dealt with under the law of defamation. He emphasised that contempt should be treated summarily in relation to concerns which are pressing and substantial and of sufficient importance to override the constitutionally protected freedom. He noted that the institution of criminal proceedings at the instance of the Director of Public Prosecutions with all the attendant delays, would be too dilatory and too inconvenient to offer a satisfactory remedy.

[56] In *AG v. Baker and Others* 1929 TPD 996, a *rule nisi* was issued on the respondents to show cause on a date stated why they could not be committed to prison or otherwise punished for contempt of court in respect of an article they published charging that the conduct of a trial magistrate was an “exhibition of magisterial imbecility and generally improper”. Counsel for respondents did not deny the contempt but mitigated. The case had been concluded when the publication occurred. *His Lordship Tindall AJP* at pp 997-8 stated the following:

“In the case of *McLeod v. St Aubyn* (1899) AC 549 Lord Morris... said this: committals for contempt of court are ordinarily in cases where some contempt in facie of the court has been committed or for cases pending in the courts. However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself. Lord Hardwicke so lays down without doubt in the case of *In re Read and Tuggonson*. He says, ‘one kind of contempt is scandalising the court itself’. The power summarily to commit for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person.... Committal for contempt of court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice.... It is a summary process and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases....”

[57] *His Lordship Tindall AJP* explained that the respondents were entitled to criticise the decision of the magistrate within certain recognised limits. He

quoted with approval the decision of *Rex v. Davies* (1906) KB 32 where the learned *Judge Bowen LJ* explained the basis for placing limits to criticism of the courts. At page 998-9, *Bowen LJ* stated the following:

“ ‘The object of the discipline enforced by the Court in the case of contempt ... is not to vindicate the dignity of the Court or the person of the judge, but to prevent undue interference with the administration of justice.’ In that judgment a statement of Wilmot CJ was quoted to this effect: “The real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone... Attacks upon judges, ...excite in the minds of the people a general dissatisfaction with all judicial determinations... and whenever men’s allegiance to the laws is so fundamentally shaken, it is the most fatal and 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 giving justice that free, open, and unimpaired current...’ “.... It is perfectly plain that the article does scandalise the administration of justice and that the first respondent in writing it travelled far beyond the limits of legitimate criticism.”

[58] In *Chokolingo v. Attorney General of Trinidad and Tobago* (1981) 1 ALL ER 244 (PC) *Lord Diplock* said the following at p. 248:

“Scandalising the Court’ is a convenient way of describing a publication which although it does not relate to any specific case whether past,

pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice.”

[59] With regard to the summary procedure in relation to the offence of Contempt of Court, *Burchell* and Milton in their book entitled Principles of Criminal law, 2nd edition at page 702 state the following:

“Unlike the position in other crimes and where prosecution must be commenced by service of a summons or indictment, contempt of court may be prosecuted summarily. In this procedure the court before whom the contempt is committed may there and then sentence the contemnor. In cases of contempt committed in *facie curiae* the court can act immediately and without any formality In contempt committed *ex facie curiae*, the offender is summoned on notice of motion to appear before the court to show cause why he should not be summarily punished for contempt.”

[60] It is argued by the respondents, in *limine*, that the summary procedure employed in this case is both unlawful and unconstitutional. It is not in dispute that this procedure has been employed for centuries. Contempt of court, even civil contempt is a criminal offence. The Crown is at liberty to prosecute the offence either summarily or in terms of the ordinary criminal procedure; the decision on which procedure to employ lies within the discretion of the Crown and it is a prerogative of the Crown. The authorities quoted in the preceding paragraphs show that the summary procedure is well settled. Section 139 (3)

of the Constitution provides inter alia, that the superior courts are courts of record and have the power to commit for contempt to themselves and all such powers as were vested in a superior court of record immediately before the commencement of the Constitution. It is evident from the subsection that the procedure for committal for contempt is not prescribed; and, this presupposes that the procedure applicable prior to the coming into force of the Constitution is still applicable. The Constitution does not abolish the Common Law summary procedure in this country; instead, it has reaffirmed it.

[61] The Summary Procedure does not offend section 21 of the Constitution as alleged or at all. It is also not true that this procedure erodes the usual safeguards accorded to accused persons. The founding affidavit in a summary contempt proceedings clearly sets out the basis of the application and the and the particulars of the charge preferred against the respondent in sufficient detail to enable him to plead; this is the case even in this matter. The application for committal for contempt complies with section 21 (1) of the Constitution in so far as the presumption of innocence is concerned. The Court merely issues a *rule nisi* calling upon the respondent to show cause why he should not be committed for contempt.

[62] The respondent is given an opportunity to respond to the allegations; in addition, he is entitled to file a Notice to Raise Points of Law if the allegations

do not disclose an offence. It is a principle of our law that no person should be punished for contempt of court unless the offence charged against him is distinctly stated with sufficient particularity to enable him to respond to the allegations; in addition, he is given an opportunity to file an Answering Affidavit. He must be allowed a reasonable opportunity of placing before the court any explanation or amplification of his evidence as well as submissions of fact or law, which he may wish the Court to consider as having a bearing upon the charge or upon the question of punishment. See the cases of *In re Pollard* (1868) 16 ER 457 at p. 464; *Coward v. Stapleton* (1953) 90 CLR 573 at pp 579-580.

[63] Unlike the ordinary criminal procedure, the personal liberty of the respondent is not interfered with. He is not arrested by the police and compelled to institute bail proceedings to regain his liberty prior to the trial. Prior to issuing the *rule nisi* the court should be satisfied that a prima case against the accused has been made; this requirement is in accordance with the presumption of innocence. Contrary to submissions made by the respondents, the onus of proof in summary proceedings rests with the applicant and it does not shift to the respondents. The applicant still bears the onus to prove the commission of the offence beyond reasonable doubt. See the cases of *Queen v. Oakes* (1989) LRC (Crim) (Canada) at 499; *SAFCOR Forwarding v National Transport Commission* 1982 (3) 654 SA at 676.

[64] More importantly the respondents are entitled to legal representation before and during the hearing. They are further entitled to call witnesses and file supporting and confirmatory affidavits in terms of Court Rules. In addition the respondents can appeal the decision of the court to the Supreme Court. In the circumstances this point of law is bound to fail. *Corbett JA in Safcor Forwarding v. National Transport Commission* 1982 (3) SA (supra) at 676 said:

“The objection that such a rule places an unwarranted onus on the respondent is ... unfounded. All that the rule does is to require the respondent to appear and to oppose should he wish to do so. The onus of establishing his case remains with the applicant and the rule does not cast an onus upon the respondent which he would not otherwise bear.”

[65] It was further argued that by the respondents, in *limine*, that the Attorney General lacks jurisdiction to prosecute this matter on two grounds: firstly, that the powers of the Attorney General as set out in terms of section 77 of the Constitution do not include the power to prosecute either in his own right or acting under delegated authority. Secondly, that the power to prosecute is vested upon the Director of Public Prosecutions in terms of section 162 (4) of the Constitution. The respondents argued that the contention by the Attorney General that he represents the Director of Public Prosecutions is not competent in terms of the Constitution. Alternatively it was argued that there has been no lawful delegation of authority by the Director of Public Prosecutions to the

Attorney General. The respondents averred that section 162 (5) of the Constitution envisages the power of the Director of Public Prosecutions to delegate only his 'subordinate officers'.

[66] In terms of section 77 of the Constitution the Attorney General is the Principal legal adviser to the Government; *ex-officio* member of Cabinet, Adviser to the King on any matter of law; provide guidance in legal matters to Parliament; assist Ministers in piloting bills in Parliament; drafts and signs all Government bills to be presented in Parliament; draw or peruse agreements, contracts, treaties, conventions and documents to which the government has an interest; represent the government in courts or in any legal proceedings to which the government is a party; as well as being available for consultations with the Director of Public Prosecutions in terms of section 162 (7) of the Constitution in respect of matters where natural security may be at stake.

[67] The Attorney General has argued that his authority to institute and prosecute contempt proceedings is two-fold. Firstly, that he may on his own, in the public interest, intervene; and, that this power is inherent and a constitutional prerogative. He further argued that he was entitled to institute these proceedings by virtue of being the principal legal adviser to the Government, *ex-officio* member of cabinet as well as the Parliamentary Counsel. In the absence of a specific constitutional provision allowing the Attorney General to prosecute this matter, I would agree with the Attorney General that such power

is implied, inherent and a constitutional prerogative by virtue of his position as the principal legal adviser to the Government. It is my considered view that he is entitled to institute these proceedings in his capacity as such in the public interest. The Attorney General does not only advise the Government, the King and Parliament but he represents the Government and Parliament in Court proceedings.

[68] The Attorney General further argued that he derives the authority to institute these proceedings from the delegated authority of the Director of Public Prosecutions. He contended that such delegation of authority was executed by the Director of Public Prosecutions. The delegation of Authority to prosecute is provided in terms of section 162 (5) of the Constitution as read together with section 3 of the Director of Public Prosecutions Order No. 17 of 1973 and section 4 (c) of the Criminal Procedure and Evidence Act No. 67 of 1938.

[69] Section 162 (5) provides, *inter alia*, that the powers of the Director of Public Prosecutions to institute criminal proceedings against any person before any Court in respect of any offence may be exercised by the Director in person or by subordinate officers acting in accordance with the general or special instructions of the Director. *Prima facie* the Attorney General is not a subordinate officer of the Director; however, when he acts by virtue of delegated authority, he is in law subordinate to the Director on the basis that he prosecutes in accordance with the special instructions of the Director. The

Attorney General has argued that he is entitled to institute these proceedings by virtue of the delegated authority of the Director of Public Prosecutions. This point of law accordingly fails.

[70] Section 4 of the Criminal Procedure and Evidence Act puts more clarity by providing, *inter alia*, that the Attorney General in prosecuting criminal matters, may appear personally, by Crown Counsel or by any person delegated by him. It is common cause that the powers of the Attorney General to prosecute criminal matters were transferred to the Director of Public Prosecutions in terms of section 3 of the Director of Public Prosecutions Order of 1973, also known as the Kings Order-In- Council No. 17 of 1973. This is the legislation which established the office of the Director of Public Prosecutions in this country soon after the repeal of the 1968 Independence Constitution.

[71] The third point in *limine* goes to the merits of these proceedings. The respondents contend that the articles published by the respondents do not disclose the offence of contempt of court. In order to objectively analyse these articles, it is imperative for the court to consider each article as a whole.

[72] The essence of the first article is that the Legislative and Executive organs of State have shown commitment to the ideals of Constitutionalism since the advent of the Constitution of 2005; and, that the Judiciary has been slow in adapting to the values of the new Constitutional Order. To substantiate his

view the second respondent referred to the case of *Jan Sithole and Seven Others v. The Government of Swaziland and Seven Others* Civil Appeal No. 50/2008, the issue being whether the Constitution of 2005 allows for the participation of political parties in the governance of the country. He accused the judges of the Supreme Court of failing to interpret the Constitution in a manner that would allow for the participation of political parties in the governance of the country. He further accused them of dismissing off-hand the question of fundamental rights by failing to unpack the Constitution and interpret it in a manner that brings the country in line with the values of the 21st century. He characterised the judges' conduct as criminal, and he attributed their conduct to an agenda which the judges were pursuing. He characterised their conduct as treasonous.

[73] The first article accuses the judges of the Supreme Court of not being impartial in their decisions and actuated by a particular agenda. In *R. v. Editor of the New Statesmen* (1928) at page 303, the court stated:

“The article imputed unfairness and lack of impartiality to a judge in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial duties.”

[74] In the case of *Gallagher v. Durack* (1985) LRC (Crim) 706 at 710 *Murphy J* said:

“...The statement by the appellant that he believed that the actions of the rank and file of the Federation had been the main reason for the Court changing its mind can only mean that he believed that the Court was largely influenced in reaching its decision by the action of the members of the Union in demonstrating as they had done. In other words, the applicant was insinuating that the Federal Court had bowed to outside pressure in reaching its decision. It is fundamental that a Court must decide only in accordance with the evidence and argument properly and openly put before it, and not under any outside influence. The imputation was unwarranted.”

[75] *Gubbay CJ* in *Re Chinamasa* (2001) 3 LRC 373 at 386 said:

“Anything spoken or written imputing corruption or dishonest motives or conduct to a judicial officer in the discharge of official duties or referring in an improper or scandalous manner on the administration of justice, has been held to fall within the ambit of this species of contempt called scandalising the court itself.”

[76] In the *Dormer* case (*supra*) at page 83 *Kotze CJ* lays down the following test:

“The test or principle always is, and remains: Has the judge in the dignity and exercise of his office, or has the administration of justice, been brought into contempt?”

[77] *Kotze CJ* in *re Dormer* (supra) at page 88 said:

“The article must be read as a whole, and its tendency is calculated to raise serious doubts as to the independence and integrity of the judges constituting the court, and to raise an alarm in the public mind as to the impartiality and purity of the administration of justice in this country.”

[78] In *AG v. Times Newspapers Ltd* (supra) at 84 Lord Cross said:

“Just as it is undesirable that articles should be published suggesting by inference that unless the case is decided in a certain way it will have been decided wrongly so it is undesirable that articles should be published which suggest by inference that unless a case is settled on certain terms the lawyers cannot have known their business.”

[79] It is a truism that jurisprudence is ever evolving as observed by Justice Bernard Ngoepe, and, that even though judges should examine previous judgments of their predecessors, they should not subjugate their intellectual powers to their predecessors as that would amount to intellectual laziness. Similarly, it is imperative that judges should embrace the ideals of constitutionalism and the rule of law with a view to advance and protect the fundamental rights and freedoms enshrined in the Bill of Rights. The invitation by the respondents to “the newly appointed judges of the High Court and Industrial Court”, at the time to embrace the ideals of Constitutionalism and the rule of law on its own does not constitute contempt of court. However, the respondents went further

and scurrilously attacked the judges of the Supreme Court that they were not impartial and that their decision was actuated by an improper motive or agenda which they were pursuing.

[80] Section 145 of the Constitution establishes the Supreme Court of Judicature for Swaziland which is the final Court of appeal; and, section 16 of the Constitution provides, *inter alia*, that this court is the final Court of appeal with appellate jurisdiction to hear appeals from the High Court of Swaziland. Section 146 (5) sets this court apart from the other courts on the basis that it is not bound to follow the decisions of other courts save its own; in addition this court may depart from its own previous decisions when it appears that they were wrongly decided. On the basis of this subsection, it was open to the litigants in the case referred to in the article to approach the Supreme Court to review its previous decision. The scurrilous attack on the Supreme Court was not necessary and certainly not justified in law.

[81] The second count relates to an article that was written and published in February 2010 in the Nation Magazine; it was in the form of an editorial comment entitled “speaking my mind”. The Attorney General alleges that by so doing the respondents unlawfully and intentionally violated or impugned the dignity, repute or authority of the Chief Justice of Swaziland. He contended that the article was calculated or intended to bring into contempt and disrepute

or to lower the authority of the judge or to interfere with the due course of the administration of justice.

[82] The article states that during the official opening of the High Court, the Chief Justice went into an unprecedented show of beating his breast Tarzan-style and calling himself a “Makhulu Baas”; and, that this conduct showed the level to which our judiciary has sunk. He accused the Chief Justice of behaving like a high school punk; and, that in the process, he sank to a terrible low and stooped below the floor. He contended that the Chief Justice by virtue of his office should behave with decorum, and, that his office is one of men and women whose integrity is beyond reproach. He accused the Chief Justice of being extraordinary arrogant, and argued that judges by tradition do not behave and speak like street punks.

[83] It is not in dispute that the Chief Justice called himself “Makhulu Baas” on the day in question. The second respondent argued that the word “Makhulu Baas” was dug by the Chief Justice from the cesspit of apartheid South Africa and accused him of suffering from a hangover of apartheid. He reminded him that in this country there has always been one “Makhulu Baas”, the highest authority, until the Chief Justice arrived and contested the position.

[84] He observed that the intention the Chief Justice in calling himself “Makhulu Baas” was to give a dressing to the judges of the High Court and exert his

authority. He further observed that by so doing he did not only lower his own stature but he brought the whole house down. He further contended that some of the High Court judges which the Chief Justice was dressing down behave with decorum since their appointment on the bench, and, in a manner to be expected of people of their standing.

[85] He remarked that the Chief Justice was not a man who inspires confidence to hold such high office and, that in effect, he doubted his appointment into the bench. Similarly, he accused the Chief Justice of bringing the judicial system in this country into shambles. To this extent he argued that there is a high incidence of murder cases in this country but the perpetrators are not brought to justice.

[86] He compared the Chief Justice's arrogance to that of Adinkrah Donkor, the former Director of Public Prosecutions, who used to boast of drinking tea and wine with His Majesty but left the country unceremoniously and in disgrace. He advised the Chief Justice not to interpret the silence to his remarks as blind submission to authority by the High Court Judges or that he has beaten the judges; he further advised him that Swazis were not fools as he mistakenly thought.

[87] It is apparent that the second article was calculated or intended to bring into contempt and disrepute and to lower the authority of the Chief Justice;

similarly, the article was intended to interfere with the due course of the administration of justice. See the case of *Reg v. Gray* (supra) at page 62.

[88] *Lord Denning MR* in his book entitled “The Due Process of Law” (1980) at pages 3-4 stated that the object of punishing contempt is ‘to keep the streams of justice clear and pure’. He continued and stated the following:

“There is not one stream of justice. There are many streams. Whatever obstructs their courses or muddies the waters of any of those streams is punishable under the single cognomen ‘contempt of court’. It has its peculiar features. It is a criminal offence but is not tried on indictment with a jury. It is tried summarily by a judge alone who may be the very judge who has been injured by the contempt.”

[89] It is trite that personal abuse of a judge in his official capacity as such amounts to contempt of Court because it has a tendency to bring the administration of justice into disrepute. Similarly, a scurrilous abuse of a judge is contempt where the words or publication reflect upon his capacity as a judge: See *Borrie and Lowe*, *The Law of Contempt* 1973 at page 153; *Burchell* and *Miltion*, *Principles of Criminal Law*, 2nd Edition at page 699. *Stephenson LJ* in *Balogh v. County Court of St Albans* (1974) 3 ALL ER 283 at pp 290-1 said:

“The power of a Superior Court to commit (or attach) a contemnor to prison without charge or trial is very ancient, very necessary but very unusual, if not unique. It is as old as the courts themselves and it is

necessary for the performance of their functions of administering justice, whether they exercise criminal or civil jurisdiction. If they are to do justice they need to administer it without interference or affront, as well as to enforce their own orders and to punish those who obstruct them directly or indirectly in the performance of their duty or misbehave in such a manner as to weaken or lower the dignity and authority of a court of law.”

[90] *Kotze CJ* in the case of *in re Dormer* (supra) at page 73 said:

“...the Superior Courts have further the inherent power to notice and punish acts committed outside the courts if they are of such a nature that the administration of justice is thereby brought into contempt. It is clear to me, therefore, that so far as the South African courts are concerned, the practice to notice and punish contempt of court summarily is well settled.”

[91] The conclusion to which I have arrived that both articles are contemptuous does not undermine or detract from the fundamental rights and freedoms guaranteed by the Bill of Rights in chapter III of the Constitution of 2005. Section 24 of the Constitution provides the following:

- “24. (1) A person has a right of freedom of expression and opinion.**
- (2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of**

expression, which includes the freedom of the press and other media, that is to say:

- (a) Freedom to hold opinions without interference;**
- (b) Freedom to receive ideas and information without interference;**
- (c) Freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of person); and**
- (d) Freedom from interference with the correspondence of that person.**

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;**
- (b) that is reasonably required for the purpose of-**

- (i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;**
 - (ii) preventing the disclosure of information received in confidence;**
 - (iii) maintaining the authority and independence of the courts; or**
 - (iv) regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communications; or**
- (c) that imposes reasonable restrictions upon public officers, except so far as that provision or as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society.”**

[92] It is apparent from section 24 that the right of freedom of expression and opinion is not absolute; it is subject to various limitations as reflected in section 24 (3). Subsection (3) (b) (iii) is relevant for purposes of these proceedings; it provides, *inter alia*, that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision that is reasonably required for the purpose of maintaining the authority and independence of the courts. *Dickson CJ in Queen v. Oakes* (1987) LRC (Crim) (Canada) at p. 499 said the following:

“The rights and freedoms guaranteed by the charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realisation of collective goals of fundamental importance. For this reason, section 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a Constitutionally guaranteed right or freedom and the fundamental principle of a free and democratic society. The onus of proving that a limit on a right or freedom guaranteed by the charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of section 1 that limits on the rights and freedoms enumerated in the charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking section 1 can bring itself within the exceptional criteria which justify their being limited.”

[93] (1) At page 500 His Lordship then dealt with the test in determining whether or not a limit is reasonable and demonstrably justified in a free and democratic society. He stated:

“...two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society, do not gain section protection. It is necessary, at a minimum, that an objective relates to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.

Secondly, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves ‘a form of proportionality test’.... Although the nature of the proportional test will vary depending on the circumstances, in each case courts will be required to balance the interest of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means even if rationally connected to the objective in this first sense, should impair as little as possible the right or freedom in question.... Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the charter right or freedom, and the objective which had been identified as of sufficient importance.

With respect to the third component, it is clear that the general effect of any measure impugned under section 1 will be the infringement of a right or freedom guaranteed by the charter; this is the reason why resort to section 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms is guaranteed by the charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the charter will be more serious than others in terms of the nature of the right or freedom violated the extent of the violation and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society.

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. The standard of proof under section 1 is the Civil Standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous of the party seeking to limit. Concepts such as ‘reasonableness’, ‘justifiability’ and ‘free and democratic society’ are simply not amenable to such standard.”

[94] It is apparent from section 24 (3) of the Constitution that the right of freedom of expression and opinion is subject to the limit that it will be sustained unless it is shown not to be reasonably justifiable in a democratic society. Section 24 (3) (b) (iii) specifically limits the right in order to maintain the authority and

independence of the courts; this is achieved in terms of the law of contempt of Court. The onus of proving that the limitation is reasonably justifiable in a democratic society lies with the party seeking to uphold the limitation. It is apparent that the law of contempt by scandalizing the court itself is reasonably required for the purpose of ‘maintaining the authority and independence of the courts’ as reflected in section 24 (3) (b) (iii) of the Constitution.

[95] *Lord Steyn in Ahnee and Others v. Director of Public Prosecutions* (1999) 2 LRC 676 (PC) said:

“It is now necessary to consider the impact of certain Constitutional guarantees on the inherent power of the courts to punish for contempt.... Counsel submitted that the offence of scandalising the court is inconsistent with the protection of freedom of expression which is guaranteed by s 12 of the Constitution. Given that freedom of expression is the lifeblood of democracy, this is an important issue. And there is no doubt that there is a tension between freedom of expression and the offence of scandalising the court. But the guarantee of freedom of expression is subject to qualification in respect of provision under any law (1) ‘for the purpose of ... maintaining the authority and independence of the courts’ and (2) shown to be ‘reasonably justifiable in a democratic society’. Their Lordships have already concluded that the offence of scandalising the court exists in principle to protect the administration of justice. That leaves the question whether the offence is reasonably justifiable in a democratic society. In England such proceedings are rare and none have been successfully brought for more than sixty years. But it is impossible not to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the

United Kingdom. The need for the offence of scandalising the court on a small island is greater Moreover, it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the ‘right of criticising, in good faith, in private or public, the public act done in the seat of justice’: see *R. v. Gray* (1900 -1903) ALL ER 59 at 62, *Ambard v. A-G for Trinidad and Tobago* (1936) 1 ALL ER 704 at 709 and *Badry v. DPP Mauritius* (1982) 3 ALL ER 973. The classic illustration of such an offence is the imputation of improper motives to a judge.”

[96] The Constitution does not only curtails the extent of the right of freedom of expression but it does not protect the derogation of this right in sections 37 and 38 of the Constitution. The said sections provide the following:

“37. (1) Without prejudice to the power of parliament to make provision in any situation or the provision of section 38, nothing contained in or done under the authority of a law shall be held to be inconsistent with or in contravention of any provision of this chapter to the extent that the law authorises the taking, during any period of public emergency of measures that are reasonably justifiable for dealing with the situation that exists during that period.

(2) A law that is passed during a period of public emergency and is expressly declared to have effect in terms provided in the section of this chapter under which that law is passed.

38. Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms:

- (a) life, equality before the law and security of person;**
- (b) the right to fair hearing;**
- (c) freedom from slavery or servitude;**
- (d) the right to an order in terms of section 35 (1); and**
- (e) freedom from torture, cruel, inhuman or degrading treatment or punishment.”**

[97] The right of freedom of expression and opinion is important in our society in advancing the democratic ideals enshrined in the Bill of Rights; the right allows society to form and express varying opinions constructively with a view to achieve open and accountable governance. However, the right has to be exercised and enjoyed within the confines and parameters of the Constitution; the enjoyment of this right like with all other rights should not interfere with the rights of others.

[98] The judicial power of Swaziland vests in the Judiciary, and, in exercising its functions, the Judiciary is independent and subject only to the Constitution. The Judiciary is not subject to the control or direction of any person or authority. To that extent neither the Crown nor Parliament should interfere

with Judges or judicial officers in the exercise of their judicial functions. All organs or agencies of the Crown are legally enjoined to give the judiciary such assistance as may reasonably be required in order to protect the independence, dignity and effectiveness of the Courts. It is against this background that the Constitution gives the Superior Courts the power to commit for contempt to themselves. See sections 138,139,140 and 141 of the Constitution.

[99] The protection given to the Courts in respect of the law of contempt ensures the maintenance of a functioning system of administration of justice as well as the confidence the public has that disputes brought before the Courts are determined according to law. It is essential, therefore, that the Courts and judges should not be accused unjustifiably of bias or other judicial misconducts which tend to impugn their integrity, independence or authority.

[100] In upholding and seeking to enforce the law of contempt of court, it must always be borne in mind that the objective is not to shield the judiciary or the judicial system from criticism or the individual decisions of various judges from appropriate comment. It is justice itself that is flouted by contempt of court, not the court or judge administering the law of contempt. The courts have a duty to protect and advance the administration of justice and should frown against conduct which is calculated to undermine public confidence in the proper functioning of the Courts. Similarly, Courts should confront conduct calculated to bring the Court or a judge into contempt or to lessen his

authority. See the case of *Solicitor General v. Radio New Zealand Ltd* (1994) 2 LRC 116 at 121, 124.

[101] It is trite that judges and Courts are open to criticism in a fair and legitimate manner. It is only when the bounds of moderation and of fair and legitimate criticism have been exceeded that the Courts should interfere. This will happen if the administration of justice has been brought into contempt. See the case of *Reg. v. Gray* (supra) at 62; in *re Dormer* (supra) at 89-90

[102] In *re Neething* 1874 *Buch* 133 the Attorney General, on affidavit, applied *ex parte* for an order of court calling on the writer to appear peremptorily before the Court to answer for the contempt contained in a letter, published in Cape Argus Newspaper of 3rd December 1874, and to show cause, if any, why he should not be punished and dealt with as this Honourable Court shall think fit for the contempt aforesaid. The words said to be contemptuous were: “Had not Mr. Justice Fitzpatrick, with his wonted humour or abandon, given unrestrained licence to his tongue, you would not have ventured to indulge in such intemperate language. You cannot plead the privilege of the judge.” *De Villiers CJ* said:

“By this decision of the court the freedom of criticising the judgments of judges and the conduct of judges, like that of anyone else, it not at all taken away. That freedom must always remain; in fact it would be a sorry thing for this colony or any other country if this freedom should ever be

taken away. But I think in this case there has been exercised not a freedom, but a licence, to use the words of Mr. Neething himself; and when it comes to that, I think it is the duty of this court to put a stop to it, and that in peremptory manner.”

[103] In *Rex v. Editor of the New Statesman, ex parte Director of Public Prosecutions* (44 TLR 301) a *rule nisi* was issued calling upon the Editor to show cause why he should not be attached for contempt of court in respect of an article published on the 28th January 1928. The article, in part, stated:

“We are not at all in sympathy with *Dr. Stopes*’ work or aims, but prejudice against those aims ought not to be allowed to influence a Court of justice in the manner in which they appeared to influence *Mr. Justice Avory* in his summing-up.”

[104] *Lord Hewart* who delivered the judgment of the court pointed out that the works complained of meant that a person who held certain views could not hope for a fair hearing in a court presided over by the learned judge. His Lordship referred to the case of *Reg. v. Gray* (supra) with approval and continued:

“Applying those canons ... the court had no doubt that the article complained of did constitute a contempt. It imputed unfairness and lack of impartiality to a judge in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority, it interfered with the performance of his judicial duties.”

[105] *Kotze CJ in re: Dormer* 1891 (4) GAR 64 at PP 89-90 in dealing with the test of scandalising the court itself had this to say:

“The authorities show that the test is, has the dignity of the office (of judge) or the administration of justice been brought into contempt?.... The exercise of summary jurisdiction in the present instance, inasmuch as the article contains a very serious contempt indeed is necessary to preserve the dignity and independence of the Court. It has been argued that this endangers the liberty of the Press, and I desire, in reply thereto, to repeat here what I said in 1877 in Phelan’s case. Although no scandalous or improper reflection on the administration of justice can be allowed, everyone is undoubtedly at liberty to criticise the conduct of judges on the bench in a fair and legitimate manner. It is only when the bounds of moderation and of fair and legitimate criticism has been exceeded that the court has power to interfere. I do not in the slightest degree desire to fetter free and open discussion in the public prints of the proceedings of this court. The liberty of the press is a great privilege and a great safeguard to the public; but the administration of justice is in like manner a matter of public importance. Consequently, the law, the very protector of the liberty of the press, will not on grounds of public policy allow that liberty, its own creature to be abused and employed as an instrument to bring the administration of justice into contempt. We would, in my opinion, be wanting in our duty if we did not mark our strong disapproval of the offence by meting out such punishment as is commensurate with the gravity of the contempt committed.”

[106] In *Reg. v. Gray* (1900) at page 62 *Lord Russell CJ* regarding proceedings for the punishment of contempt by scandalising the court itself noted that this kind of contempt:

“Is to be taken subject to one qualification – and, an important qualification, judges and courts are alike open to criticism if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good. No court could or would treat that as contempt,... but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen ...”.

[107] Whenever the issue of scandalising the courts has arisen the need to balance the competing public interests of the due administration of justice and the free debate of matters of public importance have been indicated. In *Gallagher v. Durack* 1985 LRC (Crim) 706 at 713 the Federal Court of Australia found the applicant guilty of contempt of court and sentenced him to three months imprisonment. The applicant was the secretary of a Trade Union and he published a statement that the court had made a decision in their favour because of their industrial action in demonstrating. In justifying his decision Justice Rich at p. 44 said:

“...the summary power of punishing contempts of court ... exists for the purpose of preventing interferences with the course of justice.... Such interference may ...arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court’s judgments because the matter published aims at lowering the authority of the court as a whole or that of its judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office. The jurisdiction is not given... for the purpose of restricting honest criticism based on rational grounds of the manner in which the Court performs its

functions. The law permits in respect of courts, as of other institutions, the fullest discussion of their doings so long as that discussion is fairly conducted and is honestly directed to some defined public purpose. The jurisdiction exists in order that the authority of the law as administered in the courts may be established and maintained.”

[108] The applicant appealed to the Full Court of the Federal Court where the appeal was upheld and the sentence of imprisonment quashed. The judgment of the Full Court was however reversed by the High Court of Australia by a majority of four judges to one held. They held that the statement by the appellant was contemptuous. The Court said:

“The principles which govern that class of contempt of court which is constituted by imputations on courts or judges which are calculated to bring the court into contempt or lower its authority had been discussed by the court in *Bell v. Steward* (1920) 28 CLR 419 and *R v. Fletcher ex parte Kisch* (1935) 52 CLR 248 ---- and the judgment of Rich J in the last mentioned case is consistent with what had been said in the earlier decisions. The law endeavours to reconcile two principles, each of which is of cardinal importance, but which in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrongheaded. The other principle is that ‘it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon courts of justice which if continued, are likely to impair their authority.... The authority of the law rests on public confidence, and it is important to the stability of

society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of Courts or Judges. However, in many cases, the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a Court or Judge, and the summary remedy of fine or imprisonment ‘is applied only where the court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable.’

[109] *Lord Atkin in Ambard v. Attorney General of Trinidad and Tobago* (1936) 1 ALL ER 704 at 707 delivered the judgment of the Privy Council and stated the following:

“Everyone will recognise the importance of maintaining the authority of the Courts in restraining and punishing interferences with the administration of justice, whether they be interferences in particular civil or criminal cases or take the form of attempts to depreciate the authority of the Courts themselves. It is sufficient to say that such interferences when they amount to contempt of court are quasi-criminal acts, and orders punishing them should, generally speaking, be treated as orders in criminal cases and leave to appeal against them should only be granted on the well-known principles on which cases is given.”

[110] At page 709 *His Lordship* said the following:

“But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in

good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.”

[111] In *re Dormer* (supra) at pp 89-90 *Kotze CJ* said the following:

“...speaking or writing contemptuously of the Court or judges acting in their judicial capacity, or doing such in a manner that demonstrates a gross want of that respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the Kingdom) is entirely lost among the people constitutes a contempt Nor is it necessary that the words spoken or written should amount to a libel on the Judges or have reference merely to a pending suit. The authorities show that the test is, has the dignity of the office or the administration of justice been brought into contempt?... The exercise of summary judgment in the present instance, inasmuch as the article contains a very serious contempt indeed, necessary to preserve the dignity and independence of the court.”

[112] With regard to the criticism levelled against the summary jurisdiction of contempt of court that it restricts or violate the liberty of the press, His Lordship at p. 90 had this to say:

“It has been urged that this endangers the liberty of the press, and I desire, in reply thereto, to reply here what I said in 1877 in Phelan’s case. ‘Although no scandalous or improper reflection on the administration of justice can be allowed, everyone is undoubtedly at liberty to criticise the conduct of Judges on the Bench in a fair and legitimate manner. It is only when the bounds of moderation and of fair and legitimate criticism have been exceeded that the court has power to interfere. I do not in the slightest degree desire to fetter free and open discussion in the public prints of the proceedings of this court. The liberty of the Press is a great privilege and a great safeguard to the public; but the administration of justice is in like manner of public importance. Consequently, the law - the very protector of the liberty of the Press - will not, on grounds of public policy allow that liberty, its own creature, to be abused and employed as an instrument to bring the administration of justice into contempt.”

[113] The above authorities show clearly the need to balance the right to freedom of expression and opinion in a democratic society and the limitation imposed in favour of maintaining and preserving the authority and independence of the courts as enshrined in sections 24 (3) (b) (iii) as read with 139 (3), 140 and 141 of the Constitution. It is essential to bear in mind that the right of freedom of expression and opinion together with the other rights and freedoms in the Bill of Rights depend for their continued existence upon the administration of justice. It is the Courts acting in terms of section 35 of the Constitution which are empowered to enforce the Bill of Rights; and without the proper functioning of the Court system, all the rights and freedoms guaranteed in the Constitution will count for nothing. It is against this background that “the

fountain of justice' should not be tainted by unscrupulous and scurrilous accusations and improper insinuations which are calculated and have a tendency of bringing the administration of justice into disrepute and erode public confidence in the Courts.

[114] The offence of contempt, being criminal in nature, requires proof of *mens rea* in the form of intention. The overriding test is whether the articles published have a tendency to lower or impair the authority and integrity of the judges and bring the administration of justice into disrepute. Section 139 (3) of the Constitution as read with section 24 (3) (b) (iii) of the Constitution protects the Courts and judges from conduct that is scandalising the courts as well as from scurrilous attacks on the judges. The protection of judges and Courts by the Constitution is justified because they cannot protect themselves as compared to the other two arms of government. The Courts do not wield any significant power outside the Constitution. The first article by insinuating that the decision of the Supreme Court was predicated by a particular agenda and not based on law and evidence presented constitutes contempt of court. Similarly, the second article constitutes a scurrilous abuse of the Chief Justice. It was calculated to undermine or lower the dignity of the judge and to bring the due administration of justice into disrepute.

[115] *Nathan J*, as he then was, in *Rex v. Mkhulunyelwa Dlamini* 1970 -1976 SLR 179 (HC) at 181-182, His Lordship dealt with *mens rea* in contempt of Court.

He said:

“The law is well stated in Hunt’s South African Criminal Law and Procedure Vol. II p. 186 in the following terms: ‘*mens rea* may be inferred from the fact that X spoke words or was guilty of conduct which from an objective point of view plainly constituted contempt. If X then fails to explain his state of mind, the Court may hold that the State has proved his guilt. But the onus remains with the State throughout’. Much the same idea, underlies s 86 (1) of the Subordinate Courts Proclamation (CAP 20 of the Laws of Swaziland), which creates it as an offence if a person ‘wilfully insults’ any judicial officer during his sitting. In *R. v. Silver* 1952 (2) SA 475 (A) *Schrener JA* said at pp 480-481, ‘The power to commit summarily for contempt in *facie curiae* is essential to the proper administration of justice.... But it is important that the power should be used with caution for although in exercising it the judicial officer is protecting his office rather than himself, the fact that he is personally involved and that the party affected is given less than the usual opportunity of defending himself makes it necessary to restrict the summary procedure to cases where the due administration of justice clearly requires it. There are many forms of contempt in *facie curiae* which require prompt and drastic action to preserve the court’s dignity and the due carrying out of its functions But the circumstances of the case must be examined to see whether what the appellant said constituted not merely an insult but a wilful insult to the magistrate.”

[116] In *Coetzee v. Government of the Republic of South Africa; Matiso and Others v. Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC) at para 61, Sachs J said:

“The institution of contempt has an ancient and honourable, if at times abuse, history. If we are truly dealing with contempt of court, then the need to keep the committal proceedings alive would be strong because the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.”

[117] *Corbett CJ* in the *Argus Printing and Publishing Co. Ltd and Others v. Esselen’s Estate* 1994 (2) SA (AD) at 29 E-F said:

“The purpose which the law seeks to achieve by making contempt a criminal offence is to protect ‘the fountain of justice’ by preventing unlawful attacks upon individual judicial officers or the administration which are calculated to undermine public confidence in the courts. The contempt of court is not intended for the benefit of the judicial concerned or to enable him to vindicate his reputation or to assuage his wounded feelings As Lord Morris put it in *McLeod v St Aubyn* (1899) AC 549 (PC) 561:

‘The power summarily to commit for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the Judge as a person. He must resort to action for libel or criminal defamation.’ ”

[118] This is the same position that was taken by the Zimbabwe Supreme Court *in re Chinamasa* (supra) at p.920 where *Aubbay CJ* said:

“Furthermore, the danger in adopting the American approach is that it predicated upon the conception that scandalizing contempt is to preserve the dignity of the Bench. This is wrong:

The recognition given to this form of contempt is not to protect the tender and hurt feelings of the judge or to grant him any additional protection against defamation other than available to any person by way of a civil action for damages. Rather it is to protect public confidence of all those who may have business before the courts is likely to be weakened, if not destroyed.”

[119] *His Lordship* at pp 920-921 dealt with the onus of showing that a limitation is not reasonably justifiable in a democratic society. He stated:

“...the onus is upon the applicant of showing that the law of contempt by scandalizing the court is not a limitation that is reasonably justifiable in a democratic society.

First, the primary objective of the impugned law of scandalising the court must relate to concerns which are pressing and substantial and of sufficient importance to override the constitutionally protected freedom....

The objective of the law of concept is well captured in the following passage in *Borrie and Lowe’s Law of Contempt (op cit* at 226):

‘The necessity for this branch of contempt lies in the idea that without well-regulated laws a civilised community cannot survive. It is therefore

thought important to maintain the respect and dignity of the courts and its officers, whose task it is to uphold and enforce the law, because without such respect, public faith in the administration of justice would be undermined and the law itself would, fall into disrepute.’

The same sentiment was neatly put by *Richmond P in Solicitor General v. Radio Avon Ltd* (supra at 230) in these words:

‘The justification for this branch is that it is contrary to the public interest that public confidence in the administration of justice should be undermined.’

I do not therefore consider that this objective, which the limitation in the law is designed to promote, can be said not to be of sufficient importance to warrant overriding the fundamental right of freedom of expression....

With regard to the third criterion which the applicant must meet two points must be made. First, ... the offence of scandalising the court does not extend to hostile criticism on the behaviour of a judicial officer unrelated to his performance on the Bench. Any personal attack upon him unconnected with the office he holds must be dealt with under the laws of defamation

Secondly, prompt action to preserve the authority of the Court and the carrying out of its function, which are subject to being undermined by scandalizing contempt, is required. The institution of criminal proceedings at the instance of the Attorney General, with all the attendant delays, would be too dilatory and too inconvenient to offer a satisfactory remedy. Once a matter has been referred to the Attorney General it is removed from the Court’s control and the Attorney General might well be reluctant to prosecute.’ ”

[120] *Chaskalson P in S. v. Makwanyane and Another* 1995 (3) SA 391 (CC) at p. 436 para 104 dealt with the limitations of Constitutional rights. This case was further followed by the South African Constitutional Court in *Coetzee v. Government of the Republic of South Africa; Matiso & Others v. Commanding Officer & Others* (supra) at p. 655. The Judge President in the *Makwanyane* case stated the following:

“The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in s 33 (1). The fact that different rights have different implications for democracy and, in the case of our constitution, for an ‘open and democratic society based on freedom and equality’ means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33 (1) and the underlying values of the constitution bearing in mind that, ... the role of the Court is not to second-guess the wisdom of policy choices made by legislators.”

[121] The legal position as stated by *Chaskalson P in S.v. Mankwayane* (supra) with regard to the limitations of constitutional rights in relation to the offence of scandalizing the court reflects the law in this country. This is the same position in South Africa as demonstrated by the cases of *Coetzee v. Government of the Republic of South Africa*; *Matico and Others v. Commanding Officer, Port Elizabeth Prison and Others* (supra) as well as the South African Appellate Division case of *Argus Printing and Publishing Co. Ltd and Others v. Esselen's Estate* (supra). Similarly, this is the same position that has been taken by the Supreme Court of Zimbabwe in *re Chinamasa* (supra). This legal position is not only in accordance with our Constitution but the Roman-Dutch Common Law.

[122] *His Lordship Gubbay CJ* at page 912 acknowledged that scandalizing the Court as a form of contempt is not the law in the United States of America. His Lordship continued and said:

“In *Bridges v. State of California* 314 US 252 (1941) (86 L ed 192) all the members of the Supreme Court were agreed that there is no such offence in the United States Justice Frankfurter referred to the scandalizing of the court as an offence as ‘English foolishness’. He considered criticism of the courts, no matter how unrestrained, made after a decision has been rendered, to be an exercise of the right of free discussion and free speech.”

[123] In the South African Constitutional Court of *S. v. Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409, *Kriegler J*, at para 14, correctly stated the following:

“14. The reason for the existence of contempt of court as a punishable offence is often traced back to the observations of *Wilmot J* in the old English case of *R.v. Almon (1765) 97 ER 94 (KB)* at 100.

‘The arraignment of the justice of the Judges, is arraiging the King’s 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 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’. Something of the king also existed in Roman and Roman- Dutch Law, although it was not recognised as a specific crime. It has also received the stamp of approval, albeit in passing of this court in *Coetzee v. Government of the Republic of South Africa (supra)* at para 61.”

[124] At page 421 His *Lordship Kriegler J* stated as follows:

“15. The fundamental question that has to be addressed at the outset here, is why there is such an offence as scandalising the court at all in this day and age of constitutional democracy. Why should judges be sacrosanct? Is this not a relic of a bygone era when Judges were a power unto themselves? Are Judges not hanging on to this legal weapon because it gives them a status and untouchability that is not given to anyone else? Is it not rather a constitutional imperative that public office-bearers, such as Judges, who wield great power, as Judges undoubtedly do, should be accountable to the public who appoint them and pay them? Indeed, if one takes into account that the Judiciary, unlike the other two pillars of the State, are not elected and are not subject to dismissal if the voters are unhappy with them, should not judges, pre-eminently be subjected to continuous and searching public scrutiny and criticism?”

[125] At para 16 His Lordship then provided the answer to the vexed questions which he had raised:

“16. The answer is both simple and subtle. It is, simply, because the constitutional position of the Judiciary is different, really fundamentally different. In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the Executive and the legislative pillars of the State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of

the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the constitution and its Bill of Rights – even against the State.”

[126] His Lordship, however, acknowledged at p. 423 that the offence of scandalizing the court still existed in many Common-law jurisdictions such as England and Wales, Canada, India, Australia, New Zealand, Mauritius, Hong Kong, Zimbabwe and South Africa. However, he acknowledged that one notable exception to the list of Common law jurisdictions recognising the offence is the United States of America.

[127] His Lordship observed that prior to the adoption of constitutional democracy and Bill of Rights in South Africa, it was accepted that there was tension between preserving the reputation of the judiciary on the one hand and on the other hand acknowledging the right of each and everyone to form their opinions about matters and to propound them. He further observed at para 28:

“That freedom to speak one’s mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by ss 15-19 of the Bill of Rights. It is the right – idealists would say the duty – of every member of

civil society to be interested in and concerned about public affairs. Clearly this includes the Courts.”

[128] However, he observed that the alleged tension aforesaid ought not to be exaggerated because since time immemorial it has been accepted that the business of adjudication concerns not only the immediate litigants but that it is a matter of public concern; and that for its credibility, it is done in the open. According to His Lordship, such openness seeks to ensure that society knows what is happening so that it can discuss, endorse, criticise, applaud or castigate the conduct of their courts. His Lordship continued at para 29-31 as follows:

“29. Self – evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important aspirational attributes prescribed for the Judiciary by the constitution (s 165 (4)).

30. However, such vocal public scrutiny performs another important Constitutional function. It constitutes a democratic check on the judiciary. The Judiciary exercises public power and it is right that there be an appropriate check on such power.... The nature of the separation of powers between the Judiciary on the one hand and the legislature and Executive on the other is such that any other check on the judiciary by the Legislature or the Executive runs the risk of endangering the independence of the Judiciary and undermining the separation of powers in principle. Members of the public are not so constrained.

31. **Ideally, also, robust and informed public debate about judicial affairs promotes peace and stability by convincing those who have been wronged that the legal process is preferable to vengeance; by assuring the meek and humble that might is not right; by satisfying business people that commercial undertaking can be efficiently enforced; and, ultimately as far as all are concerned, that there exists a set of just norms and a trustworthy mechanism for their enforcement.”**

[129] At pages 422-424 His Lordship accepted that the Judiciary cannot function properly without the support and trust of the public; and, that in order to preserve that public trust, special safeguards were created over the centuries. One such protective device is to deter disparaging remarks calculated to bring the judicial process into disrepute; hence, the birth of the crime of scandalizing the court which protects the authority of the courts. He acknowledged that the interest that is served by punishing offenders is a public interest against weakening the authority of the Court. He further acknowledged that it is not the self-esteem, feeling or dignity of any judicial officer that is protected but it is the fountain of justice by preventing unlawful attacks upon individual judicial officers or the administration of justice calculated to undermine public confidence in the Courts. To this extent he quoted with approval the decisions of *Argus printing and Publishing case* (supra) at p. 290 and *Chinamasa* (supra) at p. 1311.

[130] At page 425 His Lordship accepted the statement of the law by *Lord Atkin* at p. 709 in the *Ambard's* case (supra) that “But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercise the ordinary right of criticism in good faith an act done in the seat of justice”. Similarly, he accepted the statement by *Corbett CJ* in *Argus Printing and Publishing* case (supra) at pp 25-26 that “judges, because of their position in society and because of the work which they do, inevitably on occasion attract public criticism and that it is right and proper that they should be publicly accountable.

[131] At para 32 His Lordship observed that the freedom to debate the conduct of public affairs by the judiciary does not mean that attacks, however, scurrilous can with impunity be made on the judiciary as an institution or individual judicial officers. He further observed that a clear line cannot be drawn between acceptable criticism of the Judiciary as an institution on the one hand and of its individual members on the other hand statements that are downright harmful to the public interest by undermining the legitimacy of the judicial process. He emphasised, though, that the ultimate objective of the court should remain, that courts must be able to attend to the proper administration of justice and they must be seen and accepted by the public to be doing so. He further emphasised correctly that without the confidence of the people, courts cannot perform their adjudicative role nor fulfil their therapeutic and prophylactic purpose.

[132] At para 33 his Lordship stated the following:

“33. Therefore statements of and concerning judicial officers in the performance of their duties have, or can have a much wider impact than merely hurting their feelings or impugning their reputations. An important distinction has in the past been drawn between reflecting on the integrity of Courts, as opposed to mere reflections on their competence or the correctness of their decision because of the grave implications of a loss of public confidence in the integrity of its Judges, public comment calculated to bring that about has always been regarded with considerable disfavour. No one expects the courts to be infallible. They are after all human institutions. But what is expected is honesty. Therefore, the crime of scandalizing is particularly concerned with the publication of comments reflecting adversely on the integrity of the judicial process or its officers.”

[133] In para 36-47 His Lordship acknowledged and reaffirmed the test of scandalizing the court, namely, whether the statement in issue has the tendency to bring the administration of justice into disrepute. He rejected the argument that this test has led to unwarranted criminalisation of conduct that falls within the protective ambit of freedom of expression. Whilst acknowledging that the constitution has brought about a new era of constitutional supremacy and the rule of law, he accepted as well that the South African constitution itself contemplates legislative protection of the Judiciary by limiting the fundamental rights contained in the Bill of Rights. He observed that the origins of South

African law and the United States legal system stem from different common law origins and their constitutional regimes differ. The right to freedom of expression in the United States as contained in the First Amendment is not subject to any limitation. At the same time the South African right to freedom of expression is subject to a number of material limitations.

[134] With regard to the test His Lordship said at para 43-45:

“43. Whether one is looking at an allegedly scandalizing statement, or an allegedly defamatory or fraudulent one, this particular part of the enquiry has to ask what the effect of the statement was likely to have been. It is an objective test, applied with the standard measure of reasonableness, in order to establish whether the harmful effect at which the law strikes came about or not. Therefore, one does not ask, indeed it is not permissible for a party to try to prove what the actual effect of the disputed statement was on one or more publishees. The law regards it as more reliable to infer from an interpretation of the statement what its consequence was.

44. ... the real question is whether the trier of facts has been satisfied, with the requisite preponderance depending on the nature of the case, that the publisher of the offending statement brought about a particular result. In the case of scandalizing the court that result must have been to bring the administration of justice into disrepute.

45. ... Scandalizing the court is not concerned with the self-esteem, or even the reputation, of judges as individuals, although that does not mean that conduct or language targeting specific individual judicial officers is immune. Ultimately the test is whether the offending conduct, viewed contextually, really was likely to damage the administration of justice.”

[135] His Lordship further acknowledged that a limitation in a right protected by the Bill of Rights may be saved to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. He observed that there is a vital public interest in maintaining the integrity of the Judiciary, which is an essential strut supporting the rule of law.

See para 48.

[136] The decision of *Justice Kriegler* as reflected in the preceding paragraphs reflects our law. However, his decision in para 54-59 with regard to the constitutionality of the summary procedure is a departure from our law which still recognises and enforces this procedure. Section 139 (3) as read with section 24 (3) (b) (iii) of our Constitution allows not only for the offence of scandalizing the court but the summary procedure as well. *Kriegler J* stated the following:

- “54. Manifestly the summary procedure is unsatisfactory in a number of material respects. There is no adversary process with a formal charge-sheet formulated and issued by the prosecutorial authority

in the exercise of its judgment as to the justice of the prosecution; there is no right to particulars of the charge and no formal plea procedure with the right to remain silent, thereby putting the prosecution to the proof of its case. Witnesses are not called to lay the factual basis for a conviction, nor is there a right to challenge or controvert their evidence. Here the presiding Judge takes the initiative to commence proceedings by means of a summons which he or she formulates and issues; at the hearing there need be no prosecutor, the issue being between the Judge and the accused. There is no formal plea procedure, no right to remain silent and no opportunity to challenge the evidence. Moreover, the very purpose of the procedure is for the accused to be questioned as to the alleged contempt of court....

- 58. ...it is inherently inappropriate for a court of law, the constitutionally designated primary protector of personal rights and freedoms, to pursue such a course of conduct. The summary contempt procedure employed in the present case is, save in exceptional circumstances such as those in Chinamasa's case where ordinary prosecution at the instance of the prosecuting authority is impossible, a wholly unjustifiable limitation of individual rights and must not be employed. Indeed, what transpired in the court below in this case demonstrated the pitfalls of the procedure and underscores why it should be reserved for the most exceptional only."**

[137] I have dealt with the summary contempt procedure in the beginning of this judgment. Suffice to say that the decision in the *Mamabolo* case in respect of the summary nature of contempt proceedings is not at all binding upon this court.

[138] It is apparent from the preamble to the Constitution of 2005 that this country committed itself to a new era of Constitutional supremacy and the rule of law. The country further committed itself to “start afresh under a new framework of constitutional dispensation”, and to protect and promote the fundamental rights and freedoms of All in terms of a Constitution which binds the legislature, the executive, the judiciary and the other organs and agencies of the government. The Preamble further provides that all the branches of government are the guardians of the Constitution, and that it is therefore necessary that the courts be the ultimate Interpreters of the Constitution. Similarly, section 2 (1) of the Constitution provides that the Constitution is the supreme law of this country and that if any law is inconsistent with this Constitution, that other law shall to the extent of the inconsistency be void.

[139] Section 139 (3) of the Constitution provides that the Superior Courts are Superior Courts of record and have the power to commit for contempt to themselves and all such powers as were vested in a Superior court of record immediately before the commencement of this Constitution. It is apparent from the preceding paragraphs of the judgment that the contempt of scandalising the court has its origins in the English law as well as the Roman Dutch Common Law and that it has developed over the centuries to this day.

[140] This jurisdiction recognises the offence of scandalizing the court as an offence punishable by law. Any act done or writing published which is calculated to

bring the court or a judge of the court into disrepute constitutes contempt of court. The test is whether the offending conduct viewed contextually is likely to damage the administration of justice. In arriving at an appropriate decision, the court has to balance the right of freedom of expression to the protection of the administration of justice.

[141] Section 24 (3) (b) (iii) of the Constitution provides for the right of freedom of expression and opinion. However, this right is limited to the extent that is reasonably required for the purpose of “maintaining the authority and independence of the courts”. Accordingly, this right is not absolute as its counterpart in the United States of America. Our law envisages a balancing of the right of freedom of expression in a democratic society and the limitation imposed in favour of preserving the authority and independence of the Courts.

[142] It is a trite principle of our law that no wrong is committed by any member of the public who exercises the ordinary right of criticising an individual judge or the administration of justice in good faith and in a fair and legitimate manner. It is only when the bounds of moderation and of fair and legitimate criticism have been exceeded that the court has power to interfere.

[143] The purpose for punishing contempt of court is to protect “the fountain of justice” by preventing unlawful attacks upon individual judicial officers or the administration of justice which are calculated to undermine public confidence

in the Courts. Contempt of court is a public remedy and it is not intended to vindicate the reputation of an individual judge or to assuage his wounded feelings. It is intended to maintain public confidence in the administration of justice, and to ensure that it is not undermined. It is important that the authority and dignity of the Courts as well as their capacity to carry out their functions should always be maintained. The protection and maintenance of the rule of law and the rights and freedoms guaranteed by our Constitution depend for their efficacy in the public confidence of the administration of justice. It is against this background that the Constitution provides for a limitation in the right of freedom of expression and opinion in section 24 (3) (b) (iii). Such a limitation is reasonably required for the purpose of maintaining the authority and independence of the Courts.

[144] In the first count the judges of the Supreme Court are accused of not being impartial and that their decision not to allow multipartism in this country was actuated by an improper agenda which they were pursuing and that it was not based on law and their conscience. Such a publication has a tendency of bringing the administration of justice into disrepute.

[145] There is a limit beyond which Courts, in their liberal interpretation of the Constitution, could bring about multipartism in the face of section 79 of the Constitution which expressly provides that “the system of government for Swaziland is a democratic, participatory, tinkhundla – based system which

emphasises devolution of State power from the Central government to tinkhundla areas and individual merit as a basis for election or appointment to public office”. The judgment of the Supreme Court shows that proponents of multipartism may well be advised that their remedy does not at all lie in the Courts but with the Swazi Nation as a whole by amending the Constitution in accordance with Chapter XVII thereof.

[146] The Article in the second count is a scurrilous attack on the Chief Justice as a Judge of this court. The article unlawfully and intentionally violated and impugned his dignity and authority; it was calculated or intended to lower his authority and interfere with the administration of justice. They accused the Chief Justice of behaving like a high school punk, a street punk; and that he lacked decorum and integrity and that he was extraordinarily arrogant. He was further accused of contesting the political position of the highest authority in the country by calling himself Makhulu Baas; this allegation is treasonous if not subversive in the extreme. Similarly, it was alleged that the Chief Justice does not inspire confidence to hold such an office in the judicial hierarchy and further doubted if his appointment was eligible. The Chief Justice was accused of bringing the Judicial system in this country into shambles and, that there is a high incidence of murder perpetrators in this country which he has failed to bring to justice.

[147] Accordingly, I make the following orders:

- (a) The first and second respondents are found guilty of contempt of court in respect of both counts.
- (b) The first and second respondents will each pay a fine of E100 000.00 (one hundred thousand emalangeni) in respect of the first article published in November 2009 within three days of this Order.
- (c) The first and second respondents will each pay a fine of E100 000.00 (one hundred thousand emalangeni) in respect of the second article published in February 2010 within three days of this Order.
- (d) Half of the total substantive fine of E400 000.00 (four hundred thousand emalangeni) in respect of both respondents will be suspended for a period of five years on condition that they are not found guilty of a similar offence within the period of suspension.
- (e) Failing payment of the fine of E200 000.00 (two hundred thousand emalangeni) within three days of this Order, in respect of both respondents, the second respondent will be committed to prison forthwith for a period of two years.

(f) The Director of Public Prosecutions is directed to enforce compliance with this judgment.

(g) The respondents will pay costs of suit at the ordinary scale.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT