**Civil Appeal Case No.38/02**

**In the matter between:**

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| **THE COMMISSIONER OF POLICE** | **1st Appellant** |
| **THE ATTORNEY-GENERAL** | **2nd Appellant** |
| **SUPERINTENDENT AGRIPPA KHUMALO** | **3rd Appellant** |

**And**

**MADELI FAKUDZE** **Respondent**

**CORAM** **: BROWDE J.A.**
**BECK J.A.**
**ZIETSMAN J.A.**

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**JUDGMENT**

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The Court

In terms of an order issued by the High Court (Masuku J.) the first and third appellants, i.e. the Commissioner of Police and Superintendent Agrippa Khumalo, were each committed to goal for a period of 30 days for contempt of Court. It was further ordered that the three appellants (the second appellant being the Attorney-General) jointly and severally, pay the costs of the application on an attorney and own client scale, such costs to include counsel's fees calculated on the same scale.

Against this order an appeal was noted by the three appellants. Several grounds of appeal were noted. However in the appellants' Heads of Argument only one of the several grounds of appeal is mentioned. Despite this we allowed the attorney general, who appeared in person to

argue the matter on behalf of the three appellants, to argue points mentioned in the notice of appeal but not referred to in his Heads of Argument.

The Attorney-General submitted firstly that the wrong procedure had been followed by the respondent in this case. He submitted that orders for contempt of Court must be sought on summons and not by way of application. There is no such rule of law. Proceedings for such orders can be brought by way of application particularly where, as here, the basic facts, namely that the appellants were aware of the court orders and failed to comply with such orders, are not disputed. If material disputes of fact do arise the matter can then be referred for oral evidence. See in this connection the case of **CRAW AND ANOTHER VS. JARVIS 1982-1986 (1) SLR 218, at 219 A-B.**

The next point taken by the Attorney-General concerned the question of *mens rea*. He submitted that the mere failure to comply with a court order does not justify a committal for contempt of court but that *mens rea* on the part of the respondent must also be established. He referred in this connection to the case of **R VS GIDANE MDLULI 1970 – 1976 SLR 361**. The Attorney-General cited as an example the case where compliance with the court order by the respondent is for some reason not physically possible. In such a case quite clearly the respondent would not be committed to prison for failing to comply with the Order. The Attorney General sought to equate the present situation with such a case. The appellants in their affidavits allege that their duty to maintain law and order in Swaziland made it impossible for them to comply with the Court Orders. They allege that if they had allowed the respondent to return to his home this would possibly have caused anarchy and bloodshed in the area. It was further submitted by the Attorney-General that even if these fears by the appellants were not justified they in fact harboured such fears and their refusal to comply with the Court Orders did not amount to a wilful disregard of the orders. The necessary element of *mens rea* had accordingly, he submitted, not been established.

This argument is fully dealt with in the judgment by Masuku J. He points out that there are no allegations in the papers that the respondent or any of the other evictees have engaged in any activity that could cause anarchy or a breach of the peace. If there is a danger that other persons might act violently against the respondent and the other evictees on their return to the area it is the duty of the police to act against such persons. Such a possibility does not justify denying the respondent his right to return to his home.

The appellants have further not established any basis from which one could conclude that compliance by them with the Court orders would not have been possible, and as Masuku J. points out in his judgment it cannot be left to the police to decide whether or not such orders should be enforced by them. What we have here is a deliberate decision taken by the first and third appellants not to comply with the orders.

The final point to be dealt with is the point raised by the appellants in their Heads of Argument.

This point is set out in the Notice of Appeal as follows:

> "The Court *a quo* erred in law and in fact in not, at least, suspending the committal into goal of the appellants, pending compliance with the order, as it is the tradition and principle in such matters."

The application brought by the present respondent has a long history. The respondent has a home in the Macetjeni Area. On 3rd August 2000 removal orders were served on him and on other persons ordering their removal from the area. They contested the validity of the removal orders and this resulted in several orders being granted in the High Court and in this Court declaring the removal orders to be invalid. Despite such Court orders the respondent and the other persons involved have consistently been prevented by the authorities, and in particular by the first and third appellants, from returning to their homes.

During June 2002 two judgments of this Court made it clear that the respondent and the other named persons had the right to return unhindered to their homes. In one of the said judgments Steyn J.A. (with whom Browde J.A. and Zietsman J.A. concurred), in Case No.8 of 2002, stated the following:

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

> Courts arising out of the unlawful ejectment of the parties involved."

Despite these most recent judgments the authorities, and in particular the first and third appellants have still forcibly prevented the respondent and the other persons involved from returning to their homes.

The respondent, as applicant, brought his application before Masuku J. in the High Court and this resulted in the order referred to at the beginning of this judgment being granted.

Masuku J., in a comprehensive and well-reasoned judgment set out in some detail the history of the matter, and he added "It is necessary that I decry the state of affairs where orders of the courts are being deliberately not enforced by the executive."

The reason why the failure to comply with court orders is decried by the Courts is that the public look to the courts to ensure that justice is done. It is of obvious concern to the judges and magistrates if their orders are not carried out and if justice is thus denied to the litigants. As Masuku J. points out in his judgment where court orders are deliberately not enforced by the executive this results in an injury not only to the judiciary but to the entire government and nation.

In their Heads of Argument the appellants point to the fact that where an order made in a civil case is disobeyed, the procedure of committal for contempt of Court is designed primarily to enforce compliance with the civil court's order and not simply to punish the respondent. For this reason the order for committal to prison is usually suspended on condition that the Court Order is complied with. In this connection reference is made to the case of Cape Times Ltd vs Union Trades Directories (Pty) Ltd and Others 1956 (1) S.A. 105 (N).

Masuku J. was aware of this principle and he deals with the argument in the following terms:

> "I considered whether it would be proper to suspend the committal pending compliance, and found it inappropriate in view of the respondents' contumacy of orders of this Court

exhibited in previous applications."

In our view Masuku J's reasoning cannot be faulted. We have referred to the statement made by Steyn J.A. in his judgment in Case No.8 of 2002 where he refers to every conceivable step taken by the executive in an attempt to thwart the orders made by the courts. The time must eventually come when further delays and suspended orders are no longer appropriate. It is our conclusion that Masuku J. was justified in the order which he made in view of the history of this matter, and that the appeal against his order must fail.

In view of the fact that the object of the order is to enforce compliance with the earlier orders granted in favour of the respondent we add a rider to the order made by Masuku J.

The following order is made.

1. The appeal is dismissed and the orders granted by Masuku J. confirmed.

2. The three appellants are ordered jointly and severally, the one paying the others to be absolved, to pay the costs of this appeal on the attorney and own client scale, such costs to include counsel's fees calculated on the same scale.

3. Despite their committal to gaol for a period of 30 days, which we hereby order to be put into effect forthwith, the first and third appellants are to be immediately released from gaol on compliance with the order allowing the respondent to return unhindered to his home in the Macetjeni area.

4. After the release of the first and third appellants from gaol, if the respondent is

again prevented from residing in, or returning to, his home in the Macetjeni area, he is given leave to again approach the High Court on these papers, duly supplemented, for a similar order or for other relief.

J. BROWDE J.A

C.E.L. BECK J.A.

N.W. ZIETSMAN J.A.

Delivered on this……day of November 2002