



IN THE HIGH COURT OF SWAZILAND

CIV. CASE 2394/95

In the matter between:-

THE LAW SOCIETY OF SWAZILAND

APPLICANT

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

1ST RESPONDENT

THE COMMISSIONER OF POLICE

2ND RESPONDENT

CORAM : DUNN A.C.J.
FOR THE APPLICANT : MR. P. SHILUBANE
FOR THE 1ST RESPONDENT : MR. K.KILIKUMI
FOR THE 2ND RESPONDENT : MR. K. SIKHONDZE

JUDGMENT

3RD NOVEMBER 1995

On the 11th October 1995, the Principal Magistrate Mr Maphalala addressed the following memorandum to the Registrar of the High Court:-

RE: CIRCUMSTANCES LEADING TO LAWYERS PROTEST AGAINST SENIOR
MAGISTRATE MR BWONWONGA ON 9/10/95

I refer to our telephone conversation of the 10th instant as regards the above-subject matter and I wish to report as follows:

1. The report by the newspaper of the 10/10/95 is more or less factually correct save to say that it is not correct that the incident began soon after I had announced in open court that the Civil roll was to be handled by Mr Bwonwonga (Senior Magistrate). The true position is that last week on Thursday we arranged with Senior Magistrate Mr Bwonwonga that we were going to alternate weekly in doing Civil work in this Magistracy. We adjusted our diaries accordingly and was to draw up the roll. The 9/10/95 was his turn and I had advised the Clerk prior to make proper arrangements;

2. On the 9/10/95 at 10.30 am. I was in my office doing some administrative work when I heard some people talking in loud voices outside. I went out to investigate where I was confronted by a large group of lawyers numbering between 10 to 20 demanding a Magistrate. I could gather from their mood that they did not want to appear before Mr. Bwonwonga. On assessing the situation I beckoned

them to my chambers with a view to solve the problem in private to protect the dignity of the court. I must say that the group was rowdy. They were led by Attorney Mr. Thulani Masina to my office and I was walking leading the way. A large group entered my chambers and I asked them what their problem was whereupon they told me that they are not prepared to place their cases before Mr. Bwonwonga as they expressed doubts about his competence in both Criminal and Civil matter. We had a short discussion where I tried to reason but could not make headway. Mr Masina purported to be the groups' spokesman. I could gather that the rest were acting in concert.

3. At this point I decided to attend to these cases in order to protect the dignity of the Court. Moreso, it was then 11.00 am. way passed the schedule time for the court sitting at 9.30 am. and Mr Bwonwonga had not arrived.
4. Just before 1.00 pm. Mr Bwonwonga came to Manzini and I appraised him of what had transpired and he explained that the reason he was late is that he had to attend on his residence permit at the Ministry of Home Affairs.

I hope the above account will help clearing the air in this rather unfortunate incident.

The memorandum is annexure 'B' to the applicant's replying affidavit. It bears the date stamps of the Registrar of the High Court and the Director of Public Prosecutions (the DPP). The date in each stamp is the 11th October 1995. It is not clear or explained under what circumstances the memorandum came into the possession of the Director of Public Prosecution as the memorandum had not been copied to him. There is no indication as to what steps, if any, the Registrar took with regard to the memorandum.

On the 17th October 1995 the Director of Public Prosecutions wrote the following memorandum to the Commissioner of Police (2nd respondent)

**"PROTEST BY A GROUP OF LAWYERS AT MANZINI
MAGISTRATE COURT ON 9TH OCTOBER 1995**

Enclosed hereto is a copy of a Memorandum to Acting Registrar of the High Court by the Principal Magistrate, Mr. S.B. Maphalala, to The Acting Registrar of the High Court (sic). It is an account of certain events that occurred at Manzini Magistrate Court premises on the 9th October, 1995, which were given wide publicity and coverage by the mass media in the country and abroad. It gives an account of rowdy behaviour by a group, which behavior cannot be condoned in any way. In fact if any act unlawfully and intentionally violated the dignity, repute or authority of the judiciary in this country, that was it.

The said conduct by this mob should be investigated and the alleged perpetrators brought to book as a matter of urgency. I hereby direct you to open investigations to find the persons who were involved in this shameful conduct which has brought the administration of justice into disrepute and submit a docket to me for prosecution.

At least the alleged leader and spokesman of the group, a certain Mr Thulani Masina, is clearly identified in Mr Maphalala's report. The identity of the rest of the group should also be established, after which they should all be arrested and charged jointly and severally with Contempt of Court, and alternatively, with Defeating or Obstructing the course of justice. The docket should then be forwarded to me without delay for prosecution.

Kindly expedite action."

The Director of Public Prosecution's memorandum was copied to the Registrar and to the Secretary of the Judicial Service Commission.

It appears that sometime after the issue of the Director of Public Prosecution's memorandum, members of the Law Society of Swaziland got wind of the contents of the memorandum. A meeting of the Law Society was held at about midday of 20th October 1995 at which the possible arrest of some members of the Law Society pursuant to the Director of Public Prosecution's memorandum was discussed. The upshot of the meeting was that the Law Society fearing the arrest

of some of its members pursuant to the Director of Public Prosecution's memorandum decided to file an application in the High Court that very afternoon for an interim order in which the respondents were called upon to show cause on the 24th October 1995 why :-

- (a) The Respondents or their agents or their employees should not be interdicted from arresting any member of the Applicant in connection with an alleged contempt of Court and/or defeating the ends of justice that allegedly occurred at the Manzini Magistrate's Court on the 9th October, 1995.
- (b) Respondents should not be ordered to pay the costs hereof

The order was granted as parayed. The order was obviously too wide. The intention was and has been confirmed in the hearing, to interdict the arrest of the applicant's members pursuant to the Director of Public Prosecution's memorandum to the police. The rule nisi which was issued was extended on the return date until to-day.

The affidavit filed in support of the application is brief and focuses on the subject of the Law Society meeting on the 20th and the averment that there was no basis in law for arresting members of the Law Society pursuant to the Director of Public Prosecution's memorandum. The respondents have filed answering affidavits to which the

applicant has replied. The answering affidavit of the 1st respondent was filed by the Director of Public Prosecutions and that of the 2nd respondent was filed by the Attorney General. The application is in effect one against Government Officials acting in their capacities as such. The applicant could in terms of section 3 of the Government Liabilities Act No. 2/1967 have elected to cite the Attorney General as the nominal respondent. I make the observation that the Attorney General as the Government's Legal Advisor and representative should have been briefed by both respondents and taken a decision on the representation in Court, of both respondents. The practice of allowing individual Government Officials or departments who have been served with court process, to take whatever action thereon as they consider necessary should be avoided at all costs. Such action could, in some cases, prove costly and embarrassing to the Government.

Both respondents have raised certain points in limine. The applicant has raised certain points with regards to the manner in which the respondents' points have been raised. No useful purpose will in my view be served by a detailed consideration of all these points. There has not, in my view, been any serious or wilful disregard of the rules of court as to call for a reasoned ruling on such points for purposes of establishing any guidance for the future. In any event the points taken are such that even if upheld the offending party would simply withdraw to correct and return to court for determination of the issue that is central to the application. I allowed argument on the question of the

locus standi of applicant and ruled that the Law Society had a sufficient interest in the matter to bring the matter within the provisions of the Legal Practitioners Act as to entitle the Law Society to move this application. A further point which can be dealt with at this stage relates to the attestation of the affidavits filed by the applicant in support of this application. The affidavits were apparently signed by an attorney who is a professional assistant in the office of Mr. Shilubane who, as President of the Law Society has filed the main affidavit and whose office has been cited as the attorneys for the applicant. There are two conflicting decisions of the High Court on this practice. In the case of **MAGAGULA V. TOWN COUNCIL OF MANZINI AND OTHERS 1979-81 SLR p291** Nathan C.J. held that in regard to the attestation of affidavits, there is no statutory provision to the effect that a commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest. In the later case of **F.N. DLAMINI V. J.M. DLAMINI 1982-1986 VOL II SLR p416**, Hannah C.J. held that affidavits sworn before the respondent's own attorney or agent, partner or clerk of that attorney, are not admissible in evidence. A ruling on these two decisions will be no doubt necessary by an appropriate court. It is not necessary for me to deal with the issue in this application for both sides are guilty of the same error. The respondent's affidavits were attested to before legal practitioners in the employ of the Government who may be equated to the class of commissioners referred to in the two judgments. The allegation that the 1st respondent was wrongly joined in this application must be dealt with on the

merits as it has a direct bearing on the interpretation to be placed on the memorandum of the Director of Public Prosecution. It is submitted on behalf of the Director of Public Prosecution that he "is not authorised and/or empowered under any law to effect arrest of any member of the applicant". The 1st respondent is supported in this submission by the 2nd respondent who states at paragraph 3.2 of his affidavit that "the 1st respondent has been wrongly cited as he has no authority to arrest any person". The first respondent expands on this point as follows at paragraph 4 of his affidavit-

As Director of Public Prosecutions I have no authority or power under any law to arrest or order the arrest of any person. What happened in this matter is that on the 11th October 1995 I received a copy of a Memorandum from the Principal Magistrate, Mr.S.B. Maphalala to the Acting Registrar of the High Court in which the Principal Magistrate was reporting about an incident that had occurred at the premises of the Magistrate Court Manzini. After having read the contents of this Memorandum it appeared that there was prima facie evidence that certain persons had committed the crime of Contempt of Court. I brought the attention of the Commissioner of Police to this matter for him to do his duties of investigation, arrest and charge any person shown by evidence to have participated in the commission to this crime and for the Commissioner to forward to me this Police docket for prosecution.

It will be immediately observed that this averment is at direct variance with the contents of the Director of Public Prosecution's memorandum. The Director of Public Prosecutions has attempted quite unsatisfactorily, under paragraph 4, to place an entirely innocent interpretation of his conduct in writing the memorandum. The memorandum very clearly conveys the Director of Public Prosecution's conclusion-

- (1) that an unlawful and intentional act was committed by a group of lawyers.
- (2) that such unlawful and intentional conduct should be investigated and the culprits brought to book as a matter of urgency
- (3) that the identified leader of the group of lawyers should, together with such other lawyers as could be identified, be arrested and charged.

The memorandum served as a clear directive by the Director of Public Prosecutions to the Commissioner, as to how he should proceed in the matter. I am at pains to understand how it could be sought to place any other interpretation on the memorandum other than that it was such a directive.

It is of no consequence for the respondents to state that the Director of Public Prosecutions has no power to arrest any member of the applicant. The fact is that

the Director of Public Prosecutions purported to exercise the very powers which he now, supported by the 2nd respondent states he does not have. The relief sought by the applicant is as a direct consequence of the directive by the Director of Public Prosecutions.

The next issue on the merits as argued by the respondents is that the order sought by the applicant is unlawful in that it prohibits the police from carrying out their statutory duty against the undisclosed members of the applicant. There can in general, be no problem with this statement by the respondents. The police powers with regard to arrest are, however, governed by statute namely, the Criminal Procedure and Evidence Act No. 67/1938. Part V(A) of the Act sets out in clear terms the circumstances under which a police officer may arrest any person without a warrant. The relevant section is section 22 which I will set out in full:-

Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorised to arrest without warrant every person-

- (a) Who commits any offence in his presence;
- (b) Whom he has reasonable grounds to suspect of having committed any of the offences mentioned in Part II of the First Schedule,

- (c) Whom he finds attempting to commit an offence, or clearly manifesting an intention so to do.

Under Part V(B) provision for an arrest with a warrant is made as follows:-

- 31 (1) Any magistrate may issue a warrant for the arrest of any person or for the further detention of a person arrested without a warrant on a written application subscribed by the Attorney General or by the local public prosecutor or any commissioned officer of police setting forth the offence alleged to have been committed and that, from information taken upon oath, there are reasonable grounds of suspicion against such person, or upon information to the like effect of any person made on oath before the magistrate issuing the warrant:

Provided that no magistrate may issue any such warrant except when the offence charged has been committed within his area of jurisdiction, or except when the person against whom such warrant is issued was, at the time when it was issued, known, or suspected on reasonable grounds, to be within his area of jurisdiction.

- (2) Every such warrant may be issued on a Sunday

memorandum. It would then have been open to the police in the normal way, to investigate the case and to apply whatever sections of Part V of Act 67/1938 were relevant or to proceed with their investigations upon whatever formal complaint may have been made by the Magistrate or Principal Magistrate in question.

The rule nisi granted on th 20th october must in the circumstances be confirmed with the amendment, that the interdict relates only to arrests in terms of the memorandum issued by the Director of Public Prosecutions to the police, arising from the incident reported by the Principal Magistrate on the 11th October 1995.

The rule is confirmed as altered with costs against the respondents.



B. DUNN

ACTING CHIEF JUSTICE
