

## **THE ARTICLE THAT GOT HIM JAILED: By THULANI MASEKO (Jailed Human Rights Lawyer)**

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We read many years ago as children at secondary school a book called “Cry, the Beloved Country by Alan Paton. “Cry the Beloved Country’ is as the author tells us a compound of facts and fiction, an imaginary book about life in apartheid South Africa, depicting the suffering of the black majority of the people of South Africa. But this article is not fiction, it is reality as it unfolds as we see it happen in Swaziland, hence we say “Oh, Cry the Beloved Swaziland” for we are country gone to the dogs. In his introductory notes Paton writes that: “Cry, the beloved country, for the unborn child that is the inheritor of our fear. Let him not love the earth too deeply. Let him not laugh too gladly when the water runs through his fingers, nor stand too silent when the setting sun makes red the veld fire. Let him not be too moved when the birds of his land are singing, nor give too much of his heart to a mountain or a valley. For fear will rob him of all if he gives too much.” Indeed, fear has crippled the Swazi society, for the powerful have become untouchable. Cry the Beloved Country!

**Bhantshana and contempt of Court?**

Way before many of us young attorneys were admitted to practice law in this country the practice of an official opening of the High Court had become the norm, a long established practice, a convention to such an extent that it had become a custom. This is no longer the case and its abandonment was unilateral by those who head the judiciary. Members of the legal profession are key stakeholders in the justice delivery system were never consulted, let alone the courtesy to inform them. Such is the arrogance of power in this beloved Kingdom.

This year particularly opened with such a bang. We could not believe and we are still shocked at the arrest of Bhantshana Gwebu, the government chief vehicle inspector, who was arrested during the course and scope of duty, and found himself languishing in gaol for an alleged contempt of court. We call it a bang because it is the judiciary that is alleged to have issued the warrant of apprehension, the Chief Justice himself! Bhantshana’s arrest has sent shivers among right thinking members of our society. How could a public officer be arrested for executing his duties as a government employee? What is equally striking is the loud silence by the office of the Ministry of Public Service and the Office of the Attorney General.

From a point of view of an ordinary and innocent Swazi, it does appear that those who hold higher public office are above the law, only the small person is subject to the law. Yet those of us who still believe in the higher principle of the Rule of Law hold on to the doctrine as Francis Neate puts it, that the “Rule of Law is the only system so far designed by mankind to provide impartial control over the exercise of state power. Rule of Law means that it is the law which ultimately rules, not a monarch, not a president or prime minister, clearly not a dictator, not even a benevolent dictator. Under the Rule of Law no one is above the law. The law is the ruler.” For this purpose, we add, “not even the Judiciary or the Chief Justice is above the law.” This country has been grappling with Rule of Law issues for a long time now.

Amazingly, we have been told this is the year of success; the question is success in what? We have been told that this government is bent on fighting corruption. But how come Bhantshana who for a long time has been using his authority to fight corruption has been subjected to all manner of abuse, including physical violation by members of the military. The arrest is the

icing on the cake. How is it possible that we are told of a fight against corruption when those who are employed to fight it are harassed, violated and abused? How can we win the fight against corruption when the very institutions which are supposed to be in the forefront of this fight behave in a corrupt manner to fix personal vendetta? It is surely one thing to talk about fighting corruption, it is yet another to be seen to be actually fighting it. Bhantshana's case is a clear indication that fighting corruption is nothing but lip-service by those in the higher echelons of power.

#### Redefining the law of contempt of court

It is alleged that Gwebu committed the criminal offence of contempt of court. We may not know all the facts, but from what has been reported both in the print media and in Bhantshana's court papers, he did not charge the judge, but the driver. The question arises as to how the contempt of court offence arises? This we may not appreciate until the trial when the State leads evidence to prove the crime. What is disturbing about the whole saga is that Bhantshana spent some days in gaol without knowing exactly the nature of the offence he was facing. The Director of Public Prosecutions had not prepared a charge sheet. Even worse, as we understand, is the attitude he got from the Chief Justice when he appeared before him on the first day. Instead of showing concern about having representation which is a right every accused person has in terms of the criminal laws of Swaziland and the Constitution which is said to be the supreme law, he was welcomed with sarcasm. We should deeply be concerned about such conduct displayed by the head of the judiciary in the country. Such conduct deprives the court of its moral authority; it is a demonstration of moral bankruptcy. A judiciary that is morally bankrupt cannot dispense justice without fear or favour as the oath of office dictates. The old adage says that "justice must not only be done, it must be seen to be done."

As we understand the criminal offence of contempt of court, the person facing it must have the willful intention to undermine the authority of the court and must be aware that he is so undermining such authority of the court. In this case, here is a civil servant employed to monitor the abuse of government vehicles, exercises his powers as such and lands himself in trouble for contempt! We are anxiously waiting to hear how the contempt arose in these circumstances. What is a bothering trend though is that the weapon of contempt is being used by the courts to shield itself from being held accountable for the manner in which it goes about in the business of dispensing justice to all manner of people. Of course there is always a conflict between judicial independence and judicial accountability. But this line must not be blurred to enable those who hold judicial office to get away with failure to account. They too, hold public office, and they too are accountable. They too exercise judicial power for the benefit of the public and users of the court. They are not an exception to public scrutiny.

#### A travesty of justice

Many ask whether justice was done or seen to be done in the Bhantshana drama. Many will say that what we saw is nothing but a travesty of justice in its highest form. Travesty firstly because Bhantshana as an accused was denied the right to representation at the first appearance before the Chief Justice. Second, a travesty because the Chief Justice who had issued the warrant of arrest was also seized with the matter and sent Bhantshana to gaol. In more ways than one, this was a repeat of the Justice Masuku kangaroo process where the Chief Justice stands accused of being the prosecutor, witness and judge in his own cause. Even when the prosecution applied that the matter be stood down so that Bhantshana's legal representative could be heard, the Chief Justice wanted to hear none of it! So, it may well be that the Chief Justice drafted the charge sheet for the office of the Director of Public Prosecution. It stands to wonder what powers he exercised when he did so! Is this some kind of conspiracy? Wither

the judiciary.

The questions must be asked: for how long will the people of Swaziland be robbed of justice by the very institutions that are enjoined by the Constitution to enforce it? What is the value of the constitution if cannot be respected even by those who are called upon to ensure that it is respected and applied? Is the law of any value and meaning to the life of an ordinary person who does not belong to the most powerful and most high in society? It does seem that we are living the law of the jungle where the less powerful are subject to the whims and feelings of the powerful, rich and privileged.

#### Lip-service to fight against corruption

We should be disturbed that there is so much lip-service paid to the fight against corruption, yet when officials like Bantshana who seem to take the slogan seriously themselves become victims of fighting corruption! This pretence must stop, and those who speak against corruption must walk the talk. We have said before and we dare repeat it here, that we will speak even at the risk of being labeled critics with no modicum of decency. For, evil strives when those with a conscience choose to be silent for fear of the consequences. And Mandela has taught us that courage is not the absence of fear, but triumph over it. Many are afraid to speak out in this country because the consequences of speaking against the most powerful are dire. But who said the defense of the right to dignity comes without some sacrifice and without a price? Swazis must be prepared to pay a price if we are to win our sense of dignity and self-respect. We have been hard done for so long. It is even more painful when such abuse of dignity occurs time and time again in the presence of constitution that purports to be supreme. We will not stop complaining that this document was not meant to protect and defend the rights of the weak in our society, but to entrench the interests and privileges of the powerful. This is evident from the fact that the institutions created to defend the people, such as the courts, the Judicial Service Commission, the Human Rights Commission to mention but a few seem to be all more executive-bias than playing their rightful oversight role.

Perhaps Bantshana could have handled the matter differently, but he chose to handle the situation the way he did. The question is whether his conduct warranted the treatment he then got? We think not. It would appear as some suggest, that Gwebu had to be “dealt with” for sins he committed in the past confiscating cars belonging to the powerful, including the Chief Justice himself. It is such perceptions that make people lose faith in institutions of power, when it appears that such institutions are used to settle personal scores at the expense of justice and fairness.

As Alan Paton wrote in his *Cry the Beloved Country*, “The sun tips with light the mountains of Angeli and East Griqualand. The great valley of the Umzimkulu is still in darkness, but the light will come here. Ndotsheni is still in darkness, but the light will come there also. For it is dawn that has come, as it has come for a thousand centuries, never failing. But when that dawn will come, of our emancipation, from the fear of bondage and the bondage of fear, why that is a secret.” Yes, the day will come; dawn and the light are coming to Swaziland. This will be the day when we, the people, will no longer be used as pawn, but a people with full citizenship rights to shape our destiny.

So yes, cry the beloved Kingdom of Eswatini