CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 44/00

THE STATE

versus

RUSSELL MAMABOLO Appellant

Intervening

E.TV
BUSINESS DAY
FREEDOM OF EXPRESSION INSTITUTE Amici Curiae

Heard on : 27 February 2001

Decided on : 11 April 2001

JUDGMENT

KRIEGLER J:

Introduction

[1] How far can one go in criticising a judge? Our law, while saying that "[j]ustice is not a cloistered virtue"[1] and that "it is right and proper that . . . [judges] should be publicly

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1 *Ambard v Attorney-General of Trinidad and Tobago* [1936] 1 All ER 704 (PC), per Lord Atkin at 709, quoted in *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A), per Corbett CJ at 25G–H.

accountable",[2] does place limits on the criticism of judicial officers and the administration of justice for which they are responsible. This appeal concerns the constitutional validity of some of these limits. More specifically it relates to a conviction for contempt of court resulting from the publication of criticism of a judicial order. Leave was granted to appeal directly to this Court because the case raised constitutional issues of substance on which a ruling by this Court was desirable in the interests of justice.[3] The first issue was whether the law relating to the particular form of contempt of court, more colourfully than definitively referred to as scandalising the court, unjustifiably limited the right to freedom of expression vouchsafed by the Constitution.[4] The second is whether the procedure recognised and sanctioned by our law whereby a judge could deal summarily with cases of this kind, fell foul of the fair trial rights guaranteed by the Constitution.[5] An ancillary constitutional issue relates to the binding force of judicial orders and the related obligation imposed by the Constitution on all organs of state to assist and protect the courts.[6] In respect of each of the first two issues, a finding that the law does indeed limit the

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2 The *Argus Printing and Publishing* case, above n 1 at 25E—F.

3 See s 167(6)(b) of the Constitution, read with s 16(2)(b) of the Constitutional Court Complementary Act 13 of 1995 and rule 18 of the Constitutional Court Rules.

4 Section 16(1) of the Constitution reads as follows:

> "(1) Everyone has the right to freedom of expression, which includes—
> (*a*) freedom of the press and other media;
> (*b*) freedom to receive or impart information or ideas;
> (*c*) freedom of artistic creativity; and
> (*d*) academic freedom and freedom of scientific research."

5 Section 35(3) of the Constitution commences with the broad proposition that "[e]very accused person has a right to a fair trial, which includes the right . . . " and then itemises an extensive list of specific rights in paras (a) to (o).

6 Section 165 of the Constitution provides as follows:

> "(1) The judicial authority of the Republic is vested in the courts.
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
> (3) No person or organ of state may interfere with the functioning of the courts.

fundamental rights in the respects contended for, will in turn require an enquiry whether such limitation is nevertheless constitutionally justified.[7]

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(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[7] Section 36(1) of the Constitution reads as follows:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(*a*) the nature of the right;
(*b*) the importance of the purpose of the limitation;
(*c*) the nature and extent of the limitation;

(*d*) the relation between the limitation and its purpose; and
(*e*) less restrictive means to achieve the purpose."

[2] Although detailed description and analysis of the opposing contentions and supporting submissions must wait for later,[8] a prefatory outline would be helpful. In the court below, and again on appeal, both of the main issues were raised on behalf of the appellant. In essence the argument sought to be advanced on his behalf in the High Court, and later developed more fully here, was that the overriding constitutional protection given to freedom of speech and to a fair trial was incompatible with the continued recognition of the crime of contempt of court and with the summary procedure. With regard to both issues he enjoyed the support on appeal of the Freedom of Expression Institute and two commercial news media who were allowed to intervene jointly and submit written and oral argument as amici curiae. The argument on behalf of the amici was presented on a considerably narrower footing, however, being confined to advocating an adaptation of the test for scandalising committed outside the court and after the case had been concluded, and that only in respect of such cases the summary procedure be outlawed.

[3] Although the prosecution agencies of the state had no direct interest (and seem to have played no formal part) in the contempt proceedings in the High Court, the appeal was formally opposed on behalf of the state by the Director of Public Prosecutions, Pretoria. In substance that office defended from constitutional challenge both the substantive and the procedural provisions of the law as it stands, while not straining to support their application in this case by the learned judge in the court below. Although criminalising certain forms of criticism of the courts and their officers did constitute a limitation on complete freedom of expression, and although the summary procedure did infringe some of the panoply of rights that go to make up fair trial protection, the contention on behalf of the state was that both departures from the ideal were

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8 See para 34 et seq below.

justified by the countervailing public interest in preserving the integrity of the administration of justice.

The factual backdrop

[4] These opposing contentions fall to be evaluated against the backdrop of a strange set of circumstances. The appellant is an official in the Department of Correctional Services (the Department) who was summarily tried, convicted and sentenced[9] for contempt of court in the Transvaal High Court arising from comments concerning an order of that court that he had published as spokesperson for the Department. The order in question related to a newsworthy bail application. Mr Eugene Terre Blanche, the leader of the Afrikaner Weerstandsbeweging, had been sentenced to two concurrent sentences of imprisonment, six years for attempted murder and one year for assault with intent to do grievous bodily harm. He exhausted his appeal remedies on the lesser count and started serving his sentence. On the other count he was granted leave to appeal to the Supreme Court of Appeal, but on a limited basis only, the leave being confined to the question whether the conviction should be reduced to one of assault with intent to do grievous bodily harm. Later, while that appeal was still pending, he heard that his release on parole on the lesser count was imminent and in anticipation applied to the Transvaal High Court for bail pending the outcome of the appeal. The prosecution did not oppose and the application

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9 He was sentenced to a fine of R2 000 or six months' imprisonment and to a further six months conditionally suspended.

was granted by Els J in chambers.

[5] The Department was of the view that, because the scope of the appeal was "limited to the nature of the offence only and does not relate to the sentence,"[10] the prisoner would indeed not shortly qualify for parole. Accordingly, so it believed, bail had wrongly been granted and a departmental media release to this effect was issued. The author of the release was the appellant in this case, a deputy-director, liaison services, in the Department. The appellant also dealt with media enquiries about the matter, among others by a reporter from *Beeld*, an Afrikaans language daily newspaper. On 16 August 2001 the paper featured a report which, in translation, reads as follows:

> **"NGCUKA INTERVENES OVER ET'S DETENTION**
>
> 9*Wife demands answer after 'radical blunder'* 9*Judge contributes to confusion - DCS*
>
> Elise Tempelhoff
>
> Adv. Bulelani Ngcuka, national director of prosecutions, has intervened in the question of the AWB leader Eugene Terre Blanche's detention and is now going to 'study' the technical aspects thereof.
>
> Terre Blanche's wife, Martie, said yesterday that her husband was being detained unlawfully. It is 'a radical mistake' that he is still in prison in the light of his successful bail application last week in the Pretoria High Court and the fact that the control magistrate of Potchefstroom had last Friday issued a warrant for her husband's release, Mrs Terre Blanche said. Both Mrs Terre Blanche and Mr Dawie de Jager, Terre

[10] The wording is taken from a letter written on behalf of the Department by the State Attorney, Pretoria, to the prisoner's attorneys on 15 August 2000, explaining why "the parole that was initially approved has been revoked."

Blanche's legal representative now demand an urgent and 'thorough' explanation from the DCS why the AWB leader is still being detained even after he had paid his bail money of R 5000.

Mr Russell Mamabolo, spokesperson of the DCS, said yesterday that judge Johan Els had made a mistake on Thursday by granting bail to Terre Blanche pending the appeal case. This has now contributed to further confusion, he said.

Mamabolo admitted that the Rooigrond prison, where Terre Blanche is being held had received a warrant for his release. He however adheres to his view that bail had 'erroneously' been granted to Terre Blanche, he said yesterday.

As far as the DCS is concerned, Terre Blanche was sent to prison for 6 years. He admitted that the DCS had contributed to the confusion when they determined in June this year that Terre Blanche could be considered for parole.

Terre Blanche can now only qualify to be released on parole after three years, Mamabolo said.

'We have here two documents that make it impossible for Terre Blanche now to be released on bail or on parole. The one is an amended warrant issued by a magistrate in Potchefstroom on 7 August and the other is a notice from the appeal court that Terre Blanche can only appeal against the nature of the offence, viz. attempted murder, of which he had been convicted. It therefore makes no difference to the time he will have to spend in prison.'

According to De Jager, it is possible that the appeal court could now convict Terre Blanche on a lesser charge, viz. a charge of assault. The sentence would then possibly be only a year's imprisonment, De Jager said. As Terre Blanche had to serve his sentences concurrently he would by March next year have been in prison for 6 months too long, because he had qualified for the 6 month amnesty that ex-president Nelson Mandela had granted on his 80th birthday. He will therefore have to be released next month already."

[6] The learned judge read the newspaper report and later the same day issued an order in the following terms:

> "That the Director-General of Correctional Services, Commissioner Lulamile Mbete, together with the spokesperson of the Department of Correctional Services, as mentioned in *Beeld*, Mr Russel Mamabolo together with their legal representatives if they so desire appear before me on Monday 21 August 2000 at 10h00 in Court GC to explain whether they said what is reflected in the report and whether it is indeed the opinion of the DCS. In that event they will have to explain on what basis I erred and what right they had to cause to be published in the newspapers that a judge had erred if they had no grounds for such a statement." (My translation from Afrikaans.)

[7] The two persons addressed in the order, Commissioner Mbete and the appellant, duly appeared in court, represented by senior and junior counsel. Affidavits by them together with supporting documents had been prepared in consultation with their legal advisors and were filed on Friday, 18 August 2000. Commissioner Mbete's affidavit was brief and to the point: he had said nothing to the press about the matter; he was not a lawyer (the departmental media statement reflected the view of its legal advisors) and he and his department had acted in good faith, committing no contempt of court. The appellant's affidavit was somewhat longer: he too was a layman; he had relied on responsible legal advice; the media statement correctly reflected the Department's bona fide view; this view he had conveyed to the reporter, whose story correctly reported what he had said. The concluding paragraph of the affidavit summed up the appellant's case:

> "In summary I therefore state that my actions do not amount to contempt of court, that I did not intend to commit contempt of court, and that my criticism of the relevant court order was based on the facts available to me and was furthermore lawful in terms of the

Common Law and the South African Constitution as aforesaid."

[8] Although the order of court issued by Els J neither expressly nor by necessary implication conveyed that the object of the exercise was to pursue the question of contempt of court, both deponents expressly addressed that question and disavowed any intention on their part to have acted contemptuously.

[9] The proceedings that unfolded on the Monday morning were unusual in a number of respects. Three sets of counsel apparently announced their appearance: an advocate "on behalf of the state", an advocate "on behalf of the applicant (ETT Terreblanche) " and two advocates "on behalf of the accused". It is not clear how the first two advocates came to be present, nor what right of audience, if any, they had (or claimed). The learned judge opened the proceedings by announcing that it was "an enquiry to determine whether [the appellant and the commissioner] are guilty of contempt of court". He then invited counsel who had acted in the bail application to confirm that they had been present and went on, as he put it, "to set out shortly the facts which I feel led to this inquiry and I just want [the first two advocates] to confirm or to deny the facts as set out by me." The record then shows some three pages of the judge's "setting out the facts", culminating in the two advocates concerned being asked in turn whether they had anything to add, and to confirm the correctness of the resumé. They not only responded affirmatively (although some parts of the resumé clearly fell outside their knowledge) but made a number of factual averments germane to the "enquiry" ─ and adverse to the "accused". The invitation to comment on the correctness of the resumé or to add to it was not extended to counsel for the two "accused", however. Nor were they afforded an opportunity to challenge or explore any of the

factual material that had been related; not that it would have served much purpose in the circumstances. Their counsel could hardly have asked to cross-examine any of the "witnesses" who had participated in compiling the factual resumé that was to serve as the basis of the enquiry.

[10] Mr Fabricius then proceeded to address argument on behalf of the appellant and the Commissioner, among others pointing out that the order of court did not mention that there was to be an enquiry into contempt of court and submitting that (a) such a charge infringed their right to freedom of speech; and (b) "the Constitution has overtaken the court's [sic] previous powers to summarily order people before court to give an explanation of any kind whatsoever" and, expressly relying on section 35(3) of the Constitution, that it "transgresses there [sic] right to a fair trial". Counsel also made the point that simply publishing a statement that a judge was wrong, could not constitute contempt of court. The record reflects that this part of the argument concluded with the following exchange:

> "COURT: Stating that you are going to ignore an order of court are you saying is not contemptuous of court?
> MR FABRICIUS: My Lord, it depends on the circumstances.
> COURT: Are you stating that, that is not contemptuous of court?
> MR FABRICIUS: He does not say that 'I am going to ignore this court order.'
> COURT: He said 'we are going to ignore it.' That is what it boils down to. What else can you infer from that? Please go on."

[11] Towards the end of Mr Fabricius's argument the debate turned to freedom of speech. He and Els J were apparently agreed that this freedom "includes the right to criticise the courts" but differed as to the meaning of the appellant's statements as reported in the *Beeld* article. At the

conclusion of the argument by Mr Fabricius the court adjourned and upon its reconvening the judge delivered an oral judgment, concluding with the following summation of what was found to be offensive in the press report:

> "1. It is stated that I was wrong in granting bail. It is a statement of fact. A fact, if not disputed, would be accepted by the general public. It is not said that 'in his opinion' or 'in the opinion of the Department of Correctional Services' I had erred.
> 2. It is stated that I contributed to the confusion. To what confusion they are referring is not clear and how they can say that I contributed thereto I do not know. The Department of Correctional Services is solely responsible for the confusion, if any. They created the confusion, if any, and;
> 3. The Department of Correctional Services through Mamabolo and with the authorisation or knowledge and consent of the Department of Correctional Services indicated that because of my so-called erroneous granting of bail the Department of Correctional Services is not prepared to release Terreblanche when such release becomes due, that is relating to the sentence of one year' [sic] imprisonment or part thereof on the count of assault with intent to do grievous bodily harm.
> I have no doubt that this was a scandalous comment and it impugned on the integrity of this court. It was not merely the exercise of the right of freedom of speech. It is a wrongful, mala fide attack on me as judge and therefore on the judiciary and the administration of justice . . .
> Mamabolo and the Department of Correctional Services intended to bring the dignity, honour and authority of this court in discredit [sic]. If they did not have direct intent it is clear that they did have the intention in the form of dolus eventualis . . .
> The press statement was unwarranted, unfounded and irresponsible and not merely fair criticism which, as it was argued, was an exercise of their right of freedom of speech."

[12] Notwithstanding the strictures on the Department, the learned judge concluded that because Commissioner Mbete was not shown to have known about and sanctioned the press statement prior to its publication, he could not be found to have been party to the contemptuous

conduct. The appellant alone was convicted and sentenced. The appellant thereupon applied to Els J for leave to appeal to this Court, alternatively to the Supreme Court of Appeal or a full bench of the Transvaal High Court. He also asked for a certificate in terms of the Constitutional Court Rules.[11] The learned judge held that the matters in issue were factual, not constitutional, that there was no reasonable prospect of success on appeal, whether to this Court or otherwise, and refused leave. That is when the appellant obtained the leave of this Court to appeal directly to it, and was shortly thereafter joined by the amici. Against that factual backdrop we can now turn to examine the first constitutional issue raised, namely, whether the particular manifestation of the generic offence of contempt of court presented by this case unjustifiably limits the fundamental right of freedom of expression.

The nature and purpose of the offence of scandalising the court

[13] Evaluation of the argument presented on behalf of the parties and the amici respectively regarding this question must logically start by establishing what limits the law places on the right to criticise a judge, or a judicial ruling, in these circumstances. Put differently, what are the elements of the crime of scandalising the court? That question must be addressed in its context:

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[11] Rule 18(6) reads as follows:

> "(*a*) If it appears to the court hearing the application made in terms of subrule (2) that—
> (i) the constitutional matter is one of substance on which a ruling by the Court is desirable; and
> (ii) the evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the court concerned for further evidence; and
> (iii) there is a reasonable prospect that the Court will reverse or materially alter the judgment if permission to bring the appeal is given,
> such court shall certify on the application that in its opinion, the requirements of subparagraphs (i), (ii) and (iii) have been satisfied or, failing which, which of such requirements have been satisfied and which have not been so satisfied.
> (*b*) The certificate shall also indicate whether, in the opinion of the court concerned, it is in the interests of justice for the appeal to be brought directly to the Constitutional Court."

scandalising is a form of contempt of court which, in turn, is a broad variety of offences that have little in common with one another save that they all relate, in one way or another, to the administration of justice. Contempt of court has indeed been called "the Proteus of the legal world, assuming an almost infinite diversity of forms".[12] The breadth of the genus is apparent from the definitions of contempt of court in standard textbooks on South African criminal law. For example Burchell and Milton's[13] definition reads:

> "Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it."

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12 Moskovitz "Contempt of Injunctions, Civil and Criminal" (1943) *Columbia Law Review* 780, quoted by Professor Labuschagne in a most helpful article, "Minagting van die hof: 'n strafregtelike en menseregtelike evaluasie" (1988) 3 *TSAR* 329 at 330.

13 *Principles of Criminal Law* 1 ed (Juta, Cape Town 1991) at 627.

Milton[14] repeats the Burchell and Milton definition and Snyman,[15] referring to the two authorities mentioned, gives a more detailed but equally sweeping definition:

> "Minagting van die hof is die wederregtelike en opsetlike
> (*a*) aantasting van die waardigheid, aansien of gesag van 'n regterlike amptenaar in sy regterlike hoedanigheid, of van 'n regsprekende liggaam, of
> (*b*) publikasie van inligting of kommentaar aangaande 'n aanhangige regsgeding wat die strekking het om die uitslag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding."

[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*:[16]

> "The arraignment of the justice of the Judges, is arraigning 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 the

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14 *South African Criminal Law and Procedure* 3 ed (Juta, Cape Town 1996) vol II at 164.

15 *Strafreg* 4 ed (Butterworths, Durban 1999) at 329.

16 (1765) 97 ER 94 at 100.

> 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 kind also existed in Roman and Roman Dutch law, although it was not recognised as a specific crime.[17] It has also received the stamp of approval, albeit in passing, of this Court in *Coetzee v Government of the Republic of South Africa*:[18]

> "The institution of contempt of court has an ancient and honourable, if at times abused, history . . . the need to keep the committal proceedings alive would be strong because the

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17 Thus Voet *Commentary,*5.1.2, Gane's translation Vol 2 p 5, citing Gail, Bk 1, obs 39 and by way of exception to the rule that one should not be a judge in one's own cause, says:

> " . . . there is no injustice in [the judge] punishing . . . those who have the audacity to inflict injury on him . . . by word or deed in his capacity as judge and when he is fulfilling his duty . . . ."

Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* (Juta, Cape Town 1899) at 166 defined contempt of court as "an injury committed against a person or body occupying a public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated." At about the same time Kotzé CJ conducted an exhaustive analysis in *In re Dormer* (1891) 4 SAR 64 of the common law roots of the power of a court to punish contemnors. See also *In re Phelan* 1877 Kotze 5 at 8; *S v Gibson NO and Others* 1979 (4) SA 115 (D) 120; *S v Kaakunga* 1978 (1) SA 1190 (SWA) at 1193E─G.

18 *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); 1995 (10) BCLR 1382 (CC) at para 61.

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."

[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?

[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 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.

[17] No-one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law against governmental erosion. The emphatic protection afforded the judiciary under the Constitution therefore has a particular resonance. Recognising the vulnerability of the judiciary and the importance of enhancing and protecting its moral authority, chapter 8 of the Constitution, which marks off the terrain of the judiciary, significantly commences with the following two statements of principle:

> "(1) The judicial authority of the Republic is vested in the courts.
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

These two general propositions are then fleshed out and reinforced in the succeeding three subsections of section 165 of the Constitution:

> "(3) No person or organ of state may interfere with the functioning of the courts.
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

The breadth of the injunction is emphasised if one has regard to the compendious meaning that the Constitution gives to the term "organ of state" so as to include all

executive and legislative bodies in all spheres of government.[19]

[18] The judiciary cannot function properly without the support and trust of the public. Therefore courts have over the centuries developed a method of functioning, a self-discipline and a restraint which, although it differs from jurisdiction to jurisdiction, has a number of essential characteristics. The most important is that judges speak in court and only in court. They are not at liberty to defend or even debate their decisions in public. It requires little imagination to appreciate that the alternative would be chaotic. Moreover, as a matter of general policy judicial proceedings of any significance are conducted in open court, to which everybody has free access and can assess the merits of the dispute and can witness the process of its resolution. This process of resolution ought as a matter of principle to be analytical, rational and reasoned. The

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[19] Section 239 of the Constitution contains the following broad definition of the term "organ of state":

> "(*a*) any department of state or administration in the national, provincial or local sphere of government; or
> (*b*) any other functionary or institution—
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation,
> but does not include a court or a judicial officer".

rules to be applied in resolving the dispute should either be known beforehand or be debated and determined openly. All decisions of judicial bodies are as a matter of course announced in public; and, as a matter of virtually invariable practice, reasons are automatically and publicly given for judicial decisions in contested matters. All courts of any consequence are obliged to maintain records of their proceedings and to retain them for subsequent scrutiny. Ordinarily the decisions of courts are subject to correction by other, higher tribunals, once again for reasons that are debated and made known publicly.

[19] This manner of conducting the business of the courts is intended to enhance public confidence. In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute.

[20] That is where the crime of scandalising the court fits into the overall scheme of the administration of justice. It is one of the devices which protect the authority of the courts. It is therefore hardly surprising that it is recognised as a crime in many common law jurisdictions. In a recent judgment of the Zimbabwean Supreme Court, reported as *In re: Chinamasa*,[20] Gubbay CJ conducts a review and analysis of comparative sources and provides a lucid and exhaustive

[20] 2000 (12) BCLR 1294 (ZS).

exposition of the law on this topic ─ so much so that anything more than adoption would be supererogatory. Suffice it to say that in present day practice scandalising the court is to be found in the jurisdictions of England and Wales, Canada, India, Australia, New Zealand, Mauritius, Hong Kong and of Zimbabwe, Namibia and our own country.[21]

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21 *S v Harber and Another* 1988 (3) SA 396 (A); *S vKaakunga* 1978 (1) SA 1190 (SWA); *Ahnee & Others v Director of Public Prosecutions* [1999] 2 WLR 1305 (PC); *Attorney-General v Times Newspapers Ltd* [1973] 3 All ER 54 (HL); *R v Metropolitan Police Commissioner, Ex parte Blackburn* (No 2) [1968] 2 All ER 319 (CA); *R v Kopyto* (1987) 47 DLR (4th) 213 (Ont. CA); *Narmada Bachao Andolan v Union of India and Others* (1999) 8 SCC 308; *Attorney-General for New South Wales v Mundey* [1972] 2 NSWLR 887; *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA); *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKLRD 293 (CA).

[21] One notable exception to the list of common law jurisdictions recognising this particular offence is the United States of America which has, as is well known, its own historically rooted special reverence for the First Amendment and the pre-eminence it affords freedom of speech and of the media.[22] It is not necessary at this juncture to engage in any detailed discussion of the approach of that constitutional democracy to the issue currently under discussion. It will be touched on later, in the course of examining the opposing submissions of counsel for the respective parties.

[22] The nature and purpose of scandalising the court have been expressed many times in South African case law, probably nowhere more clearly than by Kotzé J in *In re Phelan*:[23]

> " . . . any publications or words which tend, or are calculated, to bring the administration of justice into contempt, amount to a 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."

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22 See e.g. *Bridges v California* 314 US 252 (1941).

23 (1877) Kotzé 5 at 7.

[23] It is unnecessary for the purposes of this case to consider any of the other elements of the offence, such as the nature of the *mens rea* required or possible defences to a charge of having scandalised a court.

The limits of the offence of scandalising the court

[24] Having established the general nature and purpose of the crime, it is necessary to delineate its scope. First, the interest that is served by punishing scandalising is not the private interest of the member or members of the court concerned. The offence was created and has been kept extant in the interest of the public at large:

> ". . . 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."[24]

In the second place it is important to keep in mind that it is not the self-esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court that is sought to be protected, but the moral authority of the judicial process as such:

> "The purpose which the law seeks to achieve by making contempt a criminal offence is to protect 'the fount of justice' by preventing unlawful attacks upon individual judicial officers or the administration of justice in general which are calculated to undermine public confidence in the courts. The criminal remedy of contempt of court is not intended for the benefit of the judicial officer concerned or to enable him to vindicate his

[24] *R v Davies* [1906] 1 KB 32 at 40.

reputation or to assuage his wounded feelings . . . "[25]

To this one could usefully add with endorsement the following statement of principle by Gubbay CJ in *Chinamasa*:

[25] Per Corbett CJ in the *Argus Printing and Publishing* case, above n 1 at 29E ─F.

> "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 that available to any person by way of a civil action for damages. Rather it is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed." [26]

[25] The crucial point is that the crime of scandalising is a public injury. The reason behind it being a crime is not to protect the dignity of the individual judicial officer, but to protect the integrity of the administration of justice. Unless that is assailed, there can be no valid charge of scandalising the court.

[26] But this clarity of principle should not seduce one into believing that applying the principle is simple. On the contrary, if one lesson is to be learnt from the numerous reported judgments, here and abroad, where courts have grappled and continue to grapple with the problem of applying the broad principles to individual sets of facts, it is that there is no simple and universally appropriate measure that can be applied to determine whether the mark of acceptable comment has been overstepped. There is no litmus test.

[27] That does not mean that the test is wholly intuitive or subjective. There are certain general guidelines, the first and most important of which is that which evoked the participation

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[26] Above n 20 at 1311C–E.

of the amici. I speak, of course, of freedom of expression. Before World War II, in an era when deference for those in public office was much greater than now, and when freedom of expression was a remote dream in much of the world, Lord Atkin, in language that may sound quaint to modern ears, nevertheless expressed the basic relationship between the two values in terms that remain wholly valid:

> "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 . . . Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."[27]

More recently Corbett CJ, as he then was, quoting these famous remarks of Lord Atkin, expressed the modern balance as follows:

> " . . . 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 . . .
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> . . . .

[27] See the *Ambard* case, above n 1 at 709.

> There seems little doubt that in the nearly 60 years which have passed since Lord Atkin made these remarks attitudes towards the judiciary and towards the legitimate bounds of criticism of the judiciary have changed somewhat. Comment in this sphere is today far less inhibited. Criticism of judgments, particularly by academic commentators, is at times acerbic, personally oriented and hurtful. I doubt whether some of this criticism would have been regarded as falling within the limits of what was regarded as 'respectful even though outspoken' in Lord Atkin's day . . . To some extent what in former times may have been regarded as intolerable must today be tolerated . . . This, too, will help to maintain a balance between the need for public accountability and the need to protect the judiciary and to shield it from wanton attack."[28]

[28] The measured observations of Corbett CJ make plain that, even before the adoption of constitutional democracy with its set of fundamental norms and the Bill of Rights, it was accepted that there was a tension between preserving the reputation of the judicial process on the one hand and on the other hand acknowledging the right of each and every one of us to form our own opinions about matters and to propound them. 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 sections 15 to 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.

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28 The *Argus Printing and Publishing* case, above n 1 at 25E─26C.

[29] Indeed, the ostensible tension between freedom of expression and protection of the reputation of the judicial process, ought not to be exaggerated. Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts. And, ultimately, such free and frank debate about judicial proceedings serves more than one vital public purpose. 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.[29]

[29] See s 165(4) quoted in n 6 above.

[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 impeachment and removal from office of a judge under section 177 of the Constitution is a check available in extreme cases only, namely incapacity, gross incompetence or gross misconduct on the part of the judge.[30] The nature of the separation of powers between the judiciary on the one hand and the legislature and executive on the other, is however 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 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 undertakings can be efficiently enforced; and, ultimately, as far as they all are concerned, that there exists a set of just norms and a trustworthy mechanism for their enforcement. In a memorable passage in *Richmond Newspapers Inc. v Virginia*[31] Burger CJ characterised these objectives thus:

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30 Section 177 of the Constitution provides as follows:

> "(1) A judge may be removed from office only if—
> (*a*) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
> (*b*) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.
> (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
> (3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1)."

31 448 U.S. 555 (1980) at 570–2.

> "The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value.
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> . . . .
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> When a shocking crime occurs, a community reaction of outrage and public protest often follows . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.
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> . . . .
>
> To work effectively, it is important that society's criminal process 'satisfy the appearance of justice' . . . and the appearance of justice can best be provided by allowing people to observe it." (Citation omitted.)

[32] But 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 on individual judicial officers. A clear line cannot be drawn between acceptable criticism of the judiciary as an institution, and of its individual members, on the one side and on the other side statements that are downright harmful to the public interest by undermining the legitimacy of the judicial process as such. But the ultimate objective remains: courts must be able to attend to the proper administration of justice and — in South Africa possibly more importantly — they must be seen and accepted by the public to be doing so. Without the confidence of the people, courts cannot perform their adjudicative role, nor fulfil their therapeutic and prophylactic purpose.

[33] Therefore statements of and concerning judicial officers in the performance of their judicial 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 decisions. 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 scandalising is particularly concerned with the publication of comments reflecting adversely on the integrity of the judicial process or its officers.

The constitutional challenge to the crime of scandalising the court

[34] In the court below Mr Fabricius took a bold line on behalf of the appellant and in this Court primarily adhered to that stance: in the light of the constitutional rights and freedoms now contained in the Bill of Rights, there is no room for the continued recognition of this crime. It could not and did not survive the advent of the fundamental freedom of expression afforded to everyone by the Constitution. At most it could be accepted, so he argued, that a limited form of contempt of court remained extant. This he defined as being where an intentional expression in pending proceedings is proven to have subverted the supremacy of the Constitution and the rule of law. In the course of argument in this Court, he somewhat tempered his contention but substantially adhered to the basic proposition that criticism of judicial proceedings after the event could never constitute a crime in the constitutional atmosphere that now prevails. Any statement, whatever its tenor and however damaging to the standing of a judicial officer and, through that officer, to the administration of justice, was now permitted. According to the argument it does not even matter whether the injurious statement is true or false. The remedy dictated by the Constitution and its values was that the free market-place of ideas would fix the value of such statements. In effect, so he contended, the reputation of judges and the integrity of

the judicial process would be best served by its unceasing and manifest integrity: let the record of the judiciary speak for itself.

[35] Mr Marcus took a less radical line in pressing the argument on behalf of the amici, namely, that the test for scandalising should be adapted to accommodate the heightened claim of the right of freedom of expression vis-a-vis the reputation of the judiciary in the constitutional era. He was content to support the decision of the majority in the Ontario Court of Appeal judgment in *Kopyto* case.[32] That was to adapt the clear and present danger test applied by the American courts when dealing with challenges to the First Amendment and the protection it gives to freedom of expression. I respectfully share the misgivings expressed by Gubbay CJ ― and by Dubin JA who was in the minority in *Kopyto* ― about the suitability of that test in a jurisdiction that does not have to apply the First Amendment nor enjoys the benefit of the extensive and complex jurisprudence so carefully constructed by the United States courts.

[36] In any event, before one could subscribe to such a wholesale importation of a foreign product, one needs to be persuaded, not only that it is significantly preferable in principle, but also that its perceived promise is likely to be substantiated in practice in our legal system and in the society it has been developed to serve. More pertinently, it would have to be established that the clear and present danger test, in the adapted form proposed or in some other permutation, was consonant with our South African constitutional value system. And, Mr Marcus's erudition

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32 *R v Kopyto* (1987) 47 DLR (4th) 213 (Ont. CA).

and eloquence notwithstanding, I remain very much unpersuaded. The reasoning advanced in support of the plea for a reformulation of the test is in substance that the law as to scandalising the court, as it now stands, places an unconstitutional damper on the freedom of expression. More specifically, so it is argued, the current test, viz whether the statement in issue has the tendency to bring the administration of justice into disrepute, has lead to unwarranted criminalisation of conduct that falls within the protective ambit of freedom of expression.

[37] There can be no quarrel with the kernel of the argument presented by Mr Marcus. Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression ― the free and open exchange of ideas ― is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed.

[38] There are more important features to be considered when deciding on the suitability in our jurisprudence of the proposed North American model for drawing the line between permissible comment on judicial affairs and scandalising. The most important of these is to be found in the plain wording of section 165(4) of the Constitution:

> "Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

In the new era of constitutional supremacy and the rule of law the judiciary is invested with materially enhanced powers, including that of invalidating any law or governmental conduct to the extent that it is found to be inconsistent with the Constitution.[33] Self-evidently the exercise of these powers could involve the judiciary in public contention and it is therefore significant that the Constitution, having reposed such trust in the judiciary, then directs this command to all organs of state. The Constitution thus recognises the importance ― and commands reinforcement, if necessary by "legislative and other measures" ― of the dignity of the courts. This is the very feature the crime of scandalising aims to protect.

[39] It follows that there is little room for any argument that adherence to the Constitution requires abandonment of a measure such as the crime in question, or for attenuating materially the circumstances in which it could be applied, as would the test advocated by counsel for the amici. On the contrary, where the Constitution itself contemplates legislative protection of these

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[33] Sections 169(a) and 172(1)(a) of the Constitution, read with s 167(5) empower high courts to strike down legislation and executive acts (other than those of the President), subject to confirmation by the Constitutional Court.

judicial qualities, it would be difficult to uphold an argument that any measure to that end which, even minimally, limits one or other of the fundamental rights contained in the Bill of Rights, is an unjustifiable infringement. It follows that a test which proceeds from such hypothesis would be inappropriate.

[40] There is yet another and no less fundamental reason why one should be slow to engraft such a test on to our law: the two are inherently incompatible, and they are incompatible because they stem from different common law origins and subsist in materially different constitutional regimes. The balance which our common law strikes between protection of an individual's reputation and the right to freedom of expression[34] differs fundamentally from the balance struck in the United States.[35] The difference is even more marked under the two respective constitutional regimes. The United States constitution stands as a monument to the vision and the libertarian aspirations of the Founding Fathers; and the First Amendment in particular to the values endorsed by all who cherish freedom. But they paint eighteenth century revolutionary insights in broad, bold strokes. The language is simple, terse and direct, the injunctions unqualified and the style peremptory. Our Constitution is a wholly different kind of instrument. For present purposes it is sufficient to note that it is infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised, representing a multi-disciplinary effort on

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34 As to which see e.g. the *Argus Printing* case, above n 1 at 25B–E.

35 See *The New York Times Co v Sullivan* 376 US 254 (1964).

the part of hundreds of expert advisors and political negotiators to produce a blueprint for the future governance of the country.[36]

[36] The process is outlined in paras 13─21 of *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

[41] A detailed analysis of the difference between the two constitutional regimes is unnecessary. Here we are concerned with one crucial difference. The fundamental reason why the test evolved under the First Amendment cannot lock on to our crime of scandalising the court, is because our Constitution ranks the right to freedom of expression differently. With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. The First Amendment declaims an unequivocal and sweeping commandment;[37] section 16(1), the corresponding provision in our Constitution,[38] is wholly different in style and significantly different in content. It is carefully worded, enumerating specific instances of the freedom and is immediately followed by a number of material limitations in the succeeding subsection.[39] Moreover, the Constitution, in its opening statement[40] and repeatedly thereafter,[41] proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression. How these two rights are to be balanced, in

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37 Contrast Laurence Tribe's characterisation of the First Amendment as "the [US] Constitution's most majestic guarantee" (*American Constitutional Law* 2 ed (The Foundation Press, New York 1988) at 785).

38 Above n 4.

39 Section 16(2) of the Constitution provides as follows:

> "The right in subsection (1) does not extend to—
> (*a*) propaganda for war;
> (*b*) incitement of imminent violence; or
> (*c*) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

40 Section 1 of the Constitution reads as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (*a*) Human dignity, the achievement of equality and the advancement of human rights and freedoms . . ."

41 See ss 7(1), 9, 10, 12, 36(1) and 39(1)(a) of the Constitution.

principle and in any particular set of circumstances, is not a question that can or should be addressed here.[42] What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.

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42 It is instructive to note that two provincial courts in Canada, one a court of appeal, upheld s 300 of the Canadian Criminal Code, which provides for the crime of criminal libel, on the basis that although it infringed freedom of expression contrary to s 2(b) of the Canadian Charter of Rights and Freedoms, it passed the minimal infringement test under s 1 of the Charter and was saved. See *Lucas v Saskatchewan (Minister of Justice)* (1995) 31 CRR (2d) 92 and especially *R v Stevens* (1995) 28 CRR (2d) 78. Moreover, although human dignity is not an enumerated right under the Charter, the Canadian Supreme Court in *Hill v Church of Scientology* (1995) 30 CRR (2d) 189, per Cory J at 219–25, engaged in a balancing exercise between freedom of expression and protection of reputation.

[42] It is therefore in my view not wise to choose to embrace a re-tooled version of a minimalist test, that was originally crafted for the American system where minimal interference with a predominant constitutional right under the First Amendment was called for, and was then adapted by a Canadian provincial court for its society under its equivalent of our Bill of Rights.[43] It does not fit and is more likely to confuse than to clarify. In any event, as I hope to show shortly, advocating adoption of the proposed test is misdirected.

[43] The amici are not really aiming at the correct target. Their criticism should not be directed at the "tendency" component of the test, but at the consequences of the allegedly offending conduct. It is not, on the argument of the amici, the question of causation that needs reappraisal but that of outcome. The complaint is not really that there is something wrong with the test of "tendency to harm" as an element of the crime under discussion. A tendency, or likelihood, a statement calculated to bring about a result ― they are all variations on the same theme. Nor are they confined to cases of scandalising the court. It is common practice where one is concerned with an offending statement, or rather an allegedly offending statement, not to put the threshold too high for the party bearing the onus of proof. Whether one is looking at an allegedly scandalising 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 ―

43 The *Canadian Charter of Rights and Freedoms*.

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] It is also important not to get bogged down in a sterile semantic debate about the difference between, and relative merits of, tests in the abstract. Ultimately, whether the test is worded this way or that, the real question is whether the trier of fact 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 scandalising the court that result must have been to bring the administration of justice into disrepute.

[45] In any event and moreover, now that we do have the benefit of a constitutional environment in which all law is to be interpreted and applied,[44] there can be little doubt that the test for scandalising, namely that one has to ask what the likely consequence of the utterance was, will not lightly result in a finding that the crime of scandalising the court has been committed. Having regard to the founding constitutional values of human dignity, freedom and equality, and more pertinently the emphasis on accountability, responsiveness and openness in government,[45] the scope for a conviction on this particular charge must be narrow indeed if the

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44 Section 39(2) of the Constitution contains the following clear injunction:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

45 Section 1 of the Constitution reads as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (*a*) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

right to freedom of expression is afforded its appropriate protection. The threshold for a conviction on a charge of scandalising the court is now even higher than before the superimposition of constitutional values on common law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity. It is a public injury, not a private delict; and its sole aim is to preserve the capacity of the judiciary to fulfil its role under the Constitution. Scandalising 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.

[46] It would be unwise, if not impossible, to attempt to circumscribe what language and/or conduct would constitute scandalising the court. Virtually the only prediction that can safely be made about human affairs, is that none can safely be made. The variety of circumstances that could arise, is literally infinite and each case will have to be judged in the context of its own

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(*b*) Non-racialism and non-sexism.
(*c*) Supremacy of the constitution and the rule of law.
(*d*) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

peculiar circumstances: what was said or done; what its meaning and import were or were likely to have been understood to be; who the author was; when and where it happened; to whom it was directed; at whom or what is was aimed; what triggered the action; what the underlying motivating factors were; who witnessed it; what effect, if any, it had on such audience; what the consequences were or were likely to have been.

[47] Nevertheless there does remain that narrow category of egregious cases where the crime in question will still be found to have been committed. From that it follows that some degree of limitation of the untrammeled right to speak one's mind openly and fearlessly about public affairs must be acknowledged.

Justification

[48] That then gives rise to an enquiry as to justification.[46] In terms of section 36(1) of the Constitution a finding that a particular law limits a right protected by the Bill of Rights is not an end to the matter. A limitation 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, taking into account all relevant factors", including a number of enumerated criteria.[47] In the present context, it is unnecessary to engage in an exhaustive limitation analysis. The category of cases where the existence of the crime of scandalising the court still poses a limitation on the freedom of expression is now so narrow, and the kind of language and/or conduct to which it will apply will

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46 *S v Manamela and Another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 33.

47 See s 36(1) quoted in n 7 above.

have to be so serious, that the balance of reasonable justification clearly tilts in favour of the limitation. Furthermore, there are very weighty considerations underlying the retention of the particular sanction, more specifically there is a vital public interest in maintaining the integrity of the judiciary, an essential strut supporting the rule of law. Weighing the importance of that interest against the minimal degree of limitation involved, the scale once again favours saving the sanction.

[49] Mr Fabricius argued, however, that the public interest in the protection of the legitimacy of the judicial process could be better served by allowing calumnies, even malicious falsehoods, concerning the judiciary to be aired and refuted by open public debate. There is a certain stark appeal in such an absolutist stance, yet it is both unrealistic and inappropriate ─ unrealistic in an imperfect world with massive concentration of power of communication in relatively few hands and inappropriate where the Constitution requires a balancing exercise. Where section 36(1)(e) speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant. On balance, while recognising the fundamental importance of freedom of expression in the open and democratic society envisaged by the Constitution, there is a superior countervailing public interest in retaining the tightly circumscribed offence of scandalising the court.[48]

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[48] It is interesting to note in this context the observations of the Indian Supreme Court in *Narmada Bachao Andolan v Union of India and Others*, above n 21 at 313C─F:

"We wish to emphasise that under the cover of the freedom of speech and expression no

[50] Finally, with regard to the question of justification, I want to acknowledge the benefit and pleasure I derived from studying the dissent of my colleague Sachs J before signing off this

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party can be given a licence to misrepresent the proceedings and orders of the court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the court and bring it into disrepute or ridicule. The right of criticising,, in good faith in private or public, a judgement of the court cannot be exercised, with malice or by attempting to impair the administration of justice. Indeed, freedom of speech and expression is the 'lifeblood of democracy' but this freedom is subject to certain qualification. An offence of scandalising the court per se is one such qualification, since that offence exists to protect the administration of justice and is reasonably justified and necessary in a democratic society. It is not only an offence under the Contempt of Court Act but is sui generis. Courts are not unduly sensitive to fair comment or even outspoken comments being made regarding their judgments and orders made objectively, fairly and without any malice, but no one can be permitted to distort orders of the court and deliberately give a slant to its proceedings, which have the tendency to scandalise the court or bring it to ridicule, in the larger interest of protecting administration of justice."

judgment. However, I see no merit in examining cases from a bygone era to see whether or not they would pass the higher test now demanded by our constitutional democracy. Although the degree of divergence between our respective conclusions seems more semantic than substantive, and although the divergence on substance is narrow, it is real. The test set in this judgment is that the offending conduct, viewed contextually, really was likely to damage the administration of justice. The rider my colleague espouses, namely that conduct must "pose a real and direct threat to the administration of justice" before it can be said to constitute scandalising the court, sets the benchmark too high. It would require proof of such close causal proximity between conduct and consequences, and of such grave consequences, that I suspect it would effectively put an end to prosecutions for this form of contempt of court. That, I believe, is neither wise nor constitutionally mandated.

The constitutionality of the summary procedure

[51] Having determined the substantive question, the next line of enquiry is to ascertain whether the procedural question, namely whether the option allowed to a judge to summon a suspected scandaliser to appear before her or him to answer to a summary charge of contempt of court, constitutes a limitation of any of the fundamental rights protected by the Bill of Rights. Before commencing that enquiry it should be observed that we are concerned only with an evaluation of the summary procedure that exists at common law. There are a number of analogous statutory provisions providing for some form of summary intervention by a judicial officer relating to conduct of a kind broadly similar to contempt of court.[49] But none of them

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[49] See e.g. s 108 of the Magistrates' Courts Act 32 of 1944, ss 159(1), 178(1) and (2) and 189 of the Criminal Procedure Act 51 of 1977 and s 7 of the Regulation of Gatherings Act 205 of 1993, each of which empowers a presiding officer to deal with a particular form of disruptive conduct on the part of an accused,

deals with allegedly contemptuous conduct of the kind in issue here, i.e. outside court and after the event. The enquiry is also limited to proceedings in superior courts. Lower courts have no extraordinary jurisdiction to deal with instances of scandalising the court. I use the word "extraordinary" to distinguish between prosecutions in the ordinary course at the instance of the prosecutorial authorities, which may be tried before a lower court, and the special proceedings initiated by the presiding judicial officer.

[52] It should also be noted that we are not concerned here with the kind of case where the orderly progress of judicial proceedings is disrupted, possibly requiring quick and effective judicial intervention in order to permit the administration of justice to continue unhindered.[50] Here we are not looking at measures to nip disruptive conduct in the bud, but at occurrences that by definition occur only after the conclusion of a particular case ― or possibly unrelated to any particular case. Swift intervention is not necessary.

[53] A person so summoned is an accused person as contemplated by section 35(3) of the Constitution. The primary enquiry is therefore whether the procedure infringes one or more of the elements of the composite set of provisions that go to make up the fair trial protection afforded to an accused person under the provisions of that subsection. The answer, on that assumption, is really quite simple. It is now settled law[51] that the right under section 35(3)

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a witness or members of the public in the course of criminal proceedings.

50 As to which see *S v Nel* 1991 (1) SA 730 (A) at 752H–753A.

51 See *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at para 16, and *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 9.

"embraces a concept of substantive fairness" and that it is "a comprehensive and integrated right" composed of a number of elements, some of which are specified in the subsection. Here one need look no further than paragraphs (a), (b), (c), (h), (i) and (j) of subsection 35(3), which provide as follows:

> "(3) Every accused person has a right to a fair trial, which includes the right—
> (*a*) to be informed of the charge with sufficient detail to answer it;
> (*b*) to have adequate time and facilities to prepare a defence;
> (*c*) to a public trial before an ordinary court;
> . . . .
> (*h*) to be presumed innocent, to remain silent, and not to testify during the proceedings;
> (*i*) to adduce and challenge evidence;
> (*j*) not to be compelled to give self-incriminating evidence . . . ."

[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 evidence. Moreover, the very purpose of the procedure is for the accused to be questioned as to the alleged contempt of court.

[55] The composite effect of these departures from the normal procedure where an accused person is called upon to face a charge of criminal conduct, is fundamental. Indeed, there is no adversarial process where an impartial judicial officer presides over and keeps the scales even in a contest between prosecution and defence. The process is inquisitorial and inherently punitive and unfair. Moreover, this procedure which rolls into one the complainant, prosecutor, witness and judge — or appears to do so — is irreconcilable with the standards of fairness called for by section 35(3).

[56] There can be no doubt that a procedure by which an individual can be haled before a judge for the sole purpose of enquiring into the possible commission of a crime, there to be questioned and, depending on the judge's view of the responses to the questioning, possibly to be punished by a fine or imprisonment, constitutes a major inroad into his fair trial rights. Nor can it be denied that such an individual enjoys little protection or benefit of the law and its processes.

[57] The next question to be asked is whether the summary procedure is saved by section 36(1) of the Constitution.[52] Accepting that the rules of the common law which sanction the procedure qualify as "law of general application" within the meaning of the subsection, the question is whether the limitation they pose is reasonable and justifiable in an open and democratic society. If one keeps in mind that the enquiry is limited to the use of the summary procedure in cases of alleged scandalising of the court, there can be only one answer. In such cases there is no pressing need for firm or swift measures to preserve the integrity of the judicial process. If punitive steps are indeed warranted by criticism so egregious as to demand them,

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[52] See s 36(1) quoted in n 7 above.

there is no reason why the ordinary mechanisms of the criminal justice system cannot be employed.

[58] The alternative is constitutionally unacceptable: 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[53] where ordinary prosecution at the instance of the prosecuting authority is impossible or highly undesirable,[54] a wholly unjustifiable limitation of individual rights and must not be employed. Indeed, what transpired in the court below in this case demonstrates the pitfalls of the procedure and underscores why it should be reserved for the most exceptional cases only.

[59] Justice would have been better served had the learned judge reported the matter to the Director of Public Prosecutions and left it to that office to take up as it deemed best.

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53 See n 20 above.

54 And even in such an extraordinary case it would not be permissible for a judge targeted by the scandalising to preside at the contempt hearing. As was done in *Chinamasa*, another judge should be designated to hear the matter.

The merits of the conviction

[60] The conclusion that the summary procedure adopted in the court below was an unjustifiable infringement of constitutionally protected rights, must of course result in a finding that the conviction and sentence cannot stand. But even if the case had not been fatally defective on this procedural ground, it could not be sustained on its substantive merits. The learned judge, probably because of his proximity to the case caused by the inappropriate procedure he elected to adopt, did not do justice to the case. With the perspective of hindsight it is clear that he really missed the fundamental point. The issue was not, as the judge appeared to believe, whether the appellant's statement that the judge had made a mistake or that he had by such mistake contributed to confusion, was a statement of fact or an expression of opinion. The appellant neither purported nor was reported in *Beeld* to have expressed anything other than an opinion. Criticism of a judgment can, because of the very nature of that which is criticised, never be anything else but a judgment, that is itself an opinion.

[61] But fact or opinion, it matters not. What was published did not in any way impair the dignity, integrity or standing of the judiciary or of the particular judge. Whatever the appellant's intention might have been, and there is no reason to doubt his word when he says he intended no disrespect, the statements he made do not bear a meaning such as could possibly found a charge of scandalising the court. Therefore, on the substantive merits also, the conviction cannot be supported.

[62] The question that then arises is whether this judgment should be confined to a declaration

to the effect that on constitutional grounds the conviction and sentence were, both procedurally and substantively bad and refer the matter back to the trial court for reversal of the conviction and sentence. Fortunately such pointless prolixity is unnecessary. Section 38 of the Constitution provides for a court to grant "appropriate relief" where a right in the Bill of Rights is found to have been infringed. Moreover, section 167(3) of the Constitution, which delineates the jurisdiction of this Court, expressly empowers it to "decide . . . issues connected with decisions on constitutional matters", which clearly encompasses the setting aside of a verdict and/or sentence found to be insupportable on constitutional grounds.

Separation of powers

[63] However, I suspect that what really motivated the learned judge to take the course that he did, and to handle the proceedings in court as he did, was an unarticulated suspicion that the appellant, Commissioner Mbete and the Department were minded to defy the bail order and were proclaiming such defiance to the world at large. Had that indeed been the case, there can be little doubt that they would have been acting contrary to their duties under the Constitution. Theirs was not to challenge a judicial order by means of a press release and media interviews. They, as servants of the state, were obliged to be exemplary in their obedience to court orders,[55] subject of course to the right that existed to take the order on appeal. Moreover the Constitution, recognises and expressly commands not only exemplary conduct by the executive and legislative branches of the state, but the active support of all organs of state in subsections 165(3), (4) and

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[55] It is as well to remember the warning of Justice Brandeis in *Olmstead et al v United States* 277 US 438 (1928) at 485 of the dire consequences when the state itself disobeys the law:

> "If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."

(5).[56]

[64] However, analysis of the judgment shows that the learned judge concluded that he could not convict the Commissioner of contempt, which then makes the conviction of the appellant on this basis all the more problematic. The appellant was in no position either to execute the order for Terre Blanche's release on bail, nor to frustrate the order. He is a media spokesman of the Department, and no more. If anyone had the power to order obedience or defiance, it was Commissioner Mbete.

[65] It would have been a very serious matter indeed, calling for speedy and decisive action, if the order had actually been defied. The spectre of executive officers refusing to obey orders of court because they think they were wrongly granted, is ominous. It strikes at the very foundations of the rule of law when government servants presume to disregard orders of court. What the most appropriate form of action would have been, is a matter for speculation and need not be pursued. Suffice it to say that the appellant was wrongly convicted of having scandalised the court. In addition his conviction and sentence followed on a procedure that unjustifiably limits his rights under the Constitution.

Order

[66] The appellant's conviction and sentence are set aside.

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56 See n 6 above.

Chaskalson P, Ackermann J, Goldstone J, Madala J, Mokgoro J, Ngcobo J, Yacoob J, Madlanga AJ and Somyalo AJ concur in the judgment of Kriegler J.

SACHS J:

[67] It is easy to guarantee freedom of speech when it is relatively innocuous. The time when it requires constitutional protection is precisely when it hurts. The justification for punishing mere speech, however unfair, inaccurate or offensive it may be, when it does not directly threaten to disrupt, pressurize or prejudice ongoing litigation, must be compelling indeed.[1]

[68] Kriegler J's judgment in this matter [the judgment] states that in certain tightly circumscribed circumstances where language of a serious nature is used, the public interest in protecting the administration of justice and maintaining the rule of law justifies the survival of

[1] Milton argues that the offence of scandalizing the court is arbitrary, irrational, vague in its nature and constitutes a violation of the principle of legality. He asserts further that there is no evidence that the offence of scandalizing the court is necessary for upholding respect for the judiciary. He submits that the offence constitutes an unreasonable and unjustifiable inroad upon freedom of expression. Milton *South African Criminal Law and Procedure* 3 ed (Juta, Cape Town 1996) vol 2 at 187-88. See also Burchell and

the offence 'more colourfully than definitively referred to as scandalising the court.'[2] I agree in general terms with this broad proposition. I also accept that the facts in the present case fall far short of substantiating the commission of any such offence, with the result that this court was not obliged to delineate in any detail the full contours of the crime. Furthermore, I agree with the finding that the procedure used in this matter was constitutionally impermissible. The law cannot be above the law; if impartial adjudication is to be at the heart of the administration of justice, a judge should not ordinarily be a judge in his or her own cause.

[69] In a word, I concur in the judgment and order. Nevertheless, I feel it necessary to qualify my concurrence with the gloss that follows. The qualifications relate to two interconnected matters, one semantic, the other substantive. Both touch on the question of the constitutionality of imposing criminal sanctions for speech made outside of court and not directed at pending cases.

[70] My semantic concern lies not with the words 'tendency', 'likelihood' or 'calculated to',

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Milton *Principles of Criminal Law* 2 ed (Juta, Cape Town 1997) at 701.

2 See para 1 of the judgment. A comprehensive survey of the South African cases on contempt of court in the form of scandalization up to 1988 can be found in Van Blerk *Judge and be Judged* (Juta, Cape Town 1998) at ch 2.

which were the subject of vigorous debate at the hearing. I agree that they are variants of a common theme which requires an objective evaluation of probable outcomes, and that it might not in all cases be necessary for the prosecution to prove actual impact upon or direct prejudice to the administration of justice. My unease relates rather to the emphasis given to the words 'scandalizing' and 'disrepute'. Taken in conjunction, they belong to an archaic vocabulary which fits most uncomfortably into contemporary constitutional analysis. They evoke another age with other values, when a strong measure of awe and respect for the status of the sovereign and his or her judges was considered essential to the maintenance of the public peace. Constitutionalism arose in combat with mystique, and does not easily become its bride. The problem is not simply that the nomenclature is quaint - something not uncommon in legal discourse - but that it can be misleading. As the judgment points out, the heart of the offence lies not in the outrage to the sensibilities of the judicial officers concerned, but in the impact the utterance is likely to have on the administration of justice. The purpose of invoking the criminal law is not essentially to provide a prophylaxis for the good name of the judiciary, as the term scandalizing suggests. It is to ensure that the rule of law in an open and democratic society envisaged by the Constitution is not imperilled. There might be a link between the repute of the judiciary and the maintenance of the rule of law. But it would be a mistake to regard them as synonymous. Indeed, bruising criticism could in many circumstances lead to improvement in the administration of justice. Conversely, the chilling effect of fear of prosecution for criticising the courts might be conducive to its deterioration.

[71] My second and more substantive qualification flows from the first. In an open and democratic society, freedom of speech and the right to expose all public institutions to criticism

of the most robust and inconvenient kind, are vital.[3] At the same time, the existence of a vigorous and independent bench capable of protecting all rights, including freedom of speech, is essential. The problem arises when speech is used in a manner calculated to undermine the very institution designed to protect all fundamental rights, including the right to free expression.[4] What further complicates the matter in South Africa is that the very context of a newly developing democracy that requires the greatest openness of debate, necessitates the existence of a judiciary with the strongest capacity to defend that openness. It is in this complex situation that any possible tension between the right to free expression and the capacity of the courts to defend free expression, must be resolved. The interaction between these dual needs is eloquently dealt

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3 In *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA) para 20, Mahomed CJ referred to freedom of speech in the context of the National Assembly as "a crucial guarantee."

4 More than a century ago Kotzé J stated that:

> "[T]he administration of justice is [like the freedom of the Press] 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."

In *In re Phelan* (1877) Kotzé 5 at 9-10, quoted in Van Blerk above n 2 at 9.

with in the judgment and requires no further comment from me.[5] I do, however, feel it necessary to clarify my position on the question of justification for the retention of the crime described - unfortunately, in my view - as scandalizing the court.

[5] See paras 48 and 49 of the judgment.

[72] The Constitution makes it clear that freedom of speech is not absolute. There are express internal qualifiers which permit the prohibition in appropriate circumstances of propaganda for war and what is commonly referred to as hate speech.[6] More generally, section 36 permits limitations which are reasonable and justifiable in an open and democratic society based on dignity, freedom and equality. As the judgment points out, contempt of court can be committed in many ways. Open and democratic societies permit restraints on speech, coupled with appropriate penalties, in the case of statements of a disruptive character made in court during proceedings, as well as of statements made outside of court calculated to pressurise adjudicators or prejudice the outcome of proceedings.[7] Such societies also permit commital proceedings, including imprisonment, to be used to compel recalcitrant persons to comply with court orders.[8] What all these species of contempt of court have in common is the objective of protecting the due administration of justice in actual proceedings. In one way or another they involve sanctions against perverting the course of justice in specific cases. The offence of scandalizing the courts is qualitatively different. It contemplates utterances made outside of court and not relating to ongoing proceedings. My qualification to the judgment relates only to this particular class of utterances, and not to the constitutionality of contempt of court proceedings in general. In my view, statements of such a kind which have no direct bearing on ongoing proceedings, should

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6 See s 16(2) of the Constitution of the Republic of South Africa, 1996.

7 See *The Sunday Times v The United Kingdom* (1979) 2 EHRR 245.

8 It was in connection with commital proceedings for alleged defiance of a court order that I made the following comment in *v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*, 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) para 61:

> "The institution of contempt of court has an ancient and honourable, if at times abused, history. If we are truly dealing with contempt of court then the need to keep the commital 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."

only attract criminal sanctions if they threaten the administration of justice in a manner analogous to the other forms of punishable contempt of court. To justify limits on freedom of speech, something more is required than simply proof of utterances likely to bring the judiciary into disrepute, whether for alleged ineffectiveness, incompetence, or lack of probity or impartiality. One can give any number of examples of cases where criticisms are made which are likely to diminish the general confidence which the public has in the way justice is being administered and yet, which, I believe, should not give rise to the possibility of prosecution.

[73] Thus, one of the most prominent lawyers of his time in England, Lord Goodman, went famously on record as saying that any client of his who engaged in litigation was a fool, since the processes of court were inordinately costly, debilitating, protracted and uncertain. It is not unheard of in this country for judicial officers to be lambasted by senior political figures for alleged lack of assiduity. Disappointed litigants often explode with angry comments on what they regard as lack of justice.[9] At a more serious and systemic level, major debates, frequently of an acrimonious and wounding kind, take place about the transformation of the judiciary, with demeaning and disempowering labels being freely thrown around. The press regularly refer to discrepancies in sentence as proof of racism on the bench, and to comments made in sexual violence cases as evidence of judicial sexism.

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9 See for example *R v Sachs* 1932 TPD 201, where the accused, a trade union leader, denounced a conviction by a magistrate, saying that it was an example of class justice.

[74] These statements are sometimes unfair, often discourteous, frequently immoderate and occasionally even scurrilous. By their nature they are all disparaging in one way or another of the manner in which the judiciary functions. Objectively speaking, they are calculated to undermine public confidence in the capacity and moral authority of the courts. They all need to be taken seriously and in appropriate circumstances rebutted or even restrained.[10] Yet, in my view, something more than damage to the repute of the courts is required before they can give rise to sanctions under the criminal law.[11] As Cory JA in *R v Kopyto*[12] said, it is important to note that:

> "...there have been no convictions for this offence in England for the past 60 years. Furthermore, cases from the United Kingdom are replete with admonitions that the court's jurisdiction in contempt cases should be exercised with great restraint. These

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10 Thus, restraining orders could in certain circumstances be made, breach of which could give rise to prosecution.

11 See the discussion by Milne J in *S v Gibson NO and Others* 1979 (4) SA 115 (D) 127G-128F. The learned judge cites English and South African authority for the proposition that:

> "Even if the criticism is a criticism of the Courts, and even if it is not well-founded or does not commend itself to the Court, that does not mean that it is a contempt of Court."

12 (1987) 47 DLR (4th) 213 (Ont.CA).

facts are particularly significant given that, like Australia and New Zealand, the United Kingdom does not have a constitutionally-protected guarantee of freedom of expression. For example, in *Attorney-General v Times Newspapers Ltd.,* [1973] 3 All E.R. 54, Lord Reid stated at p. 60:

> Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice."[13]

[13] Id n 12 at 236.

[75] I would accordingly suggest that to meet the constitutional standards of reasonableness and justifiability, prosecutions should be based not simply on the expression of words likely to bring the administration of justice into disrepute, but on the additional ingredient of provoking real prejudice. In its context such expression must be likely to have an impact of a sufficiently serious and substantial nature as to pose a real and direct threat to the administration of justice.[14] Thus, it could be part of a wider campaign to promote defiance of the law or to challenge the legitimacy of the constitutional state. Or, more specifically, it could be connected to attempts by persons such as warlords or druglords to achieve *de facto* immunity for themselves. Alternatively, there might be less dramatically confrontational examples where the speech in its context is likely in a direct and significant way to sap the capacity of the courts to function properly. If the speech targets a particular judicial officer, it should be of such an unwarranted and substantial a character as seriously and unjustifiably to impede that judicial officer in being able to carry on with his or her judicial functions with appropriate dignity and respect. Thus, to call a judge a crook in circumstances where the public is likely to give credence to such allegation, is effectively to challenge and undermine the capacity of that judge to continue with the function of impartial adjudication. It seems appropriate that unwarranted allegations of that kind, if sufficiently serious in the circumstances, could give rise to prosecution, even if the

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[14] In *R v Kopyto* above n 12 at 241, the Ontario Court of Appeal divided 4 - 1 on the question of whether or not the crime of scandalizing the court survived the advent of the Charter guarantee of the right to freedom of speech. Although the four judges who held that it could survive were split on what the appropriate test should be, they all agreed that the impact on the administration of justice had to be substantial. Cory JA laid down the following requirements for the offence of contempt of scandalizing the court: (i) intent or recklessness (ii) extreme seriousness (iii) real, substantial and immediate threat to the administration of justice.

> I do not think it either necessary or advisable in the present matter to explore the fuller reaches of the crime or to attempt a precise definition, but I do feel that the need for substantial impact on the administration of justice should be underlined.

administration of justice in general was not threatened. I agree with the judgment that in matters of this sort, context and impact are decisive. The test that I would propose would be more specific than that indicated in the judgment, though in practice the difference might be slight.

[76] I make the above observations not simply to manifest enthusiasm for the abstract virtues of freedom of speech. Experience in this country indicates that it is precisely when the judiciary lacks prestige that some of its members are most likely to be tempted to shore up its position by means of contempt of court proceedings against its critics.[15] The Deputy President of this Court has pointed out that:

> "The divisions and conflicts of our apartheid past have distorted the relationship between, on the one hand, institutions involved in the administration of justice, including the judiciary and, on the other, significant sections of the South African community. This has to be set right now in order to ensure and to maintain a healthy democracy, which fully espouses the values of the new constitutional dispensation . . . A process needs to take place, a process which will not only liberate those members of the judiciary who have felt the alienation, but which will also reassure the formerly oppressed about the judiciary's rededication to justice for all."[16]

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15 It must be remembered that the judiciary, like all institutions, had a varied composition, and many of the principles now enshrined in our Constitution were kept alive by distinguished members of the Bench. Nevertheless, for large sections of the public, the judiciary as an institution was seen as part and parcel of the system of racial domination.

16 Submission to the Truth and Reconciliation Commission by Pius Langa, quoted by Dyzenhaus *Judging the Judges, Judging Ourselves* (Hart Publishing, Oxford 1998) at 60.

The Deputy President went on to state that:

> "I have no doubt the role of the courts in the implementation of the pass laws contributed to a diminishing of the esteem which ordinary people might have had for institutions set up to administer justice . . . The role of the judicial system at this level was to put the stamp of legality on a legal framework structured to perpetuate disadvantage and inequality."[17]

[17] Id n 16 at 61.

Yet when a newspaper with a largely black readership stated in an editorial, under the heading "Hose-Pipe Justice", that a case involving two white farmers who had thrashed a black farm worker to death was a travesty of justice and that most "non-whites" have had too much experience of law courts both high and low, with or without juries, to be deceived by the falsehood that the fault lay in the jury system, it was successfully prosecuted.[18] Academic research into the impact of race on capital punishment was effectively stifled for many years by the institution of contempt proceedings. In the words of Professor John Dugard, justice became a "cloistered virtue" and this "seriously interfered with the proper pursuit of legal scholarship."[19] He went on to say that the judicial process in a racially stratified society and the role of the judiciary in an unjust legal order became taboo subjects on which academics wrote at their peril, most preferring the quiet waters of private and commercial law.[20] I would add that the result was not to strengthen the manner in which the judiciary functioned nor to generate public support for the institutions of justice. On the contrary, the more the critics were suppressed, the greater the loss of prestige of the judiciary.

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18 *R v Torch Printing & Publishing Co. (Pty.) Ltd & Others* 1956 (1) SA 815 (C) at 817F-818A discussed in Van Blerk above n 2 at 13-14. The court held, at 821B-C, that:

> "To say, in the context of the first paragraph of the article complained of as set out in the charge sheet, that in cases where Whites and non-Whites are involved travesties of justice are frequent in our Courts, is, in my judgment, calculated to bring the administration of justice into contempt [and that it reflected] in an 'improper and scandalous manner' upon the Judges and magistrates whose duty it [was] to administer justice in our Courts."

19 Dugard *Human Rights and the South African Legal Order* (Princeton University Press, Princeton 1978) at 301. See also Van Blerk above n 2 at 21 - 31.

20 Id n 19 at 301.

[77] The primary function of the judiciary today is happily to protect a just rather than an unjust legal order. Yet criticism, however robust and painful, is as necessary as ever. It is not just the public that has the right to scrutinize the judiciary, but the judiciary that has the right to have its activities subjected to the most rigorous critique. The health and strength of the judiciary, and its capacity to fulfil time-honoured functions in new and rapidly changing circumstances, demand no less. There are no intrinsically closed areas in an open and democratic society.

[78] It is particularly important that, as the ultimate guardian of free speech, the judiciary show the greatest tolerance to criticism of its own functioning. Its standing in the community can only be undermined if the public are led to draw the inference that in pursuance of the principle that an injury to one is an injury to all, the judicial establishment is closing ranks. In this respect I can do no better than quote and adopt the observations of Chief Justice Gajendragadkar of the Indian Supreme Court:

> "We ought never to forget that the power to punish for contempt large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgements, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct."[21]

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21 *In re, Under Article 143, Constitution of India* AIR 1965 SC 745 at 791 para 142. For a discussion in India of the topic of Criticism of Judges and the Administration of Justice, see Desai and Gonsalves *Freedom of the Press* (Omega Printers, Belgaum n.d.) at 39.

If respect for the judiciary is to be regarded as integral to the maintenance of the rule of law, as I believe it should be, such respect will be spontaneous, enduring and real to the degree that it is earned, rather than to the extent that it is commanded.

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For the state: ECJ Wait and SC Bukau instructed by the Director of Public Prosecutions, Pretoria.

For the amici curiae: GJ Marcus SC and M Chaskalson instructed by Rosin Wright Rosengarten Attorneys, Johannesburg.