



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 235/09

In the matter between:

**THE COMMISSIONER OF THE
ANTI CORRUPTION COMMISSION**

APPLICANT

VS

**NATHI DLAMINI
BARRY HASELSTEINER**

**1ST RESPONDENT
2ND RESPONDENT**

CORAM

M.C.B. MAPHALALA, J

For Applicant

Advocate N. Kades SC
Instructed by Mr. N.
Maseko Deputy DPP

For 1st Respondent

Advocate R.M. Wise SC,
Advo. A.J. Lamplough
Instructed by Mr. T.
Mlangeni

JUDGMENT
21st JANUARY 2010

[1] An *ex-parte* application was lodged before this Court on the 30th July 2009 by the Commissioner of the Anti-Corruption Commission, Justice Harris Michael Mtegha. He was represented by the Deputy Director of Public Prosecutions.

[2] The application was set down for hearing before the Honourable Chief Justice Banda in chambers on the 31st July 2009 for an order in the following terms:

- (a) Authorizing a warrant of apprehension (arrest) to be issued against the Managing Director of Swaziland Posts and Telecommunications Corporation Mr. E. Nathi Dlamini in terms of Section 13 (1) (A) of Act No. 3 of 2006.
- (b) Directing that immediately upon arrest Mr. Nathi Dlamini be taken to the Mbabane Magistrate Court for a remand hearing.
- (c) Granting such alternative relief as the Honourable Chief Justice may deem fit.

[3] An affidavit deposed to by a certain Barry Haselsteiner was annexed to the application in support thereof.

[4] It is clear from the application that the commissioner is the applicant.

[5] According to the Supporting Affidavit Barry describes himself as an adult Swazi male of Plot 985, Ngwane Park, Manzini, and employed by the Anti-Corruption Commission as an investigator, and duly authorized to depose to the affidavit.

[6] He states that the subject of investigation is the Swaziland Posts and Telecommunications Corporation, hereinafter referred to as the Swaziland Posts and Telecommunications Corporation; the investigation related to the authorization for incorporation of a company called Horizon Mobile Limited by Mr. Nathi Dlamini, the Managing Director of Swaziland Posts and Telecommunications Corporation purportedly for and on behalf of Swaziland Posts and Telecommunications Corporation.

[7] Barry was appointed on the 15th May 2009 by the applicant to investigate whether there was authorization for incorporation of Horizon Mobile Limited, New Payphone Installation, Asymmetric Digital Subscriber line Facility Project and New Generation Network Project. Barry's appointment was a sequel to a complaint that was lodged with the Anti-Corruption Commission.

[8] On his appointment, Barry was issued with the Investigation Certificate being annexure "BH1"; this certificate reflects his name and his mandate which is to investigate issues pertaining to Horizon Mobile in accordance with Section 11

(1) (a) (b) (c) as read with subsections (2) (a) (b), (3) and section 12 (1) (a) (b), (i) (ii) (ii), (c), (d), (e) and (f) of the Prevention of Corruption Act No. 3 of 2006.

[9] The Investigation Certificate further confirms that Barry is a Member of the Swaziland Anti-Corruption Commission; the Certificate is signed by the Commissioner of the Anti-Corruption Commission.

[10] In addition, Barry has annexed an identification card issued by the Commission with his name, and card number, photograph and his title of being an investigator.

[11] During his investigation, Barry discovered that Horizon Mobile limited was registered and incorporated in accordance with the company laws of Swaziland on the 31st January 2008; certified copies of the Memorandum and Articles of Association as well as the Certificate of Incorporation are annexed to the application as being Annexure “BH2”

[12] According to the Certificate of Collation, Nathi Dlamini, the Managing Director of Swaziland Posts and Telecommunications Corporation is one of first two directors of the company who has nine hundred and ninety nine (999) shares held on behalf of Swaziland Posts and Telecommunications Corporation; and Xolile Mhlanga, an attorney in private practice and not employed by Swaziland Posts and Telecommunications Corporation has only one share.

[13] During the course of his investigations, it became apparent that Barry required certain documents in the custody, possession and control of Mr. Nathi Dlamini; subsequently, and, on the 25th May 2009 the Commission wrote a letter, “annexure D” which was hand delivered to Nathi Dlamini in a meeting which was held on that date wherein he was requested to furnish the Commission with the following documents, namely:-

13.1.0 Certified copies of correspondence authorizing and approving Mr. Nathi Dlamini to form Horizon Mobile Limited on behalf of Swaziland Posts and Telecommunications Corporation, in particular from the following:

(a) Cabinet / Scope (Standing Committee on Public Enterprises)

(b) Ministry of Information, Communication and Technology

(c) Public Enterprise Unit

(d) Swaziland Posts and Telecommunications Corporation Board Minutes

13.1.1 Certified copies of any correspondence, minutes of meetings and/ or official notices relating to the engagement of the Union in the formation of Horizon Mobile Limited.

13.1.2 Certified Copy of Swaziland Posts and Telecommunications Corporation’s Strategic (Rollout) Plan that is currently being implemented together with the notice issued to Swaziland Posts and Telecommunications Corporation employees dated 16th April 2009.

13.1.3 Certified copy of the Swaziland Posts and Telecommunications Corporation audited annual financial statement for the year ended 2008.

13.1.4 Full details of the Contractors engaged in the New Payphone, Asymmetric Digital Subscriber Line Facility & New Generation Network Projects.

[14] During the meeting of the 25th May 2009, Barry was accompanied by fellow members of the Commission Sipho Mthethwa and Paulette Thwala. Nathi Dlamini was accompanied by the legal advisor to Swaziland Posts and Telecommunications Corporation.

[15] In the said meeting, Nathi Dlamini made an undertaking to deliver the requested documents on the 29th May 2009. However, on the 28th May 2009, Nathi Dlamini wrote a letter to the Commission confirming his earlier undertaking, and requesting an extension to the 5th June 2009; the letter is annexed and marked "BH3". The reason for the extension being:

"The amount of documentation requested and the sheer volumes of photocopying that has to be done, it is unlikely that my staff will meet our tight deadline".

The request for an extension was granted.

[16] On the 5th June 2009, Mr. Nathi Dlamini wrote to the Commission in response to the Commission's letter of the 25th May 2009. It was signed by the

Swaziland Posts and Telecommunications Corporation Corporate Secretary and Legal Advisor. In that letter, Mr. Dlamini complained about the involvement of Deputy Commissioner Mrs. Fruwith in the matter as presenting a conflict of interest since she was a former corporate secretary and legal advisor of the Swaziland Posts and Telecommunications Corporation and previously involved in the affairs of the Corporation. Furthermore, Mr. Dlamini complained that in the letter of the 25th May 2009, he was referred as representing the Government of Swaziland.

[17] It is worth mentioning that Mr. Dlamini's concerns were addressed by the applicant in a letter of the 11th June 2009. The letter of the 25th May 2009 was withdrawn and another letter was written by the applicant on the 11th June 2009.

[18] The letter of the 5th June 2009 did not accompany the requested documents; surprisingly, Mr. Dlamini annexed to the letter the Swaziland Posts and Telecommunications Corporation Act of 1980 which he said was giving the Corporation power to hold shares in any corporation and to establish and acquire any corporation. It is worth mentioning that the Swaziland Posts and Telecommunications Corporation Act had not been requested by the Commission.

[19] Other documents delivered by Mr. Dlamini which had not been requested are the Recognition and Procedural Agreement between Swaziland Posts and

Telecommunications Corporation and the Union SPTWU; New Generation Network tender evaluations, KPMG Forensic Report and the Commission of Enquiry Report – the Action Plan. Only two documents delivered by Mr. Dlamini had been requested, namely, the Strategic Rollout Plan and the Audited Financial Statement of 31st March 2008.

[20] The contents of the letter of the 11th June 2009 and the letter of the 25th May 2009 were basically the same save for the removal of the paragraphs complained of by Mr. Dlamini which were excluded. The letter of the 11th June 2009 extended the deadline for Mr. Dlamini to deliver the requested documents to the 15th June 2009; however, on that date, Mr. Dlamini did not deliver the documents and he did not even respond to the letter of the 11th June 2009 from the Commission.

[21] On the 25th June 2009, the applicant sent a further reminder to Mr. Dlamini and the deadline for the delivery of the requested documents was extended to the 29th June 2009; he was further reminded that failure to deliver the documents would constitute an offence in terms of section 12 (a) and (b) of the Prevention of Corruption Act No. 3 of 2006.

[22] On the 29th June 2009 the documents were not delivered to the Commission as requested; and on the 30th June 2009 Mr. Dlamini wrote a letter and insisted that:

“We confirm that we furnished your esteemed office with the required documents on the 5th June 2009”.

To the knowledge of Mr. Dlamini this was not true since only two of the required documents were delivered.

[23] On the 8th July 2009, another reminder was sent to Mr. Dlamini, acknowledging his letter of the 30th June 2009 and denying receipt of the requested documents.

[24] The applicant sent a final written notice to Mr. Dlamini on the 21st July 2009 advising him to deliver the documents by not later than 24th July 2009 at 16:30 hours failing which the Commission would invoke the provisions of Section 12 (3) (a) of the Prevention of Corruption Act No. 3 of 2006.

[25] On the 24th July 2009, and after receiving the Final Notice, Mr. Dlamini responded and confirmed that he was not prepared to release the requested documents because the responsibility for the incorporation of Horizon Mobile Limited fell within the Prerogative of the Corporation as mandated by Section 13 of the Swaziland Posts and Telecommunications Corporation Act of 1980.

[26] It is against this background that the *ex-parte* application was lodged before this Court for the Warrant of Arrest against Mr. Dlamini in terms of Section 13 (1) (a) of the Prevention of Corruption Act.

[27] In his Founding Affidavit, Barry submitted that the failure and/ or refusal by Mr. Dlamini to provide the requested documents constitutes a criminal offence in terms of Section 12 (3) (a) of the Prevention of Corruption Act No. 3 of 2006.

[28] The application being *ex-parte* was not served on Mr. Dlamini and he was not cited in the proceedings as a Respondent.

[29] On the 31st July 2009, His Lordship the Honourable Chief Justice Banda after hearing the *ex-parte* application granted prayers (a) and (b) of the application authorizing and directing Barry to arrest Mr. Dlamini and that upon his arrest to take him to the Mbabane Police Station and then to the Magistrate Court for a remand hearing.

[30] It is common cause that on the 14th August 2009, Barry executed the warrant and arrested Mr. Dlamini; he was in the company of other officers employed by the Commission. The arrest took place at the head office of Swaziland Posts and Telecommunications Corporation in Mbabane. Thereafter, Mr. Dlamini was taken to the Mbabane Police Station where he was charged with the offence of contravening Section 12 (3) (a) of the Prevention of Corruption Act.

[31] On the same day, Mr. Dlamini was arraigned before the Mbabane Magistrate Court where he was released on bail of E500.00 (Five Hundred Emalangen). He was ordered to surrender his passport and to report to the Anti-

Corruption Commission once a month pending finalization of the criminal proceedings against him.

[32] Mr. Dlamini now has filed an Answering Affidavit to the *ex-parte* application as well as a Counter- Application.

[33] I now turn to consider the legality of the warrant of arrest issued by the court against Mr. Dlamini.

[34] It is common cause that the applicant herein did not cite Mr. Dlamini as the Respondent nor did they serve him with the application prior to the granting of the order. Similarly, it is true that His Lordship did not issue a Rule *Nisi* with a return day to allow Mr. Dlamini to file opposing papers and be heard before the order was made. In addition, the order issued was final in nature.

[35] Rule 6 (4) provides that:-

[36] Rule 6 (7) provides that:- “Every application brought *ex- parte* by way of petition or notice of motion shall, save in matters of urgency, be filed with the Registrar and set down not later than midday on the Court day preceding the day on which the application is to be heard.”

“Any person having an interest which may be affected by a decision on an application being brought *ex-parte*, may deliver notice of an application by him for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which he desires to be heard, whereupon the

Registrar shall set such application down for hearing at the same time as the application brought *ex-parte*.”

[37] However, this Rule does not assist a person who is confronted with an order obtained *ex-parte* since the Rules do not afford him an opportunity to be heard. Only a person who learns of the *ex parte* application prior to the hearing may deliver notice of an application for leave to oppose supported by an affidavit setting forth the nature of his interest in the matter and the grounds upon which he desires to be heard.

[38] Similarly, I am not aware of any decision of the Supreme Court or High Court of Swaziland on this point. However, there are a number of cases decided in South Africa on this point, and there is no doubt in my mind that they reflect the law in this country.

[39] In the case of **Schlesinger v. Schlesinger 1979 (4) SA 342 (W)** at p. 347 F,H-348 A, **Le Roux J** had this to say:

“There is nothing inherently wrong or contrary to public policy in an interested party opposing an *ex-parte* application which has come to his notice fortuitously or by informal notice.... On principle, however, it seems to me that any person who shows a direct and substantial interest in the proceedings, and whose affidavit indicates that his opposition might contribute something to a just decision of the case should not be deprived of an opportunity of being heard. I

am in any event inclined to agree with the criticism expressed in regard to these sub-rules, VIZ, that their purpose is by no means clear for in most cases an *ex parte* application will not come to the notice of a person whose interests are at stake, until a *rule nisi* or a writ or a summons is served on him. In those rare cases where he has notice and wishes to oppose the relief sought at the very outset, I can see no reason why he should not in principle have the right to oppose. As in other proceedings, he runs the risk of being mulcted in costs should his opposition turn out to be frivolous.”

[40] In **Ghomeshi-Bozorg v. Yousefi 1998 (1) SA 692 (W)** at p.696, **Nugent J** had this to say:

“It must be borne in mind too that an order granted *ex parte* is by its nature provisional, irrespective of the form which it takes. Once it is contested and the matter is reconsidered by a court, the plaintiff is in no better position in other respects than he was when the order was first sought.”

[41] In **Pretoria Portland Cement Company Ltd and Another v. Competition Commission & Others 2003 (2) SA 385 (SCA)** at Pages 403-4, Paragraphs 44 and 45, **Schutz JA approved the decisions in Schlesinger v. Schlesinger (supra) and Ghomeshi-Bozorg v. Yousef: (supra).**

[42] At page 404, paragraph 47, **Schutz JA** had this to say:

“One is concerned here with one of the most fundamental Principles of our law *audi alteram partem*. A party’s right to a hearing cannot be lost merely because a judge hearing an urgent application omitted to provide for a return day or to draw

expressly to his attention the respondent's right to resist relief obtained against him without his knowledge."

[43] It is apparent from the above authorities that the Respondent is entitled as of right to a reconsideration of the matter. The above South African authorities reflect the law as it should be in this country and are equally applicable here.

[44] It is against this background that all the Points of Law raised by the Applicant cannot stand. The order obtained by Applicant *ex-parte* was provisional in nature and once it is contested, the court is obliged to reconsider it afresh. Clearly, an *ex-parte* order cannot stand on the way of the Principle of "*Audi Alteram Partem*"; this is a fundamental principle of our law which is the cornerstone of our Justice system. It ensures justice and fairness and the equality of all persons before the law. Every person who has a direct and substantial interest in a matter should be heard before a final decision is made.

[45] On the 14th October 2009, the Respondent lodged the Notice of Intention to Amend his Notice of Motion by the addition of the following prayers as being prayers 4 and 5:

"4. That the First Respondent's arrest on the 14th August 2009 be and is hereby set aside.

5. The proceedings commenced against the First respondent and the charge under case Number 444 of 2009 be and hereby are set aside.”

[46] The prayers sought to be amended are in paragraph 19 of the counter – application with the heading, “the Relief that I Seek”. The prayers sought therein are as follows:

“19. In this application, I seek:

19.1 An order setting aside the warrant of 31st July 2009;

19.2 An order setting aside the consequences of that warrant, that is to say setting aside the restrictions on my freedom imposed by the Magistrate’s Court when releasing me on bail;

19.3 An order declaring that the warrant of my arrest issued by this Honourable Court on 31st July 2009 was unlawfully obtained;

19.4 Conditionally as aforesaid, an order that Mr. Barry Haselsteiner be joined as the Second Respondent.

[47] During the hearing of this matter, Respondent’s Counsel, applied to hand in an amended Notice of Motion which in my opinion supercedes the prayers in the Counter- application as well as Notice of Intention to Amend. Applicant’s Counsel did not object save to state that they were not served with the Notice.

[48] The prayers sought in the amended Notice of Motion are:

- (a) That the warrant of apprehension (arrest) issued by this Honourable Court on 31st July 2009 authorizing the arrest of the First Respondent in terms of Section 13 (1) (a) of the Prevention of Corruption Act No. 3 of 2006 be and is hereby set aside.
- (b) That the order of the Subordinate Court for the district of Hhohho under Case No. 444 of 2009 imposing bail conditions upon the First Respondent's release from custody under the aforesaid warrant be and is hereby set aside;
- (c) That the said warrant of arrest be and is hereby declared to have been unlawfully obtained;
- (d) Conditionally, that Barry Heselsteiner be joined as Second Respondent;
- (e) That the applicant, alternatively the Second Respondent, be ordered to pay the First Respondent's costs on an attorney and own client scale;
- (f) That the costs include the costs of two counsel and that counsels' fees be certified in accordance with Rule 68;
- (g) That further or other relief be granted.

[49] There is no reason why the amended Notice of Motion should not be admitted partly because the Applicant did not raise any objection and partly because no prejudice would be suffered by the applicant.

[50] The Respondent has, *inter alia*, applied conditionally for the joinder of Barry on the basis that the applicant has not acknowledged that he is the applicant and that he authorized these proceedings; that if the applicant could acknowledge this, the Respondent will not pursue the application for joinder.

[51] The Respondent argues that such an acknowledgement by the applicant would improve his prospects of recovering his costs in the matter. Apparently, the Respondent fears that he might not have a remedy to recover his costs in the event that the Commissioner should later distance himself from the matter.

[52] As stated in the preceding paragraphs, Barry has filed the Investigation Certificate duly signed by the Applicant that confirms that he is a member of the Commission and that he is duly authorized to investigate the present matter pertaining to the formation of Horizon Mobile Limited in accordance with Section 11 (1) (a) (b) (c) as read with sub-section (2) (a), (b) (3) and section 12 (1) (a), (b), (i) (ii) (iii), (c), (d), (e), and (f) of the Prevention of Corruption Act No. 3 of 2006.

[53] In addition, the applicant has filed a Replying affidavit deposed to by Barry which confirms that he is the applicant; the applicant has filed a Supporting Affidavit in his capacity as the Commissioner of the Anti-Corruption Commission. He confirms that Barry is a duly appointed member of the Commission in terms of the Act.

[54] He further confirms that he had authorized Barry to depose to the Founding Affidavit in this matter and to bring these proceedings for the relief prayed for in the Notice of Motion.

[55] He continues in his Supporting Affidavit:

“5. To the extent that it is necessary (if at all) the aforesaid authority to make the affidavit and bring these proceedings is afforded by me to the said Barry Haselsteiner with retrospective effect to the bringing of these proceedings for the authorization of a warrant of apprehension to be issued against Mr. E. Nathi Dlamini in terms of Section 13 (1) (a) of the Prevention of Corruption Act No. 3 of 2006 and the further relief prayed for in the aforesaid Notice of Motion.”

[55.1] Respondent has further argued that when Barry instituted these proceedings, he had not been authorized by the applicant, and that the retrospective ratification in the Replying affidavit has no legal effect.

[55.2] It is now settled law that a deficiency in authority can be cured by ratification having retrospective operation, and that an applicant should be allowed to establish such ratification in his replying affidavit, in the absence of prejudice to the respondent:

Baek & Company v. Van Zummeren and Another 1982 (2) SA (W) 112 at 123

Moosa and Cassim NNO v. Community Development Board 1990 (3) SA 175 (A) at 180-181

Townsend Productions (Pty) Ltd v. Leech 2001 (4) SA 33 (C) at 46.

Herbstein and Van Winsen, the Civil Practice of the High Courts of South Africa, 5th Edition page 284.

[56] I am satisfied that the applicant has shown that he has authorized Barry in his official capacity as the Commissioner of the Anti-Corruption to institute the present proceedings; hence, the necessity for Barry to be joined in these proceedings as a Second Respondent falls to the ground.

[57] The next question for the Court to decide is the prayer for the setting aside of the warrant of arrest issued by this court on the 31st July 2009 against the Respondent on the basis that it was not lawfully obtained.

[57.1] The Respondent argued, *inter alia*, that His Lordship the Chief Justice in granting the order exceeded the bounds of what he was lawfully

entitled to do in terms of Section (13) (2) of the Prevention of Corruption Act; hence, the purported order was invalid and liable to be set aside.

[57.2] The Respondent opines that Section 13 (2) requires that the application must establish a *prima facie* case against the person to be arrested, which was not the case in this matter.

[57.3] Furthermore, he argues that it has not been shown that the failure to produce the documents was “without reasonable excuse”.

[57.4] It is against this background that Respondent argues that His Lordship exceeded the bounds of what he was lawfully entitled to do in terms of Section 13 (2) of the Act.

[57.5] The Respondent quotes as authority for his submission the case of the **Prime Minister and Others v. MPD Marketing & Suppliers (Pty) Ltd and Others Appeal case No. 18 of 2007** (unreported) which dealt with the Principle of Legality. At paragraphs 17.1 and 17.2 **Steyn JA** had this to say:

“17.1 The Kingdom of Swaziland is a Constitutional State. It has incorporated the doctrine of the rule of law by the enactment of the Constitution.

17.2 Such incorporation comprehends the principle of legality. It is central to the concept of a Constitutional State that the law-giver and the Executive “in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law.”

[58] The law does authorize a single judge to set aside an *ex- parte* order issued by another judge if such an order was issued erroneously; however, this does not mean a review of that judge’s decision.

[59] **Schutz JA**, in the case of **Pretoria Portland Cement Company Ltd v. Competition Commission** (*supra*) at p. 402 B-E stated:

“Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality, at the administration of “the law which has been passed by the legislature”.... And throughout it has been the High Court, ... acting through its Judges, that has enjoyed the general inherent jurisdiction to entertain reviews. It is not itself the subject of review....

The primary means of correction of judicial error is appeal to a higher court, which is appropriate where a judge has reached a final decision. But if an *ex- parte* order has been granted, that may be corrected by another single judge through the ordinary processes of the Court.... In an appeal or rehearing of a matter in which an *ex- parte* order has been made, grounds which before other

tribunals may be raised as review grounds may equally be raised in the appeal or rehearing.”

[60] The Anti – Corruption Commission was established in terms of the Prevention of Corruption Act No. 3 of 2006. The purpose of the law is to investigate and punish corrupt activities, establish an Anti–Corruption Commission and to provide for other matters incidental to the prevention of corruption. On the other hand, the main function of the commission is to take necessary measures for the prevention of corruption in public and private bodies.

[61] Section 11 (1) of the Act Provides that the Commissioner may authorize in writing any officer of the Commission to conduct an inquiry or investigation into alleged or suspected offences under this Act.

[62] Section 12 (1) provides, *inter alia*, that “where it appears to the Commissioner that an offence under this Act may have been committed by any person, the Commissioner may for the purpose of an investigation of that offence authorize an investigation officer to investigate”.

[63] Ordinarily, a complaint is lodged to the Commission by any interested person; thereafter, the Commissioner appoints an investigating officer where it appears to him that an offence under this Act may have been committed. In

reaching this conclusion, the Commissioner relies on the evidence of the complainant that an offence under the Act may have been committed.

[64] It is important to understand the word “may” in section 12 (1) of the Act as meaning an “expression of a possibility”; clearly, the offence may or may not have been committed. The investigation seeks to establish or ascertain whether an offence under this Act has been committed. Only after investigation can the offence, if any, be identified.

[65] As previously stated, Barry was investigating whether there was authorization for the incorporation of Horizon Mobile Limited by the Respondent purportedly for and on behalf of Swaziland Posts and Telecommunications Corporation. Only after the investigations can it be said whether or not the Respondent has committed an offence under this Act.

[66] During his investigations, it became apparent that Barry required certain documents in the custody, possession and control of the Respondent. In a meeting held between Barry, Respondent, Swaziland Posts and Telecommunications Corporation legal advisor as well as other officers from the Commission on the 25th May 2009, the list of documents required was given to the Respondent as well as the reason for requiring the documents.

[67] In that meeting, the Respondent did not say that the documents did not exist, but he undertook to furnish the documents to the Commission by the 29th May 2009. In addition, on the 28th May 2009, he confirmed having made the undertaking and requested an extension of time to the 5th June 2009 to deliver the documents.

[68] On the 5th June 2009, and contrary to his undertaking, he failed to deliver the documents required save for the Strategic Rollout Plan and the Audited Financial Statement of 31 March 2008. However, he never said the other documents did not exist.

[69] The letter of the 25th May 2009 was withdrawn as previously explained and substituted by the letter dated 11th June 2009 which put the deadline to deliver the documents on the 15th June 2009; however no documents were delivered and no explanation was given why the documents were not delivered.

[70] A further reminder was made to the Respondent on the 25th June 2009 to deliver the documents with the deadline extended to the 29th June 2009; however, no documents were delivered.

[71] On the 30th June 2009, the Respondent sent a letter to the Commission stating that he had delivered the requested documents on the 5th June 2009

notwithstanding that he knew very well that he only delivered two documents and many were still outstanding.

[72] Another reminder was sent to him on the 8th July 2009 and a final notice was sent on the 21st July 2009 with a deadline on the 24th July 2009; no documents were delivered.

[73] It is worth mentioning that the Respondent never at any state during his correspondence with the Commission ever mentioned that the documents required did not exist; four months later, the Respondent after the issue of the warrant of arrest mentions in his Answering Affidavit and Counter-application that he could not furnish the documents to the Commission because they did not exist.

[74] Section 12 (2) provides that:

“Any person, who has been lawfully required under subsection (1) to disclose any information or to produce any accounts, books or documents to an investigating officer shall, notwithstanding any other law to the contrary, comply with that requirement.”

[75] And Section 12 (3) (a) makes the failure to comply a criminal offence provided that there is no reasonable excuse. Clearly, there is no reasonable excuse why the Respondent did not furnish the documents. Initially, he undertook to

deliver them; then, he asked for an extension of time, after which he delivered only two of the required documents.

[76] From the 25th May 2009 to the 14th September 2009, the Respondent never said the documents did not exist. In addition, he never gave any legal justification why he did not comply with the request.

[77] In the event of non-compliance, Section 13 (1) and (2) authorizes an investigator to lodge an *ex-parte* application before a judge in chambers for a warrant of arrest of that person; and once the judge has issued a written order, the investigator can proceed to arrest the non-compliant person. This is what Barry did in this matter.

[78] I am further satisfied that the evidence of Barry as reflected in his Founding Affidavit does satisfy the requirements of Section 13 (3) of the Act. This includes the requirements for a *prima facie* case to be established; Barry has proved that the Respondent was lawfully required to furnish certain documents and that he did not furnish them without a reasonable excuse; and, that non-compliance is a criminal offence in terms of Section 12 (3) of the Act.

[79] To that extent, I am in no doubt that His Lordship the Chief Justice in granting the warrant of arrest exercised his discretion judicially. In the case of

Zuma v. National Director of Public Prosecutions and Others 2009 (1) SA 1(CC) at p. 50-51, paragraph 93, Langa CJ stated;

“One of the core considerations when classifying the discretion is whether in making the decision it is possible that there could be a legitimate difference of opinion as to the proper outcome of the exercise of the discretion. In this case, it seems clear that the discretion to issue the warrant is a matter upon which different judicial officers may reasonably and legitimately disagree. An appellate court, therefore, may not interfere with the discretion simply because it would have reached a different conclusion to that reached by the judicial officer issuing the warrant. It may only set aside the warrant if it is persuaded that the discretion has not been exercised judicially, or flowed from a wrong appreciation of the facts or the law.”

[80] In the circumstances, I am of the considered view that the Warrant of Arrest against the Respondent was lawfully obtained and the application to have it set aside cannot succeed.

[81] It is common cause that the Respondent did not furnish the required documents to the Commission.

[82] As previously explained, the Respondent never told the Commission that the documents did not exist in the letters referred to above or at all.

[83] The Respondent concedes in his Answering Affidavit that Section 10 of the Public Enterprises (Control and Monitoring) Act requires authority from the Swaziland government for Swaziland Posts and Telecommunications Corporation to undertake any major investment or expansion of its operations; however, he denied that the incorporation of Horizon Mobile Limited, New payphone installation, Asymmetric Digital Subscriber Line (ADSL) Facility and the New Generation Network Projects constitute a major investment or major expansion of its operations and thus requiring Government authorization.

83.1 Section 10 (1) provides that:

“No category A public enterprise shall do any of the following without the approval in writing of the minister responsible acting in consultation with the Standing Committee.

- (a) make any major adjustment to the level or structure tariffs prices, rates or other fees or charges;
- (b) undertake any major investment;
- (c) undertake any major expansion of its operations;
- (d) close, sell, liquidate or divest any major part of its business ...”

[84] On the contrary, it is my considered view that the incorporation of Horizon Mobile limited as well as the establishment of the three projects constitute “a major investment and a major expansion” of S.P.T.C. operations requiring government authorization.

[85] The objects of Horizon Mobile Limited according to its Memorandum and Articles of Association are as follows:

- (a) To provide telecommunication services, telecommunication systems and other related matters.
- (b) To manufacture and/or distribute telecommunication systems, telecommunications equipment and other related equipment.
- (c) To import and distribute telecommunications equipment and systems.

[86] The Minutes of the Board of Directors of Swaziland Posts and Telecommunications Corporation for a meeting held on the 14th December 2006, are annexed as being annexure BH10(b). In that meeting, the Respondent presented a paper to the Board in which he argued that “there is a need to diversify the income streams of Swaziland Posts and Telecommunications Corporation in terms of voice services, and that there is a need to venture into other businesses to reclaim the revenue streams eroded by Mobile and MTN.”

[87] The paper further outlined the need to establish a New Wholly Owned Company by Swaziland Posts and Telecommunications Corporation as the vehicle for promoting the interests of the Corporation.

[88] The Board sanctioned the Respondent to make a detailed investigation on his vision and present a Report to the Board before the Board takes a decision.

[89] The formation of the company to manufacture and distribute telecommunication systems and equipment and provide telecommunication services countrywide is clearly a major investment.

[90] To establish the three projects and engage contractors to work on them clearly indicate the magnitude of the expansion and investment. The venture was “to reclaim the revenue streams eroded by Mobile and MTN”.

[91] With regard to financing the venture, the Respondent stated that:

“It goes without saying that the current financial position of the Swaziland Posts and Telecommunications Corporation inhibits such intentions, but my recommendation will be a strategic divestiture of our MTN JV shares to fund the initiative.”

[91.1] For the Corporation to divest its shares held with MTN, authorization is required from the government in terms of section 10 (d) of the Public Enterprises (Control and Monitoring) Act No. 8 of 1989.

[92] Clearly, it cannot be said that this was not a major investment and/or a major expansion of the operations of S.P.T.C.

[93] Instead of investigating and making a report for the decision of the Board on the viability of the ventures, the Respondent proceeded to establish Horizon Mobile limited, and appointing himself a Director with 99.9 shares held allegedly on behalf of Swaziland Posts and Telecommunications Corporation and one share to a private practising attorney not employed by S.P.T.C.

[94] Furthermore, he proceeded and initiated the three projects and engaged contractors to work on them.

[95] I now turn to consider whether there was a non-disclosure by the applicant of the contents of the Swaziland Posts and Telecommunications Corporation's letter of the 5th June 2009 directed to the applicant. The Respondent argues that the said letter implied that the documents requested did not exist.

[96] On the contrary, there is a full disclosure of the letter in the Founding Affidavit; hence, there is no substance in this allegation. The letter does not say the documents do not exist either expressly or by implication.

[97] In the **Zuma case**, **Langa CJ** had this to say at paragraph 102:

“It is our law that an applicant in an *ex- parte* application bears a duty of utmost good faith in placing all the relevant material facts before the Court. The duty of good faith requires a disclosure of all material facts within the applicant’s knowledge. The Supreme Court of Appeal reiterated in Powell that an applicant for a search warrant is under a duty to be ultra - scrupulous in disclosing any material facts that might influence the court in coming to its decision.

However, an investigator cannot be expected to disclose facts of which he or she is not aware. The duty is also limited to the disclosure of facts that are material.... The test of material should not be set at a level that renders it practically impossible for the state to comply with its duty of disclosure, or that will result in applications so large that they might swamp *ex – parte* judges.”

[98] The Respondent also seeks an order setting aside the criminal proceedings at the Mbabane Magistrate Court under case No. 444/2009 which culminated in his being charged with a criminal offence under Section 12 (3) of the Act and later released on bail. His bail conditions included surrendering his passport and reporting to the Commission once a month.

[99] Section 13 (5) provides that a person arrested in terms of Section 12 (3) shall be taken as soon as practicable to a police station and be brought before a court of law within a reasonable time.

[100] He was subsequently charged with an offence in terms of Section 12 (3) of the Prevention of Corruption Act by the Director of Public Prosecutions. The criminal trial is pending before the magistrate court.

[101] Section 3 (2) of the Director of Public Prosecutions Order No. 17 of 1973 provides:

“... The powers, duties and functions vested in the Attorney General under the Proclamation (Decree No. 5) in so far as criminal proceedings only are concerned shall from the date of coming into force of this order, be vested in the Director of Public Prosecutions.”

[102] Section 162 (4) (a) of the Constitution provides:

“The Director shall have the power in any case in which the Director considers it proper to do so, to-

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person against the laws of Swaziland.”

[103] And Section 162 (5) provides that the Director may exercise these powers directly or by subordinate officers acting in accordance with the general or special instructions of the Director.

[104] Section 162 (6) provides:

“In the exercise of the powers conferred under this chapter, the Director shall:

(b) be independent and not be subject to the direction or control of any other person or authority.”

[105] The Constitution has given the Director wide- ranging powers to institute criminal proceedings against any person in respect of any offence alleged to have been committed by that person against the laws of Swaziland. In exercising these powers, he is independent and not subject to the direction or control of any other person or authority.

[106] When instituting the criminal proceedings against the Respondent, the Director acted lawfully and within her powers enshrined in the Constitution. The court cannot and will not interfere with this power. All that a court can do when an accused person is arraigned before it is to decide whether or not the State has proved its case against the accused person beyond reasonable doubt.

[107] In addition, the court has the power to decide on the validity of the charge or indictment in the event of an objection and/or challenge to it from the accused

person. Otherwise, the court cannot prevent or instruct the Director not to institute criminal proceedings against a person or compel him to withdraw a charge and/or indictment preferred.

[108] Section 162 (4) (c) of the Constitution provides that:

“The Director shall have the power in any case in which the Director considers it proper to do so, to discontinue, at any stage before judgment is delivered, any criminal proceedings instituted or undertaken by the Director or any other person or authority ...”

[109] In the circumstances, the prayer to set aside the criminal proceedings cannot succeed.

[110] I now order as follows:

- (a) The order granted by this Court on this matter against the Respondent on the 31st July 2009 is hereby confirmed.
- (b) The Counter-application lodged by the Respondent herein is hereby dismissed.
- (c) Each party is to pay his own costs including costs of Counsel.

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