



IN THE HIGH COURT OF SWAZILAND

Case no. 86/2009

In the matter between:-

QHAWE MAMBA

Applicant

and

THE KING

1st Respondent

THE COMMISSIONER (ACC)

2nd Respondent

MUSA FAKUDZE

3rd Respondent

SWAZI INTERPRISE (PTY) LTD

4th Respondent

SABELO MAVUSO

5th Respondent

NONHLANHLA DLAMINI

6th Respondent

INHLAVA CONSULTANTS (PTY) LTD

7th Respondent

SEBENZILE THANGO

8th Respondent

MASIMA CONSULTANTS (PTY) LTD

9th Respondent

ETHEL DUDUZILE MATSHEBULA

10th Respondent

PHINDILE LOKOTFWAKO

11th Respondent

THEMBANI SIMELANE

12th Respondent

PHINDILE GWEBU

13th Respondent

Neutral citation:

Qhawe Mamba v The King & 12 others (86/09)

[2013] SZHC123 (26th June 2013)

Coram:

HLOPHE J

Heard: 31/05/2013

Delivered: 26/06/2013

JUDGMENT

- [1] The current Applicant is one of twelve accused persons under High Court Criminal Case No. 86/09, cited as *The King v Musa Fakudze and eleven others*. In the said matter the accused persons are charged with various offences which comprise various counts of fraud together with bribery (for some of the accused) which all allegedly arose from an incident in which a sum of about E50 Million Emalangeni set aside for a job creation exercise was allegedly misappropriated and/or misused to the prejudice of the Swaziland Government.
- [2] When trial commenced in the said matter, the crown was represented by the Director of Public Prosecutions, Mr. Maseko who informed the court that he was appearing jointly with Advocate Mngwengwe. On the other hand various attorneys represented the other accused persons and these were Mr. M. Mabila for first accused, Mr. T. Maseko for second and fifth accused, Mr. S. Khoza for the third accused as well as Mr. M. Z. Mkhwanazi for the fourth, sixth, seventh, tenth, eleventh and twelfth accused. Otherwise the eighth and ninth accused persons were not represented by an attorney or counsel but the eighth accused person appeared as the eighth accused person as well as the Director of the ninth accused company.

[3] After the parties' representatives had introduced themselves as stated above in the said matter, the crown led its first witness, PW1, Lutfo Dlamini, who was the Minister of Enterprise and Employment at the time of the commission of the alleged offences. It is not relevant for purposes of the matter at hand what his evidence was, it suffices that his evidence was given for several days which as of the date of the argument of this matter had not been finalised. It was on the fourth or so day of PW1's giving evidence that Mr. Khoza made an application on his feet before commencement of the day's proceedings, claiming that he had instructions from his client to challenge the propriety of Advocate Mngwengwe prosecuting, let alone as main counsel in the matter.

[4] It was however agreed between the parties that Mr. Khoza was to prepare a written application in this regard and serve it on all the other interested parties for them to decide on their stance thereto. It was recorded as an agreement that the intended application by Mr. Khoza was not going to have an effect on the evidence already led with Mr. Mngwengwe prosecuting. It was further agreed that prosecution was to be proceeded with in the interim until judgment was issued in the then intended application. Dates for the filing of all the papers comprising the then intended application were fixed with the 31st May 2013 being the date for its hearing.

[5] I have not clarified that it is not in issue that Mr. Mngwengwe is an admitted advocate and is qualified to appear and practise law in this jurisdiction in accord with the Legal Practitioners Act of 1964. The

challenge on his entitlement to represent the crown in the matter had therefore nothing to do with his qualification as envisaged in terms of the said Act.

[6] Otherwise it is a fact that despite being an admitted advocate in this jurisdiction, Mr. Mngwengwe also holds the substantive position of being the commissioner of the Anti –Corruption Commission, which is established in terms of the Anti –Corruption Act No. 3 of 2006. This is the angle from which an objection was brought as regards the propriety of Mr. Mngwengwe prosecuting in the matter. In short it was contended on behalf of the third accused that it was not lawful or legally competent for Mr. Mngwengwe to appear for the crown and prosecute in the matter given that his office was an independent office in terms of both the Constitution of Swaziland and the Anti – Corruption Act. It was, for reasons which even at this stage remain unclear to me, contended that Mr. Mngwengwe’s function (as head of the Anti – Corruption Commission) is to investigate cases and not to prosecute. In so far as he was now prosecuting this case on behalf of the crown (despite in a personal and professional capacity), it was contended that he was failing to uphold the independence of the office of the commissioner of the Anti – Corruption Commission which was now being compromised as he was now taking instructions from the Director of Public Prosecutions which is in itself another independent office.

[7] To give effect to this argument, I was referred by Mr. Khoza to section 162 (4) and (5) of the Constitution of Swaziland. These subsections read as follows:-

“162 (4) The Director shall have power in any case in which he 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;

(b) take over and continue any criminal proceedings that may have been instituted or undertaken by any other person or authority;

(c) discontinue at any stage before judgment is delivered, any criminal proceedings instituted or undertaken by the Director or any other person or authority; and

(d) perform such other functions as may be prescribed.

(5) The powers under subsection (4) may be exercised by the Director in person or by subordinate officers acting in accordance with the General or special instructions of the Director.

[8] In this regard Mr. Khoza extended his above stated argument by contending that the Commissioner of the Anti – Corruption Commission was not a subordinate or junior officer to the Director of

Public Prosecutions yet the subsection in question envisaged the latter delegating his powers to someone junior to him.

- [9] It was further argued that a situation like in the present matter arose in the matter of the ***South African Personal Injury Lawyer's Association vs Heath, Willem Hendrick and Three Others Case No. CCT 27/2000***. It was submitted in that case that the Constitutional Court in the Republic of South Africa set aside as unlawful or unconstitutional the appointment of Mr. Willem Heath, a Judge of the High Court of South Africa as a Head of a unit known as the Special Investigations Unit, on the grounds that the two functions were inconsistent as they undermined the independence of the Judiciary and the principle of the Separation of Powers.
- [10] Arguing in the contrary, the Attorney General, Mr. M. J. Dlamini, disputed the argument by Mr. Khoza. He emphasized the first and second Respondents' case as pleaded in the papers which in a nutshell was that the application by the Applicant was founded on wrong grounds and therefore there was no merit in it. The Applicant's problems it was contended, started with a misdirection on the citation of the parties and concluded with failing to distinguish between Mr. Thanda Mngwengwe in his personal capacity and in his capacity as the Commissioner of the Anti – Corruption Commission. It was argued an appreciation of this latter point would lead to a quick disposal of what was hitherto viewed as a problem when it was allegedly not one.

- [11] As concerns the wrong citation, it was contended that instead of citing the matter as the Applicant against the Director of Public Prosecutions and Mr. Thanda Mngwengwe *in re* Rex against Musa Fakudze and 10 others, the Applicant decided to cite the matter as the Applicant against The King, the Commissioner Anti – Corruption Commission as well as Musa Fakudze and 11 others. Due to the wrong citation it was argued that the Applicant ended up leaving out an important party in the citation being the Director of Public Prosecutions who was the natural party in so far as his powers were the ones being challenged. Though it was accepted that no prejudice was being suffered by the Respondents given the fact that it was understood that the application was more against the Director of Public Prosecutions, who filed the Answering Affidavit and set out his defence in full, it still did not detract from the fact that the citation was a misdirection, which cannot be ignored and from which the approach by the Applicant’s attorney could have arisen.
- [12] On the citation of the Commissioner of the Anti – Corruption Commission as a party and thus allegedly failing to identify the true party before court, which it is argued is Mr. Thanda Mngwengwe in his personal capacity, it was contended that the latter was engaged by the Director of Public Prosecutions in his personal and professional capacity and not in his capacity as a Commissioner of the Anti – Corruption which if it had been realized from the onset, it allegedly would have become clear that there was nothing wrong in the Director of Public Prosecutions engaging Mr. Mngwengwe as an advocate.

[13] Mr. Dlamini argued further that as soon as it would have been realized that Mr. Mngwengwe was engaged in his professional capacity as an advocate, no argument of the compromise of the independence of the institution he heads would have ever arisen. Reference was in this regard made to the certificate of Delegation of Authority by the Director of Public Prosecutions delegating his powers to Advocate Thanda Aubrey Mngwengwe, without any mention of his position as the Commissioner, Anti –Corruption Commission. In fact the delegation referred to was annexed to the papers and read as follows:-

DELEGATION OF AUTHORITY TO PROSECUTE

I, NKOSINATHI MACMILLAN MASEKO in my capacity as the Director of Public Prosecutions and in exercise of the powers conferred upon me under Section 162(5) of the Constitution of Swaziland Act No. 1 of 2005 read with Section 3 of the Director of Public Prosecutions Order No. 17 of 1973 and Section 4 (c) of the Criminal Procedure and Evidence Act No. 67 of 1938 do hereby delegate with immediate effect the authority to prosecute and to do all ancillary duties on all Criminal cases assigned thereto upon:

ADVOCATE AUBREY THANDA MNGWENGWE

Dated at MBABANE on this 2nd day of MARCH 2012.

NKOSINATHI MACMILLAN MASEKO

DIRECTOR OF PUBLIC PROSECUTIONS
KINGDOM OF SWAZILAND

- [14] The significance of this Delegation of Authority is in my view to indicate that even before Mr. Mngwengwe was appointed Commissioner of Anti – Corruption Commission, that is as of the 2nd March 2012, given that it is common course he was only so appointed in February 2013, he had already been engaged in his personal and professional capacity in this matter as Advocate Thanda Mngwengwe. The argument is therefore that nothing in his appointment as a Commissioner of the Anti – Corruption Commission brought about his appointment as the prosecuting counsel in the matter of the Applicant and the others. I in fact agree that whatever problems there would have been, with him continuing with his prosecutorial functions, such would have been administrative in nature between him and his employer, without impacting on the legality of his being appointed to prosecute in the matter.
- [15] It was also argued that there was no merit in the comparison of this matter to the matter of Judge Willem Hendrik Heath in South Africa given the incompatibility and conflict in the two positions Mr. Heath held there as a Judge and a Head of an Investigations Unit which is different from the current matter where the positions of the Commissioner of Anti – Corruption Commission and the Director of Public Prosecutions are complementary as opposed to them being in conflict and/or incompatible. Consequently, it was argued the said case is distinguishable from the present one.

[16] The interpretation of section 162 (5) as relied upon by the Applicants, to the effect that the Director of Public Prosecutions could only delegate to an officer junior to him, was refuted by the Attorney General who contended that the subordinate officer referred to in that section is one after the powers would have been delegated to him as opposed to an officer employed in the Director's office as junior to him. That officer it was argued could be any officer as long as he qualified to appear before the Swaziland Courts in terms of the Legal Practitioner's Act of 1964 as long as he would, after engagement, subordinate himself and take instructions from the Director of Public Prosecutions as opposed to such an officer claiming to be superior to the Director of Public Prosecutions and not wanting to take instructions from him.

[17] In *Rex vs Prince Mfanasibili Dlamini Criminal Case No. 81/1990*, an objection to the prosecuting of the charges preferred against the accused by the then recently appointed Attorney General who had hitherto been the Director of Public Prosecutions, was raised. It was contended *inter alia* that he was not entitled to continue prosecuting and that his continuation to do so in the matter was on a personal basis and was therefore not going to be objective and independent as he was no longer the Director of Public Prosecutions. The High Court per Rooney J held that there was nothing to stop the then Director of Public Prosecutions from agreeing with the then Attorney General to prosecute the matter as he was a law officer. The prosecution was therefore allowed to be proceeded with.

[18] Of significance in this matter is that an officer or person who qualifies to appear before this court in terms of his legal qualification cannot be prohibited from being engaged by the crown to prosecute as long as he takes instructions from the Director of Public Prosecutions who remains capable of exercising his powers as envisaged in terms of section 162(4) of the Constitution. To contextualize this principle, nothing stops the Director of Public Prosecutions from delegating his powers to Advocate Mngwengwe irrespective of his being a holder of an independent office as long as it does not stop him from exercising the independence of his office where he is required to do so.

[19] Recently in the matter of *The King v Swaziland Independent Publishers (PTY) LTD* and *The Editor of the Nation Magazine Criminal Case No. 35/2010* the Attorney General, who had been delegated power to prosecute the matter by the Director of Public Prosecutions had his powers to prosecute in the said matter challenged by the Respondents who were charged with contempt of court which had been instituted in an application form taking into account the peculiar standing of contempt of court proceedings in law. The court dismissed the objection on two fronts, firstly it upheld the argument by the Attorney General to the effect that he was inherently entitled to institute such proceedings as principal legal advisor to the Government of Swaziland as well as on the ground that he had been delegated the power to do so by the Director of Public Prosecutions who had the power to institute as well as prosecute criminal proceedings in terms of section 162 (5) of the Constitution of Swaziland, which also allowed him to delegate the power to prosecute to a subordinate officer. The meaning of subordinate

officer was also interpreted in the said Judgment to mean any properly qualifying officer to do so provided he would after such delegation act under the instructions and guidance of the Director of Public Prosecutions and would remain subordinate to the Director of Public Prosecutions.

[20] I do not see how the independence of the Director of Public Prosecutions can be eroded by his having engaged the services of Advocate Mngwengwe who in terms of the Constitution would be required to act on the instructions and even supervision of the Director of Public Prosecutions who also has the power to terminate such a mandate at anytime in view of its having been delegated to Advocate Mngwengwe.

[21] I agree with the submission by the Attorney General to the effect that section 162 (5) of the Constitution does not imply that the person to be engaged by the Director of Public Prosecutions should be a person in his office and junior to him. I agree that it refers to somebody who would subordinate himself to the Director of Public Prosecutions after appointment. I have not been referred to any evidence indicating that Mr. Mngwengwe is not going to subordinate himself to the Director of Public Prosecutions and will not act under his instructions.

[22] It seems to me that to interpret the section of the Constitution otherwise would amount to absurdity which this court is required to avoid. In this regard I can do no more than reason by analogy and approach the interpretation of the section of the Constitution as I would that of a statute in law where it is a settled principle of our law that “the

language of a provision of a statute may be varied or modified where its ordinary meaning would lead to a “glaring absurdity” which could not have been contemplated by the legislature,” as was stated by **E. A. Kellawey in his Book Principles of Legal Interpretation of Statutes, Contracts and Wills**. The esteemed writer goes on to state the following at page 356, paragraph 22:- “The Roman Dutch Authorities are clear in this regard: “an interpretation which creates an absurdity is not permitted.”

[23] I have no hesitation that the restrictive interpretation suggested by Mr. Khoza and Mr. Mkhwanazi to section 162 (5) of the Constitution concerning the meaning of the term “subordinate officer” to the Director of Public Prosecutions would lead to absurdity when considering that the Director of Public Prosecutions would always be entitled from time to time to appoint competent counsel in a matter requiring expertise possessed by certain counsel at a given point in time.

[24] Having said that, I must point out that I am alive to the fact that once he acts in a matter, the prosecuting counsel should do so without fear, favour or prejudice as was observed in **Beulah Everlyn Bonugli and Cynthia Phylis Greaves v The Deputy National Director of Public Prosecutions and Others Case No.17709/2006**, where the court put the position as follows at pages 7 and 8 of the Judgment whilst quoting with approval the Judgment by the Supreme Court of Canada in “**Boucher v The Queen [1995] S. C. R. 16 at 23-24**”:-

“It can hardly be over emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury (court) what the crown considers to be evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all the available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of a prosecutor excludes any notion of winning or losing; his function is a matter of public duty which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and justness of Judicial Proceedings.”

[25] I am of the view this expresses fully what is expected of a prosecutor prosecuting in a criminal matter by extension that is expected of Mr. Mngwengwe in these proceedings to which the contrary has not been shown before.

[26] It is otherwise correct in my view to contend that the problem as perceived by the Applicant herein was a result of failure to properly cite the parties herein as well as the failure to draw the distinction between Mr. Mngwengwe the Advocate and Mr. Mngwengwe the Commissioner of Anti – Corruption Commission. In the former case there would be nothing in my view preventing Mr. Mngwengwe from prosecuting in the matter as long as his employer sees nothing wrong therewith, which would be different from him being engaged in his capacity as a commissioner, provided that even then there may be

nothing wrong as long as he subordinates himself to the instructions of the Director of Public Prosecutions during his exercise of prosecutorial power. Of course the position would be different where his functions tend to conflict, which has not been shown to be the case herein.

[27] Consequently I have come to the conclusion that there is no merit in the Applicant's application and I accordingly dismiss it.

N. J. HLOPHE
JUDGE

For the Applicant: Mr. S. Khoza
Mr. M. Z. Mkhwanazi

For 1st and 2nd Respondent: Mr. M. J. Dlamini