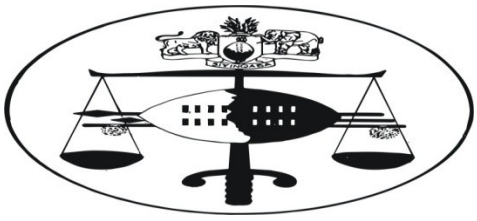

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CRIMINAL CASE NO: 142 /2014

In the matter between:

THE KING

AND

MDUDUZI ELLIOT NKAMBULE

Neutral Citation:	*The King vs. Mduduzi Elliot Nkambule Case No. 142/14 [2016] SZHC (160) (May 2016)*
Coram:	MLANGENI J.
Heard:	19th April 2016
Delivered:	17th May 2016

Summary: *Criminal Law – Prevention of Corruption Act No.3/2006 – Application in terms of Section 174 (4) of the CP & E.*

Accused charged with violation of Section 27 (1) read together with Section 35 (1) of the Act, in that he failed to disclose his interest in a process that led to the appointment of his wife as Headteacher of a school, having been part of the process in his capacity as the Executive Secretary of the Teaching Service Commission.

Section 27 (1) of The Act criminalizes conduct where a ***"member or employee"*** *knowingly fails to disclose his or her interest.*

At the close of the Crown case application made for release of accused.

*Held, the Crown case disclosed neither the a*ctus reus nor *the mens rea required before a conviction could occur, hence no need to put accused to his defence.*

Principle of giving penal statutes a restrictive interpretation referred to.

Accused acquitted and discharged.

JUDGMENT

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[1] The Accused is charged with contravening Section 27 (1) read with Section 35 (1) of the Prevention of Corruption Act No. 3 of 2006, in that

> ***"----upon or about the 27th October 2010 and at or near Mbabane area in the Region of Hhohho, the said accused being a husband to one JABULILE NKAMBULE (HLETA) and a member***

or an employee of the Teaching Service Commission, a public body responsible for decision making in matters, inter alia, the appointment of schools' administrators or head teachers, did unlawfully and knowingly failed (sic) to disclose his interest that he was the husband to the said JABULILE NKAMBULE (HLETA) and participated in the meeting on which the said commission approved the appointment of the said JABULILE NKAMBULE (HLETA) as an administrator or Head Teacher of Manzini Practising Primary School, thus contravening the said Act."

[2] He has pleaded not guilty to the charge.

[3] On the 10th January 2014 the Accused's defence Counsel sought further particulars from the Director of Public Prosecutions, by letter of the same date. Further particulars were eventually supplied by the Crown, but the defence's position was that the response of the Crown did not adequately answer to the issues raised. I will not, however, delve much into this aspect because the defence eventually resolved to proceed with the matter notwithstanding the reservations that it had regarding the responses to the request.

[4] The Crown led the evidence of two witnesses, being the Investigator who is employed by the Anti-Corruption Commission and the

Chairperson of the Teaching Service Commission at the material time, and then closed its case. At this stage the defence informed the court that it intended to move an application under Section 174 (4) of the Criminal Procedure and Evidence Act 1938 as mended, for the acquittal and discharge of the Accused, on the basis that there is no sufficient evidence upon which the accused should be called to his defence. It was agreed that the application and response thereto would be canvassed in writing and this is how it proceeded.

THE LAW

[5] It is convenient at this juncture to capture, verbatim, the wording of Section 174 (4), and I do so presently.

> ***"If at the close of the case for the prosecution, the court considers that there is no evidence that the Accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him."***

[6] The test to be applied at this stage of the enquiry is objective. As articulated by Dunn J., as he then was, in the case of **THE KING vs. DUNCAN MAGAGULA AND OTHERS,** Criminal Case No.43/96 (unreported), the question to be answered is whether or not there is evidence on which a reasonable man, acting carefully, might or may convict. This test has been adopted with approval, and I here refer to

the judgment of **ANNANDALE A.C.J.** as he then was in the Case of REX vs. **MITESH VALOP AND THREE OTHERS**, Criminal Case No. 188/04, where he further stated at page four paragraph three that:-

> ***"---- it is clear that the decision to refuse a discharge is a matter solely within the discretion of the trial court. This is borne out by the legislature's choice of language, namely, the use of the word 'may'. The exercise of this discretion may not be questioned on appeal."***

See also the judgment of S.B. Maphalala J. in the case of **R.V. MSUNDUZA KHUMALO AND ANOTHER**, Criminal Case No. 26/2002 where he also relies on the judgment of Dunn J. in the Duncan case, *supra.*

[7] With the above exposition in mind, I respectfully disagree with Crown Counsel's submission at page 13 of his heads, where he states that the standard of proof at this stage is **"whether a reasonable man acting carefully <u>would</u> convict."** I see a world of difference between the word **"would"** and **"may"** or **"might"**. The word "would" in my view, has the effect of impinging upon the discretion that the legislator has, for good reason, bestowed upon the presiding officer.

THE EVIDENCE

[8] The gist of the charge against the accused is captured by the Crown at paragraph 2 of its written submission, in the following terms:-

> ***"---- did unlawfully and knowingly failed (sic) to disclose his interest that he was the husband to the said Jabulile and participated in the meeting on which the Commission approved the appointment of Jabulile as an administrator or Head Teacher of Manzini Practising Primary School."***

I take it that the word **"Unlawfully"** was intended for **"wrongfully"**, because unlawfulness can only be a conclusion of law upon the facts.

[9] From the Crown's narrative above at least two legal requirements emerge, that of Criminal intent (knowingly) and that of participating by the accused in the decision that appointed his wife as a head teacher (the act).

[10] PW1 is the Commission's Principal Investigator in the matter. He is Bhekithemba Dlamini. He stated that after doing preliminary investigations on the particular complaint, he was furnished with a copy of minutes which shows that numerous decisions were taken during the meeting of 27th October 2010, including the appointment of Mrs. Jabulile Patience Nkambule as head teacher of Manzini Practising Primary School. It is common cause that she is the wife of the accused and was his wife at the time material to this case. The witness further

stated that he analyzed the minutes and noted that there was no declaration of interest by anyone, certainly not by the accused person. He then commented on various aspects of the so-called minutes, but not without the defence raising the best evidence rule, the effect of which is that because the witness was neither the author nor custodian of the minutes, he was not competent to authoritatively testify on the contents of the document.

[11] The so-called minutes were eventually handed in by PW2, and marked **Exhibit "A"**. PW2 was Chairperson of the Teaching Service Commission at the material time and he was present in the meeting of the 27th October 2010 whereat the accused's wife was appointed head teacher. The document bears the signature of PW2 as well as the accused person. Clearly, these two persons can competently testify on the contents of the document.

[12] This document which is referred to as minutes, **Exhibit 'A'**, has caused me enormous difficulties. The word **"Minutes"** is described as a summarized record of the points discussed in a meeting" – See the **CONCISE OXFORD ENGLISH DICTIONARY, 2002 Ed**. A much older dictionery describes minutes as "an official record of the proceedings of a meeting, conference, convention, etc." – per **COLLINS ENGLISH**

DICTIONARY, 1980. From the above definitions, I understand that minutes are a summarized record of proceedings in a meeting or something of that nature, e.g. Conference. My impression of **Exhibit 'A"** is that it falls far short of a document that can properly be described as 'minutes' and it lacks a lot of the important contents of minutes that we are all familiar with. Herein below I highlight some of the aspects that undermine the probative value of the document.

12.1 It might not be important who led the prayer, or if everybody prayed, but it is certainly important what was said about minutes of the previous meeting, whether they were adopted, with or without changes.

12.2 Under those present is listed one Mrs. Lukhele as Number 5, whereat she is then recorded as absent, but perhaps this is nothing more than ineptitude or slovenliness.

12.3 The bigger problem is that the so-called minutes is nothing more than a bare list of resolutions, in terms of which all that appears is a list of head teachers and other categories who were appointed, the word being used is **"approved"**. The accused's wife was No.2 in category '**C'** of the agenda. Like the fourteen others who came after her, she was approved as head teacher.

[13] There is no indication as to whether there were other candidates that were on the list for consideration, there is no idea whether the names came as recommendations from regional offices, and if so, whether the Commission was at liberty to reject the recommendations. Clearly, there is a lot of important things that the minutes should have but does not have. There is certainly nothing on the document that demonstrates the role of the accused person in the process – be it at nomination, recommendation or approval stage. I am therefore unable to agree with the submission of the Crown that the accused person **"cunningly placed his wife's name before the Commission as the only candidate."** What about the rest of the names which, according to the list, were the only names – without any competitor? There is simply no evidence to support this far-reaching assertion by the Crown.

[14] To the contrary, under cross-examination PW2, the Chairperson of the Commission, stated that the agenda items were compiled by Human Resources Officers from the various regions and handed over to the Commission. He did not say that it was prepared by the accused or that the accused influenced or determined its contents in any way.

[15] I find that it would be most unsafe to rely on **Exhibit 'A'** as evidence of anything other than a bare record of resolutions that were taken at the meeting. I accept therefore, that the accused's wife is one of many who were approved on the 27th October 2010, but how the approval of all came about is a matter for intense speculation. It is possible that the list came as recommendations from regional officers who did the screening, and the available evidence suggests the possibility that the Commission's role was possibly a formality, as all those who appear in the list were approved. There is no minute of anyone who was rejected.

[16] Under cross-examination, the Chairman Mr. Singwane (PW2) emphatically stated that in the decision-making process the Commission was subject to no external influence. But more importantly, he was asked the following questions and gave answers.

Q: Other than handing over the document (agenda) does the Executive Secretary (Accused) participate in the meeting?

A: No, unless if he is asked to clarify something.

Q: Does he vote?

A: He doesn't vote, he does not sway the Committee one way or the other.

[17] Later on, he states that he wanted the Commission to be independent and tried hard to maintain the independence of the Commission. It is to be noted that the accused is not a Commissioner, he is its Executive Secretary. One could understand Mr. Singwane to be saying that even the Executive Secretary was not in a position to influence the Commission's decisions.

[18] From the evidence as referred to above, it is clear that the accused did not participate in the appointment of his wife; neither did he influence the outcome. It is apparent that he was not in a position to influence the outcome. There is no evidence to show that he prepared the agenda or influenced its preparation. There is no evidence that he cunningly promoted his wife's name as against any other candidate. As a matter of fact, all the candidates in the list of aspiring head teachers were approved. According to the Common Law there would be no *actus reus*.

[19] But is there *actus reus* in terms of the applicable statute? Under Section 27 conduct that is criminalized is that of an **"employee"** or **"member**" of the public body, i.e. the Teaching Service Commission in

this particular case. The defence argues that since the accused is neither a member nor an employee of the Teaching Service Commission, he is outside the ambit of those who are liable under Section 27 of the Act. It argues that Commissioners are appointed by the Head of State in terms of Section 173 of the Constitution and the accused is appointed by the Civil Service Commission, hence he is an employee of the Civil Service Commission, permanent and pensionable. PW1 admitted this under cross-examination, and he further admitted that since accused was an employee of the Civil Service Commission he could not at the same time be an employee of the Teaching Service Commission. It is common cause that he is not a member of the Teaching Service Commission, he is merely its Executive Secretary.

[20] Contrary to the defence case the Crown argues that although in the letter of the law the accused is not an employee or member of the Teaching Service Commission, he committed the mischief sought to be prevented by the statute in that he **"was able to blindside the Commission into promoting his wife to the position of head teacher. He prepared the agenda for the meeting, an agenda that conveniently and only placed the name of his wife before the Commission."** I have demonstrated above that the evidence

does not support this far-reaching assertion. If this argument were to apply to the accused's wife it must apply to all the other fifteen head teachers who were approved on the day, and indeed to all those who were approved on the day in the different categories of permanent employees, promotions and transfers.

[21] It is trite that penal statutes are to be accorded a narrow interpretation, for the reason that they adversely affect the rights and liberty of man. In this respect I have been referred by the accused's Counsel to the writings of **E.A. KELLA WAY**, Principles of Legal Interpretation (Butterworths – 1995) It is for that reason that I am reluctant to hold that the accused falls within the ambit of Section 27 (1) which refers to a **'member'** or **'employee'**. Contrary to the submission of PW1, the Act makes no reference to **'ex-officio'** member, and I therefore reject the notion that the accused should be treated as an ex-officio member of the Commission. If that was the intention, the Act should have so provided.

[22] But even if I were to hold that he is within the ambit, which I do not, the Crown still has the onus to prove criminal intent – *mens rea*. There is nothing to suggest that this is a strict liability statute. In the evidence that has been led before me there is no iota that attempts to

prove criminal intent on the part of the accused. As a matter of fact the bulk of the evidence does nothing more than place the accused, passively, at the meeting and, quite tenuously, during preparations for the meeting. I say **'tenuously'** because the evidence is that the accused does not even prepare the agenda for the meeting. The agenda items come from regional Human Resources Officers, and there was no suggestion that he has a right to add to or take away from the list that he receives. Significantly, there is no agenda item on declarations of interest by those present, and this alone completely negates criminal intent.

[23] In the position that I take in respect of the importance of criminal intent I derive much fortitude in the comprehensive judgment of Madondo J in the case of **SELBY NHLANHLA MBATHA vs. THE STATE**, **Case No. AR 265/11 (KWAZULU NATAL HIGH COURT – PETERMARITZBURG)**, for which I am thankful to the Crown. One of the issues in that matter was whether a single 1.98 metre tall dagga plant in the premises of the accused was within the meaning of **"cultivation"**, and whether it was proper to infer knowledge of the plant by the accused. It was held that one plant cannot, in those circumstances, amount to cultivation, and that despite that the single

plant was well tended that was not enough to establish *mens rea* on the part of the accused.

[24] At paragraph 21 of the judgment His Lordship has this to say –

> ***"The imposition of criminal liability in the absence of a criminal intention has for some hundreds of years at least been regarded as an abhorrent concept in South African Law and in Anglo-American Common Law."***

In this context I May also refer to the renowned **HALSBURY'S LAWS OF ENGLAND, Vol. 44** at paragraph 911 which says the following –

> ***"It has been said that it is of the utmost importance to the protection of the liberty of the subject that a court should always bear in mind that unless a statute ---- rules out mens rea as a constituent part of a crime, the court should not find a person guilty ---- unless he has a guilty mind"***

[25] The case of **R vs. RODGERS, 1964 (1) SA 833** is an example of a statute that falls just short of creating a strict liability offence. The court held that the Crown must prove criminal intent, and only then does the onus shift to the accused person to prove lawful authority or reasonable excuse to be in possession of an offensive weapon or offensive material.

[26] What the above quoted authorities are clearly saying is that the Crown cannot avoid the critical responsibility to establish and prove criminal intent. On the evidence before me there is hardly anything that points towards criminal intent.

[27] I comment briefly on **Exhibit "B"**, which contains a job description for the Secretariat of the Commission. This document was handed in by the Crown with the consent of the defence. This document offers no evidence of *actus reus* by the accused on the day in question or prior to that day.

[28] For the aforegoing reasons I find that the accused person has no case to answer, and he is hereby acquitted and discharged in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 1938 as amended. I add, needlessly, that if I were to call the accused to his defence, and he chose not to give any evidence in his defence, it is extremely unlikely that a court, acting reasonably, could convict the accused on the basis of the available evidence, and of course the law protects him against self-incrimination.

T.M. MLANGENI

JUDGE OF THE HIGH COURT