



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 421/10

In the matter between:

REX

and

NATHI ELIJAH DLAMINI

Neutral Citation : Rex vs Nathi Elijah Dlamini (421/10) [2018]
SZHC 203 (13 DECEMBER 2018)

Coram : MABUZA – PJ

Heard : 12/02/2018; 19/03/2018; 23/04/2018; 24/04/2018;
02/07/2018

Delivered : 13 DECEMBER 2018

SUMMARY

*Criminal Law: Prevention of Corruption – Accused charged with
contravening section 12 (3) of the Prevention of
Corruption Act No. 3 of 2006.*

**Ruling in terms of section 174 (4) Act 67 of 1938:
Application for discharge at the end of the Crown’s case.**

MABUZA -PJ

- [1] When this matter came before me it had been part heard by Ota J, an expatriate judge who left these shores without having concluded the matter. The transcripts were incomplete and inaudible. All efforts to find the judges notes failed abysmally. I ordered that justice would be best served if the matter be heard *de novo*. The matter started *de novo* before me.
- [2] The Accused stands charged with the offence of Contravening section 12 (3) (a) of the Prevention of Corruption Act No. 3 of 2006, in that upon or about the period from the 25th May 2009 to 24th July 2009, all dates inclusive and at or near Mbabane in the Hhohho Region, the said Accused in his then capacity as Managing Director of Swaziland Post & Telecommunication

Corporation, a Public Enterprise, and having been lawfully and duly requested by the Anti-Corruption Commission (in terms of The Prevention of Corruption Act No. 3 of 2006) to furnish certain documents, to wit:

- (i) Authority from Cabinet/SCOPE – authorizing the Incorporation of Horizon Mobile Limited;**
- (ii) Authority from the Ministry of Information, Communication and Technology – authorizing the Incorporation of Horizon Mobile Limited;**
- (iii) Authority from the Public Enterprise Unit – authorizing the Incorporation of Horizon Mobile Limited;**
- (iv) Swaziland Post & Telecommunications Corporation Board of Directors’ Minutes – authorizing the Incorporation of Horizon Mobile Limited;**
- (v) Certified copies of any correspondence, minutes of meetings and or official notices relating to the engagement of the Swaziland Post & Telecommunications Workers Union (SPTWU) in the formation of Horizon Mobile Limited.**

The said Accused unlawfully and without reasonable excuse failed or neglected to produce the aforesaid requested documents, and did thereby contravene the said Act.

- [3] When the charge was put to him on the 19th March 2018 the Accused pleaded not guilty to the charge. Mr. Simelane for the Accused confirmed the plea of not guilty as being consistent with his instructions.
- [4] It was common cause that during the period 25th May 2009 to 24th July 2009 the Accused was the Managing Director (MD) of Swaziland Posts and Telecommunications (SPTC). He had earlier on caused the formation, incorporation and registration of the company known as Horizon Mobile Limited. The Memorandum and Articles of Association thereof were handed into Court as Exhibit D.
- [5] The Certificate of Collation shows that Horizon Mobile Limited was incorporated with the Registrar of Companies as No. 111 2008 on the 31st January 2008. This certificate is signed by the Registrar of Companies.
- [6] The Certificate of Collation shows that the Accused in his capacity as Managing Director and Xolile Mhlanga an attorney are the first two directors of the Company to be registered and known as Horizon Mobile Limited. The certificate is signed and sworn on the 13th May 2008.

[7] The subscribers to the Memorandum of Association of Horizon Mobile Limited are:

(a) **Swaziland Posts and Telecommunications Corporation (duly represented by Managing Director Nathi Dlamini) Director, P.O. Box 125, Mbabane.**

(b) **Xolile Mhlanga (Attorney) P.O. Box 3311, Manzini.**

[8] It is indicated therein that Swaziland Posts and Telecommunications holds nine hundred and ninety nine (999) shares and Xolile Mhlanga holds one (1) share.

[9] Their signatures as subscribers were appended to the Memorandum of Association on the 13th May 2008.

[10] Exhibit D is a standard template originating from the Companies Act No. 7 of 1912. The distinguishing feature is the first page which normally sets out the main objects of the Company which are usually set out as follows:

- “1. The name of the company is Horizon Mobile Limited.**
- 2. The registered office of the Company will be situate in Swaziland at Phutfumani Building, Mahlokohla Street, Mbabane.**

3. The objects for which the Company is established are:

- (a) (i) To provide telecommunication services, telecommunication systems and other related matters.**
- (ii) To manufacture and/or distribute telecommunication systems, telecommunications equipment and other related equipment;**
- (iii) To import and distribute telecommunications equipment systems;**

[11] The rest of the objects that follow are normally standard, the operative objectives being the main objects set out in paragraph 3. (a) (i) (ii) (iii).

[12] It is the shareholding and directorship which alarmed Mduduzi Jabulane Zwane (PW1) and the fact that Horizon Mobile Limited had already been formed and incorporated without the SPTC's Trade Unions participation and input. PW1 is the Secretary General of the SPTC trade union.

[13] He stated that he discovered that Government companies are normally incorporated using the line Principal Secretary and line Minister as first

directors and that the shareholding was 50/50 in favour of the Minister and Principal Secretary. He gave the Eswatini Electricity Company as an example in point.

[14] He together with other members of the Trade Union reported the matter to the Director of the Public Enterprise Unit, Mr. Victor Nxumalo (PW2) who asked them to put their request in writing which they did per letter dated 4/3/2009 (Exhibit A). Upon receipt of the letter from the Trade Union, PW2 wrote to the Accused but there was no response.

[15] The Trade Union then went to lodge a complaint with the Anti-Corruption Commission (ACC) who advised them to put their complaint in writing which they did in a letter dated 29/3/2009 (Exhibit C) the contents of which are as follows:

**“The Commissioner
Anti Corruption Commission
P.O. Box 4842
Mbabane**

Dear Sir/Madam

Re: Request for your assistance

- 1. The above subject matter refers.**
- 2. We request your office to lend a helping hand on two issues at SPTC:**

Firstly, the Managing director of the Swaziland Posts and Telecommunications Corporation, SPTC, notified us in a meeting held on 2 February 2009 that he registered a subsidiary company by the trading name of Horizon Mobile Limited for SPTC around January 2008. The news of the new company has not gone down well with the employees. We are gravely concerned with the manner in which this company was registered in that:

- i. We were not informed of the concrete reasons behind its formation prior to its registration.
- ii. We were told during the briefing that the company was formed to safeguard the assets of SPTC in case SPTC is liquidated for bankruptcy. We do not subscribe to this justification because SPTC is a public company not a private company. This effectively means that whatever financial problems SPTC encounters the government will come on board to solve those problems just like she has done recently. The issue of a possible attachment of assets for this public enterprise is misdirected in this instance.
- iii. We were also told that the company is the same as the other business units of SPTC namely Swazi.net and Phutfumani Couriers. To the best of our knowledge these are internal brands of some of the services offered by SPTC that do not have independent directors. The newly formed company has separate directors, the MD inclusive. We ask ourselves why?
- iv. The objectives of Horizon Mobile Limited are the very core objectives and reasons for the existence of SPTC. Why should these objectives be executed by another company other than SPTC herself?
- v. The directorship and shareholding of Horizon Mobile Limited is not clear and controversial to us employees.
- vi. A legal representative of SPTC or at least a government representative does not feature in the registration and share holding of this company.
- vii. If SPTC is being privatised and a new company is formed we need to be officially and formally engaged by the government as the owner of SPTC so as to negotiate our future. We do not want to lose employment under such a cloud of uncertainty and controversy.

Please help us establish the legitimacy of this company before it is too late. We want to know if the proper channels were regarded and followed in registering this company.

Secondly SPTC has embarked on a number of lucrative projects namely: the installation of new pay phones, ADSL broadband internet and the Next Generation Network (NGN). All these are multi-million projects. The sad part of it is that the tenders for these projects, save for the ADSL project, were never made open to the public and the international community as per the requirements for projects of this magnitude. All we were told is that selective tendering was used to choose the supplier

We strongly suspect that there are some elements of corruption involved in the above mentioned issues.

It is in these premises that we request your honourable office to prove or disapprove our suspicions. We also request your office to probe the relationship and business dealings between SPTC and MvTel.

Please find herein attached the Memorandum and Articles of Association of Horizon Mobile Limited:

Your cooperation in this regard will be highly appreciated.

Yours faithfully

**Mduduzi Zwane
General Secretary. SPTWU**

[16] The person initially mandated by the ACC Commissioner and seized with the investigation herein was one Barry Haselstein (Barry). He would have been the Crown's star witness had he not relocated to Zambia. In his absence Mr. Sipho Mthethwa (PW2) gave evidence.

[17] He testified that he worked closely on this case with Barry and was intimately knowledgeable with regard to all its aspects. His evidence was mainly documentary evidence. He handed in all the documentary evidence accompanied by narrations concerning each document.

[18] PW2 stated that on the 25th May 2009 he together with Barry delivered a letter to the Accused and also held a meeting with him at which they requested the Accused to produce a series of documents which were listed in the letter handed to him (the series of documents included those listed in the charge herein). The Accused was accompanied by his lawyer (PW4) Mandisa Matsebula. At this meeting the Accused undertook to deliver the requested documents on 29th May 2009 but, on 28th May 2009 sent a letter to Barry requesting further time in which to deliver the required documents and indicated that he would do so by 5th June 2009.

[19] On 5th June 2009 the Accused delivered a series of documents. Of the seven sets of documents delivered on this day, five of these had not been asked for by Barry and only two of the documents called for by him were received. The Accused was given a further period of time to comply. On 15th June

2009 the Accused failed yet again to produce the documents and in consequence on 25th June 2009 a further reminder was sent to the Accused calling for these documents. The deadline for the delivery was extended to 29th June 2009. Again, this deadline was not met and a further reminder was sent to the Accused calling for these documents. Again, this deadline was not met and a further reminder was sent to the Accused on 8 July 2009 and a final notice was sent dated 21st July 2009, extending the deadline for delivery to the 24th July 2009.

[20] Ultimately, the ACC being dissatisfied with not receiving all the information sought from the Accused decided to charge him with contravening section 12 (3) (a) of the Prevention of Corruption Act No. 3 of 2006 (POCA).

[21] Section 12 (3) (a) of POCA reads as follows:

“(3) Any person who –

(a) without reasonable excuse fails or neglects to disclose any information or to produce any accounts, books or documents required by an investigating officer ...”

[22] It was submitted by the Crown that the Accused by having failed to produce the requested documents listed in the charge sheet, and to furnish a reasonable excuse for his failure to do so contravened section 12 (3) (a) of the POCA 2006; thereby committing an offence.

[23] A crown witness Ms. Mandisa Matsebula (PW4) who was SPTC legal advisor and company secretary at the material time testified that the documents listed in the charge sheet did not exist. Listening to the evidence of PW2, PW3 and PW4 unfold, the Court reached the conclusion that indeed the documents did not exist.

[24] Counsel for the Crown argued that the fact that the non-existence of the documents should have been mentioned to the ACC at the relevant time when the documents were being sought so as to be considered as a reasonable excuse or explanation. He argued further that mentioning same now before Court long after the last given deadline of 28th July 2009 is in contravention of section 12 of the POCA.

[25] Therefore, Counsel for the Crown contends, a reasonable man acting carefully may convict the accuse of contravening section 12 (3) (a) of the

POCA on the basis of the aforesaid evidence of the Crown and in the absence of evidence being led by Accused proving that he provided a reasonable excuse to the ACC for his failure to produce the requested documents.

[26] It seems to me that Crown Counsel accepts the explanation from PW4 that the documents requested did not exist as a reasonable excuse.

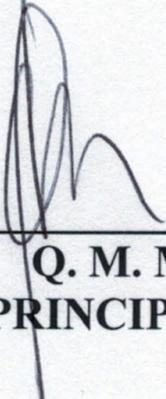
[27] In my view it will serve no useful purpose for the Accused to take the witness stand merely to repeat what PW4 has informed the Court that the documents did not exist. If this excuse was acceptable then had it been proffered timeously it is equally acceptable now to the Court.

[28] I may even add that it was incumbent on Barry and PW2 to cast the net wider in their investigations by visiting SCOPE/Cabinet and the ITC Ministry to source the evidence they sought. There is no evidence before me that this was done. The judgment in the case of **Exparte Commissioner of the Anti Corruption Commission vs Gideon Dlamini & Two Others** Civil case No. 249/2016) 2016 SZHC 206 (October 2016) is instructive in

this regard with respect to collection of evidence and arrests of suspects under POCA.

[29] In view of the foregoing it is my finding that a *prima facie* case has not been made against the Accused by the Crown and I so hold. Consequently the Accused is acquitted and discharged.

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Q. M. MABUZA
PRINCIPAL JUDGE

For the Crown : Mr. T. Dlamini

For the Accused : Mr. B.J. Simelane