IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 183/2019**

In the matter between:

THE KING Applicant

And

GOODWILL SIBIYA Respondent

Neutral Citation: *The King v Goodwill Sibiya (183/2019) [2020] SZHC 74 (28th April 2020)*

CORAM: **N.M. MASEKO J**

FOR THE APPLICANT: **Bryan Magagula**
(DPP's Chambers)

FOR THE RESPONDENT: **T.R. Maseko**
(T.R. Maseko Attorneys)

HEARD: **30th September 2019**

DELIVERED: **28th April 2020**

Preamble:

Criminal law – Section 163 – whether the Court can conduct an enquiry to determine whether an accused is of unsound mind where such accused has not demonstrated any signs of unsoundness before that Court dealing with his case.

Held: That it would not be in the interest of justice to compel an Accused who is of sound mind to undergo mental evaluation in terms of Section 163 of the Criminal Procedure and Evidence Act No. 67 of 1938 as Amended.

RULING ON THE APPLICATION IN TERMS OF SECTION 163 OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT NO. 67 OF 1938 AS AMENDED

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[1] On the 4th July 2019, the Crown launched motion proceedings, seeking an order in terms of the following prayers:

1. That the accused person by the name of Goodwill Sibiya who faces the charges of Contravening the Suppression of Terrorism Act of 2008 and the Sedition and Subversive Activities Act No. 46 of 1938 undergoes mental evaluation in terms of Section 163 of the Criminal Procedure and Evidence Act 67 of 1938.

2. For the stay of the trial of the said accused pending findings in terms of paragraph 1 above.

3. Further, and/or alternative relief.

[2] The Founding Affidavit of Crown Prosecutor Mr Macebo Nxumalo states that the basis for the application is twofold. Firstly that the documentary material forming the subject matter of the charges seems to have been prepared by a person of unsound mind.

[3] Secondly, Crown Prosecutor Nxumalo states that the behaviour of the Accused on the first day of remand in this matter on the 26th May 2019 exhibited signs of a person who was not of sound mind. Mr Nxumalo alleges that the Accused addressed the Court in a disrespectful manner and was uncooperative.

[4] In his Answering Affidavit the Accused raised a number of points *in limine*, namely that-

- the application is fatally defective because the Crown did not attach the application which forms the basis of this application.
- the Crown's application is frivolous, vexatious and abuse of Court process and is calculated to embarrass the Accused.

- the deponent to the Founding Affidavit, Crown Prosecutor Macebo Nxumalo does not have authority to file this application without being authorised by the appropriate authority being the Director of Public Prosecutions.

[5] It is common cause that the Respondent filed an Answering Affidavit on the 9th July 2019 and subsequently filed another one on the 10th July 2019 before the Applicant filed a Replying Affidavit. The second Affidavit was a replacement of the first Affidavit.

[6] The Crown objected to this second Affidavit and I have no reason to disallow it as there was no prejudice suffered by the Crown owing to the fact that the Crown had not yet filed its Replying Affidavit.

[7] During submissions, Mr Magagula submitted that attaching the documents before this Court in this application would have been premature and contrary to Section 334 (1) of the Criminal Procedure and Evidence Act, which provides that documentary evidence must be supplied to the

accused at least ten (10) days before trial, if the trial is to be heard by the High Court. Mr Magagula submitted that, in *casu*, a pre-trial conference has been held but that trial dates have not been set by the Registrar. He submitted further that evidence of the application's origin would have to be led first during trial before the actual documents are tendered before Court as evidence.

[8] Mr Magagula submitted further that the application is not defective because the words complained of, have been quoted in the affidavit before this Court and thus enabling the Accused to plead thereto. He submitted that evidence contained in an affidavit is admissible before courts on the basis of Rule 6 (1) which provides **that every application before the this Court shall be brought on Notice of Motion supported by an affidavit or affidavits**.

[9] Mr Magagula submitted also that the office of the Director of Public Prosecutions is established in terms of Section 162 of the Constitution, and that subsection (5) thereof provides for the powers as entrusted on the

Director, and that the Director exercises these powers in person or by subordinate officers. He submitted that the Deponent in this affidavit is a Principal Crown Counsel – a subordinate of the DPP and thus the affidavit is properly deposed to.

[10] Mr Magagula submitted further that there is no prejudice that will be suffered by the Accused in the event this Court orders him to undergo a psychiatric examination with a view to determine his state of mind. Further that Section 163 is there to enforce the Accused's constitutional rights to a fair trial as this would determine his ability to appreciate the indictment against him.

[11] On the other hand Mr T.R. Maseko submitted that Section 163 was enacted way back in 1938, in an era which had little regard for the rights of persons, including persons with mental and psychological disabilities. Further that in the light of our constitutional framework, and in light of the country's ratification of the Convention on the Rights of Persons with Disabilities

(CRPD) therefore Section 163 should be applied with the utmost caution and with deference to the rights of accused persons.

[12] Mr Maseko submitted that Section 163 affects an accused person's dignity, liberty and fair trial rights, and that the Section 163 application also limits the Respondent's rights not to be treated in a cruel, inhuman or degrading manner. He submitted that where the Crown seeks to invoke Section 163 in response to opinions uttered by an accused person that is an infringement on the accused person's constitutional right of freedom of expression.

[13] Mr Maseko further submitted that the deponent to the Crown's Founding Affidavit has no authority to file this application because, firstly, Section 163 (1) applies to instances where a judicial officer is of the opinion that the accused is of unsound mind and consequently incapable of making his defence. He submitted further that it is therefore unclear why the Crown would bring an indictment in the first place when at the same time it was of the opinion that the Accused's conduct was illustrative of insanity.

[14] Secondly, Mr Maseko submitted that the Deponent had no authority to depose to the Affidavit as he did not allege that he had been duly authorised to do so by the DPP.

[15] Having considered the argument of Counsel on both sides, it is imperative that I consider Section 163 which is crafted in this way: -

> ***163 (1)*** ***If in the course of a trial or preparatory examination the judicial officer has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, he shall enquire into the facts of such unsoundness.***
>
> ***(2)*** ***If the judicial officer is of opinion that the accused is of unsound mind, and consequently incapable of making his defence, he shall postpone further proceedings in the case.***
>
> ***(3)*** ***If the case is one in which bail may be granted, the judicial officer may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person and for his***

appearance before the judicial officer or such other officer as the judicial officer may appoint in that behalf.

(4) If the case is one in which bail may not be granted or if sufficient security is not given the judicial officer may remand the accused in custody and shall report to the Attorney-General for the information of His Majesty who may order the accused to be confined during His pleasure in a place of safe custody.

[16] I must state from the onset that Section 163 empowers the Court to make a determination as to whether the accused is of unsound mind or not. It is also within the spirit of the Section that the Crown and/or the Defence can motivate the Court to make an enquiry into the mental stability of the Accused in terms of this Section, where there is a feeling that the accused may be of unsound mind, which may result in him or her not to appreciate the case preferred against him. In *casu* it is common cause that the Crown is motivating this inquiry.

[17] The question in *casu* then becomes, has this Court observed any conduct of the Accused which may influence it to conduct an inquiry in terms of

Section 163? The answer in my view is no, because, on numerous occasions I have interacted with the Accused in Court and he has always responded well to whatever issues I addressed to him. He has never exhibited any signs of mental instability which may influence me to conduct an enquiry in terms of this Section. Further he has vigorously opposed this application by the Crown and has advanced sound reasons why I shouldn't consider the route of Section 163.

[18] I have observed during remand proceedings that he is of sound mind and responds with understanding the questions posed to him. He is therefore not the kind of a person who, at this stage, can be said to be of unsound mind and thus be subjected to the inquiry in terms of Section 163 of the Act.

[19] It would therefore not be in the best interests of justice to conduct an inquiry in terms of Section 163 when the Accused has not exhibited any signs of unsound mind before me since the day I assumed presiding over this matter

[20] Consequently I hereby hand down the following order:-

1. The application by the Crown is hereby dismissed.

2. A trial date has to be allocated on delivery of this ruling.

3. Each party is to pay its own costs.