

SUPREME COURT OF SWAZILAND

**Held at Mbabane
No.44/2009**

Appeal Case

In the matter between:

NATHI DLAMINI

APPELLANT

AND

**THE COMMISSIONER OF ANTI-CORRUPTION UNIT
RESPONDENT**

1ST

(Applicant a quo)

**BARRY HASELSTEINER
RESPONDENT**

2ND

(2nd Respondent a quo)

CORAM M.M. RAMODIBEDI CJ

A.M. EBRAHIM JA

S.A. MOORE JA

FOR THE APPELLANT ADV. R.M. WISE SC

FOR THE RESPONDENT ADV. N. KADES SC

JUDGMENT

Prevention of Corruption Act - Powers of Commissioner to appoint investigator - Functions of Commission under the Act - Authority of Commissioner and investigator to obtain warrant of arrest of person suspected of having committed an offence under the Act.

EBRAHIM JA:

[1] The Appellant is the Managing Director of the Swaziland Posts and Telecommunication Corporation (hereinafter referred to as SPTC). The first respondent is hereinafter referred to as the "Commissioner" and second respondent as "Haselsteiner". The Prevention of Corruption Act 2006 is hereinafter referred to as the "Act".

[2] Haselsteiner was appointed as the investigating officer in terms of Section 8 of the Act. He was the deponent of the founding affidavit in the court *a quo*. The Commissioner's authority to appoint Haselsteiner to investigate is derived from section 12(1) of the Act.

[3] There were two hearings of this matter in the court *a quo* before different judges. The first hearing was before Banda CJ (as he then was) before whom an *ex parte* application was brought, in which the appellant was not cited as a party and which application was not served on him. The learned judge granted an order authorizing his arrest and ordered that he be taken to the Mbabane police station and thereafter to the Magistrates' Court for a remand hearing. A warrant of apprehension was issued by the Registrar of the High Court in pursuance of this order.

[4] The appellant was arrested and was taken to the police station and then on to the Magistrates' Court where he was placed on remand. He was granted bail in the sum of E500.00 and was required to surrender his passport. It was incumbent on him to

report to the Anti-Corruption Commission (hereinafter referred to as the “Commission”) once a month.

[5] On 1st September 2009 the appellant filed papers in the High Court in terms of which he sought to have the warrant of apprehension authorizing his arrest reversed, the setting aside of the bail, reporting conditions, and the return of his passport. He answered the allegations in the Haselsteiner’s founding affidavit and advanced legal grounds on why the *ex parte* order granted by the court *a quo* should not have been granted. On 14th September, 2009 the Commissioner responded through an affidavit deposed to by Haselsteiner augmented with supporting affidavits and annexures and in this way resisted the appellant’s application.

[6] The matter came before Maphalala J and he dismissed the application and confirmed the order of the former learned Chief Justice. He also ordered that each party pay their own costs including the costs of counsel. The appellant appeals against this order.

[7] It was Haselsteiner’s deposition in his founding affidavit at the hearing before Banda CJ that as investigator of the Commission, appointed as such by the Commissioner, he had been authorized to “commence an investigation into the formation of a company called *Horizon Mobile Limited, New Payphone Installation, ADSL Project and New Generation Network Project*”. His appointment had been made following a complaint being lodged with the Commission, alleging impropriety by the appellant.

[8] Haselsteiner thereafter commenced his investigations and discovered that *Horizon Mobile Limited* was registered and incorporated in accordance with the laws of Swaziland and that the directors of the said company were the appellant who held nine hundred and ninety nine (999) shares on behalf of SPTC and Miss

Mhlanga the appellant's lawyer at the time of registration held one (1) share. It was Haselsteiner's assertion that during the course of his investigation, it became apparent to him that certain documents, which he believed to be in the possession of the appellant be obtained in order to facilitate his investigations.

[9] On 25th May, 2009 he delivered a letter to the appellant and also held a meeting with him at which he requested the appellant to produce a series of documents which he listed in the letter handed to the appellant. At this meeting Haselsteiner was accompanied by Siphon Mthethwa and Paulette Thwala. The appellant was accompanied by his lawyer. At the meeting the appellant stated that he was not representing the Swaziland Government but SPTC. Haselsteiner acknowledged this and confirmed this fact in a subsequent letter addressed to the appellant, dated, 11th June, 2009. Furthermore, at this meeting, the appellant undertook to deliver the requested documents on 29th May 2009 but, on 28th May 2009 sent a letter to Haselsteiner requesting further time in which to deliver the required documents and indicated that he would do so by 5th June 2009.

[10] On 5th June 2009 the appellant delivered a series of documents accompanied by a letter signed by the "Corporate Secretary, Legal Adviser", Mandisa Matsebula. Of the seven sets of documents delivered on this day, five of these had not been asked for by Haselsteiner and only two of the documents called for by him were received by him. The appellant was given a further period of time to comply. On 15th June 2009 the appellant failed yet again to produce the documents and in consequence on 25th June 2009 a further reminder was sent to the appellant 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 appellant on 8th July 2009 and a final notice was sent dated 21st July

2009, extending the deadline for delivery to the 24th July, 2009. It was Haselsteiner's assertion that no reasonable excuse was tendered for this failure and more particularly he deposed that: These Are "Most Crucial And Important Documents". Haselsteiner concluded that the appellant by his failure to comply to provide the requested information, in full, has committed a criminal offence in terms of section 12(3) (a) of the Act.

[11] Section 12(3) provides as follows:

"(3) Any person who -

- 1. without reasonable excuse fails or neglects to disclose any information or to produce any accounts, books or documents required by an investigating officer under subsection (2); or*
- 1. obstructs an investigating officer in the execution of an authority made under subsection (1), commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand Emalangeni or to imprisonment not exceeding five years or to both".*

[12] It is against the background of these facts that Haselsteiner sought the arrest of the appellant in terms of section 13(1) (a) of the Act. He did not serve the *ex parte* application on the appellant "for fear that he might abscond and the whole purpose be defeated".

[13] Section 13(1) (a) provides as follows:

"13. (1) Subject to the provisions of subsection (2), an investigator or officer authorized by the Commissioner who reasonably suspects that an offence has been committed under this Act may -

(a) search or arrest any person;"

[14] Mr. Wise for the appellant has submitted that the main thrust of his appeal is that the court *a quo* had no jurisdiction to grant the warrant of arrest. He accepts that section 11(1) (a) of the Act empowers the Commissioner, to authorize in writing any officer of the Commission to conduct an enquiry or investigation into alleged or suspected offences under the Act. He submitted that to the extent that the Commissioner himself wrote all the letters, save the first, which requested the appellant to produce the requested documents, the Commissioner failed to specify in these letters the alleged or suspected offence under the Act which he considered the said contentious documents necessary for the conduct of the investigation. This he submitted was a requirement in terms of section 11(1) (c) of the Act. This section provides as follows:

“11. (1) in the performance of the functions of the Commission under this Act, the Commissioner may -

1.
2.
3. *require any person in charge of any Ministry, Department or other establishment of the Government or head, Chairman, Manager or Chief Executive Officer of any public body or private body to produce or furnish within such time as may be specified by the Commissioner, any document or a certified true copy of any document which is in the possession or under the control of that person and which the Commissioner considers necessary for the conduct of investigation into alleged or suspected offence under this Act”.*

[15] It was Mr. Wise’s submission that the Commissioner failed to specify any suspected offence which appeared to him to have been committed and into which offence Haselsteiner was authorized to investigate. In addition, that the Commissioner failed to name the offender in respect of which the investigator was to have power to require the production of the requested documents. In the result, it

was his contention, that the requests made by the Commissioner were not lawful and that every demand made by Haselsteiner for the production of documents was therefore not lawful. It follows he argued, that there was no obligation on the appellant to comply with the requests made of him. It was also his submission that the Act does not authorize the Commissioner to obtain an order authorizing the arrest of the appellant and “that the Act only authorizes an officer who has been duly authorized thereto to make such an application and therefore that the *ex parte* application which was brought by the Commissioner was invalid...”

[16] I have some difficulty with these submissions. On 25th May 2009 the appellant both verbally and in writing was requested to produce a number of documents. He did not intimate to Haselsteiner who made the request that the required papers did not exist but instead undertook to comply. He then followed up on the 28th May 2009, with a request for an extension of time to have the documents delivered by the 5th June 2009. There was no indication from the appellant even at this stage that the papers called for did not exist.

[17] Instead on 5th June 2009 he delivered seven sets of documents but of these only two of the papers requested by Haselsteiner were included. A new deadline, 15th June 2009 was set for him to submit the remaining papers. This deadline too, was not met and a further extension to 29th June 2009 was agreed to. On this date there was again no delivery of the papers and a reminder was sent on 8th July 2009 to the appellant that he should comply and a final notice requiring delivery was then sent to him dated 21st July and a new deadline for him to comply was set for the 24th of July 2009. It was only on 1st September that appellant then intimated in his answering affidavit that the requested papers did not exist. I find the appellant’s conduct, in this regard, highly suspicious and unsatisfactory. He is the Managing Director of SPTC and it is

singularly improbable that right at the outset, when the request was made of him by Haselsteiner to provide certain documents, that he would not have been aware of their existence or otherwise, why then did he continue to avoid responding to the request made by Haselsteiner? It seems to me that there was very reasonable cause for believing that the appellant may well have breached the provisions of the Act and in particular section 13(1) (supra) that is a failure to comply with a legitimate request made to him. Furthermore, the Act does not preclude the Commissioner himself or any officer acting under his authority from bringing such application. This is clear from the wording of section 11(2) of the Act which provides as follows:

“11. (2) In the performance of the duties under this Act, the Commissioner or, if acting under the authority of a warrant issued for that purpose by or on behalf of the Commissioner, an officer of the Commission, shall have -

- 1. access, where necessary with a court order, to all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents relating to the functions of any Government Ministry, Department or other establishment, or parastatal, public body or private body”;* (emphasis added)

[18] There is, therefore, also no merit in the submission that Haselsteiner was not competent to bring the proceedings. In his affidavit filed with the Court *a quo* the Commissioner deposed to the following:

“3. I confirm that Barry Haselsteiner is a duly appointed member of the Swaziland Anti-Corruption Commission having been duly appointed thereto in terms of the said Act.

1. *I confirm that at all times material hereto the said Barry Haselsteiner was authorized by me in my official capacity as Commissioner of the Anti-Corruption Commission to make the founding affidavit of the 30th July 2009 and bring these proceedings for the relief prayed for in the Notice of Motion in this matter dated 30th July 2009.*

1. *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 authorizing 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”.*

[19] This is indicative of the fact that Haselsteiner was clearly authorized to proceed to investigate on behalf of the Commission. The appellant for the first time and only in his answering affidavit admitted that he did not furnish the Commission with the requested documentation because these documents did not exist. He deposed that this was clearly conveyed in his letters to the Commission of 5th June 2009 and 24th July 2009. Neither of these letters state these documents do not exist. It is also curious that on 30th June 2009 the appellant wrote a letter in which he stated that all the required documentation had been delivered on 5th June 2009. This was clearly not the case. The admission by the appellant that he did not supply the requested papers as they do not exist is for the very first time made in his answering affidavit on 1st September 2009. The appellant's statement that he did not supply the documents as they do not exist and that he conveyed this to the Commission is not true. In fact in case of those letters he declined to provide the information requested.

[20] The Commissioner's authority to appoint an investigating officer (Haselsteiner) to investigate where it appears to him that an

offence may have been committed by any person is derived from Section 12(1) of the Act. Section 12(1) of the Act provides as follows:

“12(1) 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 investigating officer to exercise....”

See also Section 8(1) of the Act which provides as follows:

“The Commission shall appoint such investigating and other officers to assist the Commission in the performance of its functions under this Act as the Commission may determine after consultation with the Minister”.

[21] It is beyond dispute that the Commissioner in making this appointment acted following a complaint received that an offence under the Act may have been committed. It is not the case of the appellant that in appointing Haselsteiner the Commissioner acted beyond his powers but rather that the alleged corruption offence had not been identified. In my view, this submission is without merit. The whole purpose of carrying out an investigation is to establish whether or not an offence has been committed. Only after such an investigation has been carried out can an offence, if any, be identified. What is clear is that the warrant for the appellant's apprehension was applied for and granted because of his alleged failure to comply with Section 12(3) of the Act in that he failed to produce the documents requested of him by the investigator. As a result of failure the investigator had every reason to believe that the appellant had committed an offence and it follows that in terms of Section 13(1) he had the powers to have him arrested.

[22] A complaint had been made to the Commissioner suggesting improper conduct on the part of the appellant. It seems to me that the Commissioner was, therefore, duty bound to carry out an investigation to determine the validity or otherwise the basis of the complaint. It is questionable, that at the outset; when the complaint was made to him that the Commissioner would have been aware with certainty of the nature of the “offence” allegedly committed by the appellant. Only after the investigation had been carried out would the offence committed if any, be identified. He then did what was only proper in the circumstances. He called for an investigation to be carried out.

[23] In terms of Section 10(1) of the Act the Commissioner was not restricted in investigating “alleged or suspected offences” committed under the Act. See Section 10(1) (C) which provides:

“10. (1) The functions of the Commission shall be to -

(a)

(b)

(c) investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation”.(emphasis added)

[24] The issue before the Court is not whether the appellant has committed an offence specified in Part III of the Act but whether he committed an offence in terms of Section 12(3) of the Act, that is “any other offence disclosed during such an investigation” see Section 10(1) (C) (supra).

[25] In my view there is no valid basis for interfering with the granting of the warrant of arrest by the learned Chief Justice Banda

(as he then was). He exercised his discretion in doing so, and it cannot be said that he did not do so judicially or that his decision in doing so is flawed from a wrong appreciation of the facts or the law. See *Zuma v. National Director of Public Prosecutions and Others 2009(1) SA1(CC). Langa CJ* at page 50-51 stated:

“One of the core considerations when classifying the discretion is whether 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 appellant 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”.

[26] Finally, I believe it would be useful to summarise the various sections of the Act to which I have referred, during the course of this judgment. In my view, an analysis of these provisions serves to emphasise the correctness of the conduct of the respondents in the manner they set about investigating the complaint made against the appellant.

8(1) provides for the appointment of investigating and other officers to assist the Commission in the performance of its functions;

10(1) (c) provides the authority to investigate any alleged offence or any other offence disclosed during such an investigation;

11(1) (c) provides the authority to call for documents in order to facilitate investigation;

12(1) gives powers to the Commissioner to authorise an investigator to source documentation in order to facilitate the investigation;

12(3) (a) & (b) are the provisions in terms of which an offence is committed for the failure to comply with the requests made by the investigator;

13(1) (a) provides the investigator with the power of arrest of an offender who is suspected of having committed an offence.

[27] Against the background of these legislative powers available to the respondents and their proper use of these powers I am of the view that the former Chief Justice and Maphalala J came to the proper conclusions in their handling of this matter.

[28] Accordingly, the appeal is dismissed with costs including the certified costs of counsel.

A.M. EBRAHIM

JUSTICE OF APPEAL

I AGREE _____

M.M. RAMODIBEDI

CHIEF JUSTICE

I AGREE _____

S.A.MOORE

JUSTICE OF APPEAL