Twala J

# IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1866/94

In the matter between:

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| PHILEMON PHONGWANE MASUKU | Applicant |
| and | |
| THE DIRECTOR OF PUBLIC PROSECUTIONS | 1st Respondent |
| THE PRESIDENT OF THE SWAZI NATIONAL COURT - NHLANGANO | 2nd Respondent |
| THE ATTORNEY GENERAL | 3rd Respondent |

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| CORAM: | Hull, C.J. |
| FOR THE APPLICANT | Mr. M. Mamba |
| FOR THE FIRST RESPONDENT | The Director of Public Prosecutions in person |
| FOR THE SECOND AND THIRD RESPONDENTS | Mr. Masuku |

Judgment

(26/10/94)

The applicant appeared before the Swazi Court at Nhlangano (which in accordance with established usage I will call the National Court) on 20th October 1994 on a criminal charge. It appears from his founding affidavit that this arose from a fracas on 8th October involving five other men. He alleges that they accosted and robbed him, and that he fought back in self defence, injuring one Mndzebele with a pen knife.

When he came before the Swazi National Court, he was told that his case would be tried by that court on 25th October at 9.00 a.m.

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In his affidavit, in paragraph 9, he has said that he informed the court officials and the police, at the court, that he had engaged a lawyer to conduct his defence; and that the court officials told him that the Director of Public Prosecutions had decided that the case should be tried in the Swazi National Court and that he had no right to apply for the transfer of his case to a court in which lawyers have a right of audience.

At the hearing of this application, in answer to a question that I put to him, Mr. Mamba informed me from the bar that in fact the application was made in court to the court president, who refused it. Mr. Mamba has undertaken to file a further affidavit to that effect. No objection was taken to that, this fact evidently being uncontroversial.

In the late afternoon of 24th October, i.e. two days ago, the applicant brought these present proceedings in the High Court on a basis of urgency. His notice of application, as it was filed, sought to interdict the Director from prosecuting the applicant on the charge before a Swazi National Court or before any other court before which he cannot be represented by an attorney. It also sought to interdict the President of the Swazi National Court at Nhlangano from proceeding on the charge "pending finalisation" of the application; and it further sought a rule nisi, operating with immediate effect, calling on the respondent to show cause by 11th November why the orders should not be made final.

When the application came first before me, on 24th October, it had not been served on any of the respondents. Mr. Mamba made a bare submission, without citing authority, that insofar as the Swazi Courts Act 1950 (No. 80 of 1950) precludes legal representation in proceedings before Swazi National Courts, it is inconsistent with established principles of common law, and should therefore be construed restrictively in favour of the applicant.

On that argument, I was not satisfied at all that the High Court had jurisdiction to intervene. I ordered the matter to stand over until 9.00 a.m. on 25th October, i.e. yesterday, and that notice of the application should in the meantime be given to the respondents.

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This was done. When it came on again for hearing yesterday, Mr. Mamba applied without objection for leave to amend the application, in respect of the second interdict sought (i.e. against the court president), by adding the words "or an application to the Judicial Commissioner" - in other words to widen the prayer to interdict the court president from proceeding on the charge pending, inter alia, an application to the Judicial Commissioner. This was granted.

Moreover, by the end of the application, Mr. Mamba was content simply to seek an order interdicting the court president from proceeding further on the charge, pending an application under section 30(1)(c) of the Act to the Judicial Commissioner - i.e. an order to that effect alone (apart from the issue of costs) - the purpose of the application to the Judicial Commissioner being to ask him under that provision to direct that the case be transferred to a Magistrate's Court.

All parties agreed that this is now the issue and that the matter, before me, can be disposed of finally on this decision.

At the close of submissions, on consideration of the arguments advanced at the contested hearing, I granted an interim interdict against the court president pending my decision. At that stage, none of the parties were aware of the point that the proceedings at Nhlangano had by then reached. It was, accordingly, recognised that the interim interdict may not have been in time to prevent the trial proceeding to a hearing.

The case for the applicant, as developed by Mr. Mamba at the contested hearing, can be summarised shortly as follows:

Although section 8 of the Swazi Courts Act 1950 confers jurisdiction on Swazi National Courts (in the way described in that section) to try criminal cases in which the complainant and the accused are members of the Swazi nation, the Judicial Commissioner may under section 30(1)(c) on (inter alia) the application of an accused person transfer a

criminal case at any stage to a Magistrate's Court of the First Class having jurisdiction. It is a cornerstone of the process of criminal justice that a person accused of an offence should be able to make his defence. By implication, he may need legal representation in order to do so. This has been recognised by the Court of Appeal in Caiphas Dlamini v. R. 1982 - 86 II S.L.R. 309 (and more particularly at page 313), and in the subsequent decisions of the Court of Appeal in Nkosinathi Vilakati and Another v. R. (Criminal Appeal No. 12/1993, Court of Appeal) and of Mr. Justice Dunn in Simon Makhanya v. R. (Criminal Appeal No. 7/94, High Court.)

Thus, notwithstanding section 23 of the Act, which itself provides "Notwithstanding anything contained in any other law, no advocate or legal practitioner may appear or act for any party before a Swazi Court", it is always open to an accused person who needs legal representation to apply to the Judicial Commissioner under section 30(1)(c), and it is always within the discretion of the Commissioner to transfer a case to a Magistrate's Court. Moreover, he may exercise that discretion in order (inter alia) to assure the accused of legal representation.

Although that is not quite the way in which Mr. Mamba initially presented his submission, I think it is accurate to say that, in the end, that was how he put it and was understood to have put it.

In seeking to sustain the argument, he also submitted that the Director of Public Prosecutions is not vested with jurisdiction to institute criminal proceedings in Swazi Courts. This submission is not tenable in my view. However I do not consider that this affects Mr. Mamba's main submission.

By the time the present application was made to the High Court, and indeed by the end of the hearing here, no application had in fact been made by the accused under section 30(1)(c) of the Act. Mr. Mamba indicated, however, that this would be done within such time as the High Court might direct, in granting an interdict.

The Director of Public Prosecutions opposes the application here first, and specifically, on the ground that it is his prerogative

alone, as dominus litus, to decide whether to institute or proceed on a public prosecution, and in which court to decide to do so. By virtue of subsections (4) and (5) of section 91 of the Constitution as originally enacted in 1968 (No. 50 of 1968), the Attorney General was empowered to institute and undertake criminal proceedings against any person in any court, and exclusively to take over any such proceedings from any other person or authority and to discontinue any such proceedings. The only express limitation of these functions was in respect of courts martial. Moreover, by virtue of subsection (8), the Attorney General was in the exercise of these functions not subject to the direction or control of any other person or authority.

Section 2 of the Constitution, at the time of its enactment, provided that it was to be the supreme law of Swaziland and that if any other law were inconsistent with it, that other law was to the extent of the inconsistency void.

Thus, it is submitted, on the commencement of the Constitution section 30(1)(c) of the Swazi Courts Act 1950, being inconsistent with it, thereupon became void. Putting it another way, it was thereupon by implication repealed.

Although the Constitution was repealed in 1973 by the Proclamation by His Late Majesty King Sobhuza II of 12th April 1973, section 91 read with section 2 had already had its effect on section 30 of the Act of 1950. The repeal of a law, by reason of section 23(a) of the Interpretation Act 1970 (Act No. 21 of 1976) does not revive any earlier enactment already repealed by that law.

Although the Proclamation repealed the Constitution, section 91 was immediately brought in to force again, and by (inter alia) the Director of Public Prosecutions Order 1973 (King's Order - in - Council No. 17 of 1973) the functions, powers and duties of the Attorney General in respect of criminal proceedings have since been vested in the Director.

Accordingly, the Director submits, the power to decide in what court a criminal prosecution is to be pursued is solely a matter for the Director, as dominus litus. The courts do not have jurisdiction

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to interfere with his choice of forum. The power, formerly vested in the Judicial Commissioner under section 30(1)(c) of the Swazi Courts Act 1950 to transfer a criminal case to a Magistrate's Court, was a prosecutor's function. It would be illogical and wrong to hold that two separate officials each have the right to determine the choice of forum.

I do understand the Director's own submission to be limited, implicitly, in one sense - i.e. that what he asserts is the exclusive right to decide in which court of competent jurisdiction to prosecute. Clearly, for example, and as a matter of law, no Swazi Court (or Magistrate's Court) has jurisdiction to try a murder case. In such a circumstance there is no "choice" of forum.

Mr. Masuku, for the Attorney General, associated himself with the Director's submissions, and also made helpful submissions on the principles governing the granting of interdicts.

In criminal proceedings in Swaziland, subject to one reservation to which I shall come, it is in my view beyond argument that the Director of Public Prosecutions is dominus litus. The question here, however, as to what that means in the present context.

He does himself have the power, in his own discretion, to institute criminal proceedings. He has the power in his discretion, to take over and continue criminal proceedings brought by some other person or authority. He also has the power, in his discretion, to discontinue any criminal proceedings before judgment. If he chooses to do so, no court of law will question his reasons for such a decision. In the exercise of his functions he is not subject to the direction or control of any other person - court of law, member of the executive or complainant. Moreover no court may require him to bring a prosecution or to proceed upon it. If he chooses not to proceed, then that is his business, subject only to any legal consequences that the law itself may lay down, according to the stage which the criminal proceeding has reached at the point at which he decides not to continue.

All of these things, in my view, are aspects of his role as dominus litus in the conduct of a criminal prosecution.

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By section 6 of the Criminal Procedure and Evidence Act 1938 (Act No. 67 of 1938), the Director is also empowered at any time before conviction to stop any prosecution commenced by any person, but the section also provides that where the accused has already pleaded to the charge, he is thereupon entitled - i.e. as of right - to a verdict of acquittal. My own view, provisionally, is that this power, which is subject to the consequences contained in the section, is additional to that conferred by section 91 of the Constitution. I say that because the common law rules of criminal procedure in South Africa (and in consequence, I think, in Swaziland as well) are said to be of English origin (see Joubert, The Law of South Africa, Volume 5, page 371 at paragraph 491) as distinct from the substantive criminal law which is basically Roman - Dutch. By the law of England, the Attorney General has the right to stop a criminal prosecution at any time before judgment by entering a nolle prosequi, a power that is not subject to control by the courts (see R.v. Comptroller of Patents [1899] 1 Q.B. 909, 914); and no such consequences as are set out in section 6 of the 1938 Act attach to its entry. Section 91(4) of the Constitution of Swaziland follows a constitutional model which has been widely adopted throughout the Commonwealth and which, in my opinion, is intended to reflect in statutory constitutional form the principle that the Attorney-General or his counterpart retains the power to enter a nolle prosequi.

The usual practice in Swaziland, where a prosecution is to be stopped, is to invoke section 6 of the 1938 Act. I would not wish to discourage that. There are very good reasons in my view why, if proceedings are discontinued against an accused person who has pleaded to the charge against him - in other words in cases where trial has begun - he should be entitled to a judgment of acquittal. In England, the nolle prosequi is used sparingly.

Nevertheless in constitutional theory, the right of the Attorney General - or his counterpart - simply to bring a prosecution to an end by the equivalent of a nolle prosequi is an important one. It is unnecessary to decide, on this application, whether the power conferred by section 6 of the 1938 Act is a separate power from that conferred by section 91 of the Constitution. I think that it is, but I do not so decide.

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The role of an Attorney General or Director of Public Prosecutions as dominus litus derives, I think, from the theory in common law (both in the English and Roman-Dutch systems) that every crime, unlike a civil wrong, is committed against the state: see Landsdown and Campbell, South African Criminal Law and Procedure, Volume V at page 107. In the modern world, however, in those countries which have adopted formal constitutions that do provide, expressly, that the Attorney General or Director of Public Prosecutions is independent of any other authority in the exercise of his functions, I do not think that there can be any doubt that an important reason for this is to preserve the integrity of the process of criminal prosecution, by insulating it from political or sectarian pressures - while at the same time enabling the holder of that office to discharge his own responsibilities, and to have the opportunity to vindicate his own judgment, by presenting a charge as he thinks fit (within the overall confines of the principles of criminal justice) before a court of law. The courts are always zealous to safeguard their own independent role of adjudication. The person responsible for the independent prosecution of a criminal charge must equally be allowed - subject, as I say, to those rules of criminal procedure that are intended to safeguard the interests of accused persons - to prosecute his case as he sees fit in his judgment.

In England, traditionally, the chief state prosecutor - the Attorney General but in more recent times, usually, his delegate the Director of Public Prosecutions - has always exercised his prosecuting functions independently. He takes into account public opinion as a matter of course. He may properly, but with discretion, have regard to political considerations. But he is always expected to act independently at all times. In South Africa, in my understanding, that used to be the case, but after 1926 his functions came under the control, pursuant to statute, of the Minister for Justice.

In England, too, there is one other important feature of the criminal process. Although the courts will never direct the Attorney General or Director of Public Prosecutions to institute or proceed upon a prosecution, they do assert an inherent jurisdiction for their own part, to stay a criminal proceeding -and to do so not only under the doctrine of autrefois acquit or autrefois convict but also if they

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regard the continuing of a prosecution as oppressive: See Connelly v. DPP [1964] AC 1254.

It is a jurisdiction that is invoked very sparingly, but it is also a very important safeguard in the interests of the individual - a corollary of the principle that the chief state prosecutor must be free for his part to bring a prosecution, as he thinks fit independently, in the interests of the state; and also, itself, a principle that brings the two functions, prosecution and adjudication, into their proper relationship to one another.

On a proper understanding of the concept dominus litus, it does not in my view subordinate the function of the court to that of the prosecutor. "Dominus litus" means "master of the suit" (see The Dictionary of English Law, Jowitt), but it refers to the conduct of the prosecution. It is a concept that is concerned with the right to commence, continue or discontinue the conduct of the prosecution case and it is also, I think, always subject to any other rules of law that on their correct construction do govern the trial or disposal of a case. Thus, of course, and as I have mentioned, the concept cannot be used to confer on a court of a particular class a jurisdiction that it does not possess. I do not consider, either, that on a proper view the concept itself curtails the power of a court of law to ensure the fair trial of a criminal charge, as for example by insisting in an appropriate case either that it should proceed forthwith to a hearing or, in effect, that the prosecutor should elect to withdraw it - in other words by refusing any further postponement.

The one reservation that I do have about the role of the chief state prosecutor as dominus litus, in the conduct of a prosecution - the reservation to which I referred earlier - is whether or not he has the right to stop proceedings for contempt of court commenced, mero motu, by a superior court itself. Such proceedings are criminal in nature. Whether he has that right is an issue currently before this court. It has, I regret to say, been before this court for some time, but it will fall to be decided presently in the proceedings in which it arose, and so on that I do reserve my conclusion.

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On the present application, the Director's first objection depends on whether or not the powers vested in the Judicial Commissioner by section 30(1)(c) of the Swazi Courts Act 1950 are properly to be characterised as powers relating to the prosecuting function. I do not think that they are.

I do agree with the Director that whether or not a criminal prosecution is to be instituted before a Swazi National Court is a matter for him. I am also inclined to think, though it is not necessary to decide this point here, either, that the effect of the constitutional provisions both when they were enacted and as they are now (because it is a later enactment then the Swazi Courts Act 1950) may be to confer on the Director or his representative a right to appear and prosecute a case in a Swazi National Court, notwithstanding section 23 of the 1950 Act, and even though the accused does not have a right to legal representation in such a court. The fact that the Constitution expressly excludes from the powers of the Director the control of prosecutions in courts martial, but does not deal expressly with Swazi National Courts, to my mind suggests that this is so. Apart from that, and even though it may seem one-sided, I am also inclined to think that if, as is clearly the case, the Attorney General in 1968 was vested with very full powers as the independent chief state prosecutor, and the Director has inherited that role, then in principle there is no real reason why he should not be at liberty to carry out his constitutional functions in any court, except the one in which he is expressly precluded by the Constitution from doing so. The question of legal representation for the accused is, I think, a separate issue.

However, the freedom of the Director to commence criminal proceedings in a court of his choice depends on the law. The constitutional provisions do not themselves mean that he can institute proceedings in whichever court, and at whatever level, he so chooses. His freedom of choice to do so depends on the constitutive provisions establishing courts of various categories. Here, as in South Africa, and subject to certain jurisdictional limitations, it is true that he has a wide range of choice of which he can take advantage, in his own judgment as dominus litus.

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Again, in that respect, I think that it is illustrative to contrast the position in England. There, certain offences of a minor nature must by law be prosecuted in a lower court. Others, of a serious nature, must be brought in the higher courts. In the middle, there is a range of offences that may be tried in either forum, though usually (I believe that it is still correct to say) at the election of the accused person himself. The legal consequences of such a system are very important. In respect of any offence of a serious nature, the accused is entitled to trial by a superior court (which of course there means trial before a jury of his fellows in fact, but in any event also means, simply, trial by a higher court.)

The Swazi National Courts are invested with jurisdiction to try every allegation of crime except those punishable by death or imprisonment for life, and certain cases relating to marriages or witchcraft. They are invested with that very wide jurisdiction subject to limitations that are expressed in general terms, by reference to repugnancy, natural justice, morality, inconsistency with the laws of Swaziland, and humanity. (See sections 9, 11 and 12). Accused persons who are prosecuted in the Swazi National Courts are not permitted legal representation.

The Swazi Courts Act 1950, however, also establishes a hierachy of customary courts, namely those at first instance, Courts of Appeal and Higher Courts of Appeal. It also provides in section 33(3), a right of appeal from a Higher Court of Appeal to the Judicial Commissioner. His functions, in that respect, are clearly of a judicial nature. It further provides, in the same section, for a further limited right of appeal to the High Court itself, and by virtue of section 104 of the Constitution and section 4 of the High Court Act, 1954 (Act No. 20 of 1954) and also, through section 2 of that Act, the inherent jurisdiction of the High Court, this court has full powers of review of the decisions of Swazi Courts.

Section 30(1) of the Swazi Courts Act 1950, which has never been expressly repealed, confers on the Judicial Commissioner, in paragraph (a), the power to revise any proceeding of a Swazi National Court other than the Higher Court of Appeal, including a power to review an acquittal or a sentence. That is in my view a power that is to be

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exercised judicially. Then in paragraph (c) he is empowered to transfer a criminal matter to a Magistrate's Court.

I think that that is to be construed as a judicial function, too, and not as a prosecuting function. It would be unusual, to say the least, if the Commissioner were to have prosecuting and judicial functions. I do not think that he does. The correct position, in my view, is that it is open to the Director (subject only to any limitations of law as to the jurisdiction of a court) to initiate proceedings in such court as he thinks appropriate. He must however take the court as he finds it. If he chooses to institute proceedings before a Swazi National Court, then it is open to an accused person to apply to the Judicial Commissioner to transfer the proceedings into a Magistrate's Court - in the Commissioner's discretion, which must nevertheless be exercised judicially. I am also of the view that the Judicial Commissioner may properly take into account the relative gravity of the alleged offence, the desirability of having legal representation for an accused person on a serious charge, and the wish of the accused himself, in deciding how to exercise his discretion.

As long as the Judicial Commissioner does exercise his discretion judicially, how he does so is a matter for him. Mr. Masuku submitted that if an accused person were to be able to apply to the Commissioner to transfer his case to a Magistrate's Court so that he could be legally represented, the result might be that the Swazi Court system might fall into disuse. I do not think that there is any substance in that concern at all. The system of customary courts is a very important feature in the administration of justice in Swaziland. In the ordinary run of lesser criminal charges, I do not think that it is likely at all that accused persons will apply to the Judicial Commissioner for transfer of their cases to the Magistrates' Courts. Where, however, a person finds himself accused of a serious offence before a Swazi National Court, and wishes himself to apply to the Judicial Commissioner for a transfer to a Magistrate's Court so that he may engage a lawyer to assist him, then in my view it is open to him to do so, and it is also right that he should be able to so apply, subject however to his being bound by the Judicial Commissioner's determination in the proper exercise of his judicial discretion.

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In the present case, I granted an interim interdict yesterday simply in order to safeguard the rights of the applicant, on a balance of convenience and to the extent that the Swazi National Court had not by then proceeded on the case before it, while allowing myself time to consider the matter. The question now is whether I should continue the interdict until, within a time to be specified by this court in making any such order, the applicant here applies to the Judicial Commissioner for the transfer of the case to a Magistrate's Court.

It has been open to the applicant, on my own view of the law, to apply to the Judicial Commissioner for a transfer since he first knew that it was intended to proceed against him in the Swazi National Court. On his own evidence, he has known that since 20th October at least. The applicant has not said that he has informed the court president that he wishes to apply to the Judicial Commissioner under section 30(1)(c) for a transfer. He has been allowed some latitude in presenting the facts on which he relies in presenting this application and, without wishing to presume on Mr. Mamba, I do think that it is clear enough that the submissions that he made for the applicant only began to focus on section 30 at the hearing yesterday.

This court will not intervene lightly in the process of the Swazi National Courts. There are in my view cogent reasons why it should only do so sparingly.

However, it has been said on behalf of the applicant, without objection but subject to his counsel's undertaking to produce an affidavit to that effect, that he did ask the court president for the transfer of the case to a Magistrate's Court so that he could obtain legal representation. In substance, I think that he did therefore make his intentions clear, even if he did not direct his application to the right quarter. He was, and still is, in my view entitled to make that application to the Judicial Commissioner under section 30(1)(c) of the Swazi Courts Act 1950. I am not fully informed of the nature of the allegations against him, but it has not been contested that they relate to the injuring of Mndzebele with a knife. On that, it appears to me that he may face a charge of a fairly serious nature in respect of which he may reasonably need the assistance of a lawyer.

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In those circumstances, on balance, I consider that the interdict should continue on condition that if he has not already done so, he should make his application to the Judicial Commissioner within seven days from today, and thereafter until that application is determined by the Commissioner.

On balance, I also consider that the costs of this present application should follow the event.

Orders accordingly.

D. Hull.

DAVID HULL
CHIEF JUSTICE