# IN THE HIGH COURT OF SWAZILAND

**CIVIL CASE NO 2627/06**

**MBUYISA DLAMINI VS** **APPLICANT**

**SENIOR MAGISTRATE JOE GUMEDZE**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**1st RESPONDENT 2nd RESPONDENT**

**CORAM** **MAMBA AJ**

**FOR THE APPLICANT** **MR. C. NTIWANE**

**FOR THE RESPONDENTS** **MS. N. LUKHELE**

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**JUDGEMENT 26th**

**January, 2007**

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[ The applicant, Mbuyisa Dlamini who calls himself an adult male of Lozitha in the District of Manzini was tried and convicted by the

serving that sentence at the Matsapha prison. He has now applied to this Court to have the proceedings pertaining to his trial and conviction reviewed and/or set aside and/or corrected. It follows, I think, that if those proceedings are set aside, likewise his conviction and sentence must be set aside.

I shall hereinafter refer to the applicant as the accused and the first respondent as the Magistrate.

The basis or the grounds upon which this application for review is based or founded is stated by the accused in his founding affidavit as follows:

> **"6.2.1When I was tried all of the witnesses gave their evidence in Siswati.**
>
> 6.2.2 **Notwithstanding that there was an official court interpreter at all material times he never interpreted for the court the answers given by the witnesses as they were led in examination in chief or when my then attorney Thulani Dlamini cross examined them. The court recorded in English whatever they said notwithstanding that they gave their evidence in SiSwati and there was no interpretation of what they testified to.**
> 6.2.3 **I am advised and I verily believe the Magistrate Court is a court of recording whose proceedings are to be conducted in English and where the evidence ought to be recorded in English.**
> 6.2.4 **I fear that the Magistrate did not record what was testified to in as much as there is a real likelihood that he might not have recorded the true meaning of what was testified to particularly as Siswati is different from the English language and a literal interpretation might not be the import of what the witnesses testified to.**
> 6.2.5 **I have annexed the affidavit of my then attorney Mr. Thulani Dlamini in support of the aforegoing allegations.**

**6.3.1 First respondent, and in open court read his judgment and eventually sentenced me on the 19th January 2006 as aforesaid.**

**6.3.2 Notwithstanding that first respondent was *functus officio* in respect of my trial he subsequently took the judgment from the court file and edited and/or amended same after I had noted an appeal against the conviction.**

**6.3.3 I am advised and I verily believe that the actions of first respondent as aforesaid are bad at law and that they vitiate the proceedings."** The accused's then attorney, Mr. Thulani Dlamini, in his confirmatory affidavit states that -

**"4.2 The official court interpreter whose names and particulars are unknown to me only interpreted the question that were being put to the Crown witnesses in examination in chief and under cross examination. He never interpreted for the court the answers the respective witnesses gave. This is in respect of all the witnesses.**

6.2.6 **I submit that first respondent, without any interpretation of any nature, recorded the responses the witnesses gave. I cannot be certain whether he recorded everything that was testified to particularly because there was no interpretation of the witness's evidence. Nor can I with any certainty know what it is first respondent recordedas there wasno interpretation.**

6.2.7 **After applicant had been convicted he instructed me to lodge an appeal on his behalf.**

6.2.8 **I submit that on the 1st February 2006 I proceeded to be Magistrate Court, Mbabane where I perused the court file with a view of reading the court's judgment that was delivered on the 19th January 2006. I could not find the judgment in the court file and I was advised that first respondent had it.**

6.2.9 **I then called first respondent and enquired about the judgment. His response was that he was making certain corrections on the judgment.**

6.2.10 **On the 2nd February 2006 I filed applicant's appeal in court and duly served second respondent. The judgment was still not in the court's file.**

**4.8 On the 2nd February 2006 I called first respondent and demanded the judgment. He advised me that he wanted to add certain thing to the judgment because he had seen the grounds of appeal that I had filed on applicant's behalf."**

[5] In reply to the above allegations, the learned Magistrate has noted that - **"During the court proceedings, an interpreter was present. The double stream system of interpretation was not strictly adhered to, more particularly because all parties were Swazis by birth and English oriented, the adopted procedure was accepted in the circumstances and at no time did the accused attorney or prosecutor raise any objection, request for interpretation, assistance or concern on during the proceedings.**

**I recorded the evidence in English based at times on my own interpretation, from the defense attorney if questions or answers were not clearly framed. No objection has been stated on the record regarding any possible misinterpretation. There are no clauses on the record highlighted wrongly interpreted and thus prejudicial.**

**It is my submission that the purpose of interpreting would be to convey the translated version of a witness's statement (evidence) to the best of ones ability more particularly to someone or judicial officer who is not familiar with the language concerned. Where the judicial officer understands the language as well as the parties concerned and even if the interpreter does the interpretation, that judicial officer will use his own words of his own understanding of evidence or questions to the best of his ability since whatever is recorded must be understood by him/her and any reader thereof.**

**When I recorded the proceedings, I did so judiciously for proper administration of justice at all times being alive to the awesome duty with which I am tasked**

**AD PARAGRAPH 6.2.4-6.2.5**

**The allegation of a "real likelihood" of me not recording the real meaning of the evidence given is totally devoid**

**of any truth and is perceived as a protraction from the real issue Le. convicted on the evidence judiciously and fairly. Justice was not failed and the accused placed his case in the hands of counsel, the latter being in complete control of what should lawfully and procedurally be done in order to ensure that the rules and procedure are followed.**

**It is therefore, fundamental that any defence counsel must have full comprehension of his duties to the client and to the court in assisting the court to reach a fair, equitable and just decision of the case. The *court a quo,* on numerous occasions reminded and requested both defence and prosecuting counsels to assist the court. The record would be read back by court where English recordings of evidence were done by court and such was not objected to by the defence. At times reading back would be done at the instance of the defence.**

**After reading back, no doubts or corrections were ever exposed by the defence attorney nor the accused on the incorrectness or inappropriateness of English recorded evidence which was duly interpreted in SiSwati in the full view of the accused and defence counsel. There is no likelihood of the recording having been wrong or incorrect.**

**AD PARAGRAPH 6.3.1-6.3.4**

**The record in question was not taken for dubious, amendment or any misdeed but to have recourse in order to unite reasons for judgment and sentence as per the law. No illegality, wrongfulness or irregularity is necessitated by the taking of the court record so as to satisfy one's obligation and mandate as aforementioned. I am alive that wherever there is doubt created in the mind of the judicial officer presiding over a case, such doubt operates in favour of the accused. If any doubt existed in my mind, I would have expeditiously pronounced the verdict of guilt soonest, without any waste of time. The allegations by applicant are frivolous, scandalous, devoid of any truth and an exhibition of lack of appreciation of the duties and functions of a judicial officer.**

**The whole trial was conducted judiciously, fairly, without any failure to justice and without any prejudice on the accused (applicant) or any other party. It is my submission that no irregularity exists hereunder to justify a setting aside of these proceedings (court a quo}. The case proceeded without any miscarriage, traversity of justice, failure of justice and was neither in the conflict of public interest."** The learned Magistrate concludes his submissions with a prayer that this application must be dismissed.Both the Public Prosecutor who stood in for the Crown in the ***court a quo*** and the interpreter in that court have filed their affidavits in support of the respondents herein. They have both confirmed how the evidence, during the trial was led or presented and have denied that there was any irregularity resulting in a failure or miscarriage of justice as a result of the method or manner adopted by the Magistrate in receiving the evidence from the various witnesses.The accused denies the assertion by the Magistrate thai whatever was contained in the court record, including the Magistrate's English rendering of what the witnesses had said in Siswati. would at certain intervals in the trial be read back to the parties by theMagistrate.From the above averments, the following facts which are either common cause or not in issue may be extrapolated for purposes of considering this application:

(a) The record of the proceedings in the ***court a quo*** is in the English language.

6.2.11 The testimonies of the various witnesses was recorded by hand by the Magistrate.

6.2.12 Most if not all of the witnesses gave their evidence in open court in Siswati.

(d) All the major role players or protagonists in the ***court a quo*** have Siswati as their first language - that is to say, they speak and understand that language well.

(e) An official interpreter was present and took part in the proceedings.

6.2.13 Every testimony given by a witness in Siswati was never interpreted by the official interpreter into English but the Magistrate wrote down in English what he himself understood the witness to be saying.

6.2.14 As a matter of fact and law, the Magistrate is not a sworn interpreter.

(h) The official interpreter only translated from English into Siswati whatever was said in court and not ***vice versa.***

(i) Everything that was said in Siswati was silently translated and taken down in English by the Magistrate. (non-Siswati speakers if any, present in the court gallery did not understand this testimony, unless if of course, they brought along with them their own pi-hate interpreters.)

(j) Neither the Crown nor the defence objected (then) to the way adopted by the Magistrate in receiving the various depositions by the witnesses who spoke in Siswati.

(k) There is no proof of any specific mistake in interpretation by the

from Siswati into English, in fact no such verification exercise was conducted by anyone. **(1)** After passing sentence and before the accused could file his notice and grounds of appeal, the Magistrate took away the record of the proceedings. After the accused had filed his notice and grounds of appeal, the Magistrate, "... **in order to unite reasons for judgment and sentence as per the law,"** (privately) made some yet undisclosed amendments to the said record.

This court has to determine from the above facts whether the fact that the Magistrate silently acted as an interpreter from Siswati into English was an irregularity in the proceedings. In argument before me both counsel agreed it was. Ms Lukhele for the Crown in a carefully prepared and presented argument, submitted that the admitted irregularity did not **"consist of such a gross departure from the established rules of procedure that it could be said that the accused has not been properly tried."**

It is not every irregularity in ihe proceedings that renders the trial a nullity. An irregularity or -Illegality in the proceedings will vitiate a trial or render such trial a nullity if it is a substantial or gross **"departure from those fundamental formalities, rules and principles of procedure with which the law requires such a trial to be initiated or conducted"** that it constitutes or results in a failure of justice. For the irregularity to vitiate the proceedings it must ***per se*** have resulted in a failure of justice.See **S V YUSUF 1968(2) SA 52 (A).** This requirement is rooted in fairness, which is what a trial and legal justice should be all about.

[12] Where for instance, the irregularity is not per se fatal to the proceedings and there is evidence, unaffected by the irregularity, which establishes the guilt of the accused beyond a reasonable doubt, the trial is not vitiated or rendered a nullity. **JAMLUDI MKHWANAZI AND ANOTHER VS R CRIMINAL APPEAL 42/93 (UNREPORTED), S VS TUGE, 1966(4) SA 565 (A) S VS YUSUF, 1968(2) SA 52 (A)**

[13] The established and fundamental procedure and practice in this Court and in the Magistrate's court in Swaziland is that where the evidence is tendered by a witness in a language other than English, such evidence must be interpreted into English by a sworn court interpreter. Such interpreter may be sworn generally or specifically to interpret in a given case where his or her services are required. This rule of practice and procedure obtains regardless of whether or not the language spoken by the witness is known and understood by the judicial officer and the parties. Neither the presiding judicial officer nor any other party to the proceedings may appropriate to himself or herself the role of court interpreter in such circumstances.

[14 It is not inconceivable, as indeed it often happens, that the presiding officer or a part}- to the proceedings may question or express disagreement with what has been interpreted by the official interpreter and at the end a mutually acceptable interpretation is agreed upon. The final word though, of what the corrert interpretation is, lies with the official interpreter unless it is shown by expert evidence that his interpretation on that particular point is incorrect.

[15[ Where the presiding officer assumes the role of unofficial and silent interpreter neither of the parties 3D the proceedings may have the opportunity to see or know then how the judicial officer has interpreted into English what *has,* just been said by the witness. The required transparency, openness and fairness that are the hallmarks of a public hearing are compromised. Once that occurs, that very foundation or essence of a trial is destroyed. This has a domino effect inasmuch as it in xarn breeds lack of confidence in the courts or administration of justice. Once litigants lose faith or confidence in the courts, self help becomes the only credible solution or avenue. The end resurt is anarchy.

[16~ I accept, entirely, that when the Magistrate decided to dispense with the services of the interpreier in the circumstances described herein, he did so in good faith. 3s sole aim throughout the trial was to dispense justice rather tharx to dispense with ir_

[IT In the case of **S V MPOPO 1978(2) SA 424 (A),** a case cited by Mr. Ntiwane in his submissions, where an interpreter was used to interpret the evidence into English, the trial Judge had remarked in his judgment about the accuser s demeanour that

> **"His evidence in the witness box and his demeanour has been completely unsatisfactory. One of my assessors is a fluent Xhosa linguist, I myself understand the language sufficiently to follow the evidence and to form some impression of his demeanour and we are both satisfied that his demeanour was tmtt of a lying witness,"**

The truth of the matter though was That the accused had giver his evidence in ***Sotho*** and not ***isiXhosa.***

[18] On appeal Corbett JA (as he then was) at 426F-427A observed that

> **"It seems to me that what happened in the court *a quo* amounted to an irregularity. Generally speaking, where a witness gives evidence through an interpreter, what occurs is that:**
> **A species of expert witness is telling the court in a language understood by the court (and by any recorder) what it is the witness is actually saying. What the expert or interpreter tells the Court becomes the actual evidence in the case put before the court and recorded."**
>
> **(S V NAIDOO 1962(2) SA 625 (A) at 632H - per Williamson JA.)**
> **What the court must, thus, have regard to is what the interpreter tells the court, not what the witness himself says in the language which is being interpreted. For the court or certain members of the court to give their attention to what the witness himself is saying and to rely upon their own individual knowledge of the language used to form views or impressions as to the veracity or otherwise of the witness' testimony amounts, in my view, to an undesirable and potentially dangerous procedure. In the first place, as already emphasized, it is what the interpreter tells the court that constitutes the evidence and it is this that the court is required to evaluate. It is true that the interpretation procedure is not altogether satisfactory in that it often puts the cross-examiner at a disadvantage and does not enable the court to obtain such direct and clear-cut impressions of the demeanour of the witness as it may gain when no interpreter is employed. These disadvantages, however, do not justify recourse to the kind of practice followed in the present case. Secondly, the interpreter is the chosen expert whose function it is to translate the words used by the witness into the language of the court. For members of the court, having perhaps an imperfect knowledge of the language (as appears to have been the position in the present case), to endeavour to go behind the translated evidence and, thereby, to reach certain conclusions seems to me to be fraught with danger."**

Whilst I accept that the court in Mpopo's case (supra) was dealing with the views of the presiding judge based on his impressions on the demeanour of the accused as a witness and that ***in casu*** no such credibility findings are in issue, the underlying principle is that where an interpreter is used to interpret for the court, it is what the interpreter eventually interprets to the court that is the evidence before the court. I accept further, for purposes of this application that the Magistrate was entitled to form an impression of the demeanour of the accused based on his performance as a ■fitness. The learned Magistrate, however, went beyond just forming views based on the demeanour of the accused. He, in effect said, I understand both English and Siswati and therefore I do not need the official interpreter to translate for the court from Siswati into English what the witness is saying. I shall be the interpreter and I shall, alone, record the Siswati evidence into rlriglish as I perceive the witness to be testifying in court.

The procedure adopted by the Magistrate in the court below, which is that complained of herein is similar in all essential respects to what occurred in **S V PONY ANA 1981 (1) SA 139 (TKSC).**

The headnote in that case reads in part as follows:

> **"Where an interpreter is used in criminal proceedings, it is what is said in public and what is interpreted, whether it be from one language to another or expert evidence, that is the evidence given for practical purposes and which is recorded.**
>
> **Where, in an appeal from a conviction in a magistrate's court, it appeared that at the trial questions had been put to a witness in English and translated into Xhosa by a sworn interpreter, the witness had answered in Xhosa and the answers recorded by the magistrate were not the**

> **interpreter's rendition thereof, but that of the magistrate, [it was] held, that this amounted to a gross irregularity [and] accordingly, that the conviction and sentence had to be set aside.**

I have noted above that what occurred in Ponyana's case (supra) is on all fours with what the Magistrate did in the court below. In the former, the Magistrate explained the procedure adopted by him in the following terms:

> **"The court interpreter was only interpreting from English into Xhosa as the defence attorney was leading the accused in evidence in chief in English. Knowing that we are Xhosa linguists our court interpreters do not bother to interpret to us from Xhosa to English unless specifically asked to do so when the witness does not speak up sufficiently."**

On appeal the court summarized the position as follows:

> *In my view this explains quite clearly what has happened in these proceedings .... It would appear that the accused gave evidence-in-chief in [Xhosa], the questions were translated to him and his answers were not recorded by the Magistrate in the language in which they were given, nor were they recorded, nor was the interpreter's interpretation of his answers interpreted but the Magistrate placed upon the record his interpretation of what the witness had said. It is not necessary to go further than that but it would appear from what the Magistrate says here that this happens throughout, that the questions are put in English, then the witness reply in Xhosa, then only the English version of the question is interpreted by the interpreter and whatever the witness has said in Xhosa is recorded, rendered into English

by the Magistrate and recorded. In our view this amounts to a gross irregularity. Firstly, the Magistrate is not a sworn interpreter. He may be what he calls himself, a Xhosa linguist, but we do not know if he is an English linguist. His knowledge of the English language may not be sufficient to enable him to render correctly into English what the witness has said in Xhosa. Secondly, the record which he has before him is not a record of what the accused has said through the interpreter. If the accused speaks through the interpreter that becomes the evidence of the court. This has been held in a number of cases and one which we were referred to this morning is **S V NAIDOO 1962(2) SA625 (A).**

The ratio of the judgment in my view, with respect, is perfectly correct. It is what is said in public and what is interpreted, whether it be evidence from one language into another or expert evidence, that is the evidence which is given for practical purposes and which is to be recorded. One can see all sorts of difficulties arising should any other view be held. The first and foremost which comes to mind is that the interpretation given by the Magistrate is his own, it is recorded by him and no body in that court except that Magistrate knows what he has recorded in English in so far as the accused or the witness' version in Xhosa is concerned. Therefore the attorney (or the accused, if he is unrepresented) is in no position to argue or to raise a point about wrong interpretation and this may lead to grave injustices. In our view it constitutes an irregularity for the Magistrate to adopt the procedure which he did in this case or for any Magistrate to follow the same procedure. Not only is it a procedure which does not commend itself to us but it

is a gross irregularity, rendering the proceedings completely null and void." **(per Munnik CJ @140)**

[24] I, with due respect, agree and the result in this case must be the same. In the present case all the evidence is tainted by the irregularity. The irregularity is so gross that it per se results in a miscarriage of justice.

[25] In view of this conclusion i.e. that the proceedings were a nullity, it is not necessary for me to go into the merits and enquire, whether despite the irregularity, there was evidence, unaffected by the irregularity which established the guilt of the accused beyond a reasonable doubt.

[26] Two further issues call for comment in this application. Firstiy, there is the allegation which is admitted by the Magistrate that after passing of sentence the Magistrate removed the court record from its custodian, the Clerk of Court and amended it. He says he did so not for "any misdeed or dubious amendment but in order to unite reasons for judgment and sentence as per the law."

[27] Frankly, what the above quoted words mean escape my comprehension. The bottomline is, nonetheless that the learned Senior Magistrate admits having amended or altered the contents of the court record after the accused had filed his notice of appeal. He explains himself by simply saying the amendments were not dubious. With due deference to the Magistrate, he has missed the point. Whether the alterations he made in the court record were dubious or not, he was at that stage done with the matter ***{functus officio)*** and had no power to amend the record ***rae.ro motu.***

Secondly, the Magistrate has in his affidavit added a prayer that this review application be dismissed. Although the Magistrate is cited as a party to the proceedings herein, it is undesirable in my judgment, to include such a prayer in his depositions. To do so may tend to suggest an element of bias on the part of the judicial officer concerned and this must be avoided, always. His duty is to furnish the necessary information to the review court and not to argue for or against the application. I can only add and repeat what Hull CJ said in the case of **DIRECTOR OF PUBLIC PROSECUTIONS VS THE SENIOR MAGISTRATE, NHLAHGANO AND ANOTHER, 1987-1995 (4) SLR 17 @ 22G-I,** where the learned Judge said:

> **"Criminal trials, and applications for review, are of course not adversarial contests between judicial officer and prosecutor. It is wrong and unseemly that they should be allowed to acquire that flavour. Ordinarily on a review, the judicial officer whose decision is being called into question is cited as a party for formal purposes only. He will have no need to do anything beyond arranging for the record to be sent up to the High Court, including any written reasons that he has or may wish to give for his decision.**
>
> **It may be necessary, very occasionally, for him to make an affidavit as to the record. This is, however, to be avoided as far as possible. It is, generally, undesirable for a judicial officer to give evidence relating to proceedings that have been taken before him in principle, there may be a need for a Magistrate to be represented by counsel upon a review, if his personal conduct or reputation is being impugned but these too will be in exceptional circumstance."**

in summary, the application for review succeeds. As a result of the gross irregularity, the conviction and sentence are set aside.

As the proceedings in the court below were a nullity, the second respondent is at Jarge_to re-charge the accused for the same offence should she be so advised.

[30] In the event the accused is charged again, he must be tried by a different judicial officer. It is also desirable that a new prosecuior altogether should be involved.

MAMBA AJ