IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE No. 237/08

In the matter between

Musa Fakudze 1st Applicant

Sebenzile Thango 2nd Applicant

Inhlava Consultancy (PTY) Ltd 3rd Applicant

Dr. Ben Dlamini 4th Applicant

Sabelo Mavuso 5th Applicant

Phindile Ndlangamandla (Born Gwebu) 6th Applicant

Thembani Simelane 7th Applicant

VS

The Director of Public Prosecution 1st Respondent

The Attorney General 2nd Respondent

Coram: S.M Monageng J

For the Crown: Mr. V. Kunene

Mr. S. Khuluse

For accused:Mr. T. Mabila
Mr. M Mkhwanazi

JUDGEMENT
22nd AUGUST 2008

[1] This is a notice of motion in which the seven applicants seek an order in the following terms:

1. Staying the criminal proceedings against all of them and permanently prohibiting the 1st Respondent from reinstituting any prosecution against them in respect of the same charges, alternatively:
2. Directing the 1st Respondent to prosecute them within 30 days from the grant of this order, failing which it be declared that no criminal charges are pending against the applicants.
3. Costs of the application.
4. Further and/or alternative relief.

[2] The application is opposed by the Director of Public Prosecutions. The 1st Applicant Musa Fakudze initially brought her own application under case Number 237/08 and 2nd to 7th Applicants brought their application, which was registered under case number 471/08. Since the facts are similar, the two cases were consolidated.

[3] The background of the matter is that on or about the 23rd January 2007, the applicants were arrested by the police on fraud, corruption and theft charges. They subsequently appeared before a Magistrate's Court and were released on bail under the following conditions:

3.1. That they surrender their travel documents and/or passports and not apply for new ones pending finalization of the criminal trial.
3.2. That they do not communicate or interfere with State witnesses.
3.3. That they report every last Friday of each month, to the

nearest police station.

3.4. That they advise the police whenever they are to change their normal residences physical addresses.

[4] The 1st respondent was further granted an interim order in the following terms against some of the applicants:

4.1. Restraining the applicants from operating their bank accounts and/or disposing/alienating their fixed or immovable properties pending finalization of their criminal trial in due course.

4.2. Restraining the applicants and/or any other person with the knowledge of that order from dealing in any manner whatsoever with the property specified in the notice of application pending finalization of applicants' criminal trial in due course.

4.3 Interdicting and restraining the Registrar of Deeds from registering transfer of any of the immovable property specified in the schedule of assets in the notice of application.

[5] In summary, the applicants allege that the Director of Public Prosecutions is either disinterested or lacks the desire to prosecute them or simply that the Director of Public Prosecutions is not interested in what happens to their lives for the following reasons:

5.1. Ever since they were released on bail the Director of Public Prosecutions has not done anything regarding their prosecution.

5.2. The Director of Public Prosecutions should have, in the

first instance, moved an application before the Hon. Chief Justice in terms of Section 88 (1) (bis) of the Criminal Procedure and Evidence Act which provides that:

> "The Chief Justice may, on an ***ex. parte*** application made to him in chambers by the Director of Public Prosecutions, and on being satisfied that it is the interests of the administration of justice so to do, direct that any person accused of having committed any offence, shall be summarily in the High Court without a preparatory examination having been instituted against him".

5.3. The applicants further say that a pre trial cannot be done without the Chief Justice's consent following an application under Section 88 (1) (bis).

[6] They contend that this has led to serious pre trial prejudice in that their lives have virtually come to a stand still, their reputations are suffering, their integrity has been adversely affected by the publicity that has been occasioned by this case. In summary they argue that they have suffered social prejudice.

[7] They further aver that, in the event that they are prosecuted, chances are that witness' memories and their own might have faded, and they will therefore not be accorded a fair trial, and that in fact, their constitutional right to a fair trial has been violated by the Director of Public Prosecutions.

[8] The applicants further state that, although no law prescribes what is reasonable time before a person is indicted,

this Court must adopt the six months that is provided for at Section 194 (4), of the Constitution which reads as follows:

"The matter of a public officer who has been suspended shall be finalized within six months, failing which the suspension shall be lifted". They are of the view that it is proper to make an analogy in this case. They also argue that Section 136 (2) of the Criminal Procedure and Evidence Act can also be used to justify their submission. For convenience I quote sections 136 (1) (a) (b) and 136 (2):

136 (1) Subject to the provisions of this Act as to the adjournment of a court, every person committed for trial or sentence whom the Attorney General has decided to prosecute before to High Court shall be brought to trial at the first session of such court for the trial of criminal cases held after the date of his commitment, or else shall be admitted to bail, if thirty-one days have elapsed between such date of commitment and the time of holding such session, unless:

> (a) The court is satisfied that in consequence of the absence of material evidence or for some other sufficient cause, such trial cannot then be proceeded with without defeating the ends of justice; or
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> (b) Before the close of such first session an order has been obtained from the court under section 137 for his removal for trail elsewhere.
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> 136. (2) If such a person is not brought to trial at the first session of such court held after the expiry of six months from the date of his commitment, and has not previously been removed for trial elsewhere, he shall be discharged

from his imprisonment for the offence in respect of which he has been committed".

[9] The applicants have fiercely argued that the Director Public Prosecutions has violated and continues violating their rights to a fair and speedy public trial as provided for by Section 21 (1) of the Constitution which reads:

"In the determination of civil rights and obligations or any criminal charge, a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial Court or adjudicating authority established by law"

[10] In response, the Director of Public Prosecutions argues that with regard to the 2nd applicant there is no resolution authorizing the 3rd applicant to act on behalf of this company. I will not dwell on this issue in the interest of justice. The 3rd applicant is the director of this company and there is no dispute about this. The Crown further contends that there has been no delay, and if it is found that there has been a delay, then the applicants have not proved that they have suffered any trial related prejudice.

[11] The State further avows that if there is a delay, it cannot be said to be unreasonable for the reasons that:

(1) The Court Roll is congested, so Courts give preference to people in detention.

(2) Vital documents are in South Africa for forensic verification and that South Africa does the verification for the whole of Africa, so that the its documents have had to

join a queue.

(3) In this jurisdiction it takes 2 to 3 years to bring a fraud suspect to Court.

[12] As a result of these factors, the State argues, the Director of Public Prosecutions cannot be accused of dereliction of duty, neither can she be said to be negligent, and that these factors should inform the decision of the Court.

[13] With regard to social prejudice, the State contends that what the applicants say is prejudicial is mere speculation and that in any case, by being an accused person, especially in such a case, what say they are social prejudice issues are unavoidable.

[14] Regarding Section 88 (1) (bis) of the Criminal Procedure and Evidence Act, the State avers that, although only a summary should be presented for consent by the Chief Justice, the information in the documents that have been sent to South Africa for forensic verification is a vital part of that summary, and that the summary cannot be presented without it, so that is not possible, for the time being, to move an application under this section.

[15] In relation to Section 194 (4) of the Constitution, the State argues that, had the legislature intended this section to apply not only to disciplinary matters but also to criminal matters, this would have been made clear in the Constitution. Further, the State argues that Section 136 (2) of the Criminal

Procedure and Evidence Act applies to people who have been committed for trial and is therefore inapplicable to the present matter.

[16] I wish to mention that stay can be defined as a stopping or arresting of judicial proceedings by the direction or order of a Court. It is a kind of injunction with which a Court freezes proceedings at a particular point, stopping the prosecution of the action altogether, or holding up some phase of it. A stay may imply that the proceedings are suspended to await some action required to be taken by one of the parties.

[17] In certain circumstances, however, a stay may mean discontinuance or permanent suspension of the proceedings. Where there is no fixed date, this, will be ***sine die,*** and it is taken to mean a stay intended to be permanent. In practical terms, a stay may have the same meaning as a dismissal in criminal matters, and the stay in such circumstances will have the same beneficial effect, for the accused persons, as an acquittal.

[18] The relief the applicants seek through this application is for this Court to stay the proceedings permanently and the result being a bar to the Director of Public Prosecutions to ever bring charges against them. Alternatively, the applicants urge this Court to set a condition for the Director of Public Prosecutions to prosecute them within 30 days from today, failing which the prosecution will be stayed permanently.

[19] I should observe that powers to prosecute are provided for at Section 162 of the Constitution of Swaziland as follows:

"162 (1) there shall be a Director of Public Prosecutions whose office shall be a public office.

162 (4) the Director shall have power in any case in which the Director considers it proper to do so to:-

(a) Institute and undertake criminal proceedings against any person before any Court (other than a Court martial), in respect of any offence alleged to have been committed by that person against the laws of Swaziland.

(b) In the exercise of the powers conferred under this chapter, the Director shall,

(i) have regard to the public interest, the interests of the administration of justice and the need to prevent abuse of the legal process; and

(ii) be independent and not be subject to the direction or control of any other person or authority:

(c) discontinue, at any stage before judgment is delivered, any criminal proceedings instituted or under taken by the Director or any other person or authority".

[20] This Section is couched in clear and unambiguous terms and it vests an absolute discretion on the Director of Public Prosecutions to initiate, prosecute and terminate criminal proceedings. Courts are, however, called upon to intervene, where there is proof, either that the legal limitations of such functions have been transgressed, or the exercise of discretion is not ***bona fides*** - see **Sibusiso Ndlangamandla v Rex** Criminal case No.57/2001-2005 (unreported) page 5 paragraph 11, where Maphalala J, also quoted the cases of **State vs Nellmaphins** 1885 -1888 SAR 121, **R v Weldeck** and Thime

1913 T.P.D. 568 and **Cullingham v Attorney General** and others 1909 T.S. 572).

[21] In the same judgment, Maphalala J quoting Nathan CJ (as he then was) in the case of **R v Nxumalo** and 1977 -78 S.L.R. 102 at 104 B -E Serial observed that:

"in ***Rv Sikumba*** 1955 (3) S.A. 125 (E) De Villiers J said at page 127 D-E "The prosecutor, as the representative of the solicitor general, is ***dominus litis.*** It is within his power to withdraw a charge at any stage of the proceedings, and no Court can prevent him, just as no Court can force him to prosecute, (see **Cullinghan v Attorney General** and others, 1909 TS 572). In his concurring judgment Curlewis J said "the Attorney General has an absolute discretion to initiate and prosecute criminal proceedings at the instance of the Crown. He does so upon his own responsibility and in the performance of that duty, is wholly independent of this Court, which cannot interfere with the discretion conferred upon him by the statute "

[22] Against this background looms the concept of the right to a fair trial, which originally was a common law concept, but which has been given a far greater significance by Constitutional recognition. It has now become a stand alone concept. In this jurisdiction, Section 21 (1) of the new Constitution of the Kingdom of Swaziland is relevant. I should state that in interpreting the constitutional provisions of fair trial, Courts over time, have acknowledged that the concept is broad and also embraces substantive fairness, which was not the case before the advent of constitutions. It is trite that the constitution only articulates a set of minimum guarantees that

the citizenry is entitled to.

[23] The broad interpretation acknowledges that a fair trial should also include substantive fairness, which essentially means the fairness of the process leading to the prosecution itself. This should be differentiated from the manner in which the trial is conducted. The concept goes beyond the mandatory rules of procedure. This necessity requires enquiries as to whether the institution of the prosecution is fair, regardless of the resultant fairness of the trial itself.

[24] A broader consideration of when fairness commences would of necessity include the right to have the trial started without unreasonable delay, the right to have investigations concluded timeously, so that the period before the accused is charged, is also relevant in determining whether the right to fair trial was violated by the Director of Public Prosecutions in the present case.

[25] In the case of **Sanderson v Attorney General,** Eastern Cape 1998 (2) SA 38, the Constitutional Court of South Africa interpreted the right to a trial without delay. The Court in analyzing this concept took into account non trial related prejudice, and observed that generally, the rights primarily protected are trial related, but the Court was of the view that non trial prejudice can have drastic consequences on the liberty, self worth and integrity of an accused. Further that these are relevant in determining whether a violation of the accused's right to a trial without unreasonable delay has occurred as is being asked of this Court.

[26] In invoking the concept of public interest, which is

quite fluid, it is noted that fair trial is not only a constitutional requirement, but also a societal requirement. To that extent, I observe that society is desirous to see its members subjected to convictions and punishment where justified, but that this should be after a fair trial. To that extent, it is trite that fair trial or allegations of non fair trial practices, should not be used to allow the guilty to escape punishment, so that the sacred reputation of fairness is protected.

For the above see the cases of:
S v Motlontsi 1996 (1) SACR 78 (C)
S v Marx 1996 (2) SACR 740 (W)
S v Mekne and others 1996 (1) SACR 335

[27] The accused persons bemoan the fact that, what has happened in their particular case is for them to be arrested and subsequently released on bail. They have not been given the indictment, which should spell out succinctly what charges they face, so that they know the accusations they are facing, and so that they can prepare themselves to meet such accusations.

[28] In the Kingdom of Swaziland, such indictment as observed above, is preceded by the Director of Public Prosecutions seeking the consent of the Honourable Chief Justice, per Section 88 (1) (bis), of the Criminal Procedure and Evidence Act. This means that, a person cannot be an accused proper without an indictment duly authorized by the Chief Justice. In this particular case, such authority under this section has not been sought by the Director of Public Prosecutions, eighteen after the applicants' arrest. The State avers that the Director of Public Prosecutions cannot seek such

authority because investigations are not complete, in particular that certain documents have been sent to experts in South Africa for forensic verification.

[29] The State further avers that the institution to which the documents have been sent, services the whole of Africa and that its own documents have had to join a queue so to say. The State seems to suggest that without those documents, what they refer to as a complex case is not complete. I should observe that there is a surprising shroud of secrecy surrounding these documents. Even in Court, Counsel for the Crown was making mysterious statements, that had the potential to leave listeners wondering if indeed any documents have been sent to South Africa.

[30] It is acknowledged practice that where the State feels that divulging the nature of the questioned documents in open Court could jeopardize their case, they can approach the judicial officer in chambers to inform him/her what the documents entail, to avoid resultant impressions that the State could be on a fishing expedition.

[31] I should state that I take a very dim view of the mystery surrounding these so called documents. It is also on record that the accused persons or some of them have been asking for particulars and other information from the Director of Public Prosecutions' office, in writing, over time, but it is clear that their requests have been ignored. I should say very strongly that the State is obliged to respond to accused persons and to give them the information they seek. The State is also obliged to give them the full reasons for the charge. Once the above obligations are not complied with, the Crown has not complied with procedural fairness for going to trial, and may, in

certain circumstances, be in default.

[32] The State seems to be of the view that, the fact that the accused persons are on bail, is a substitute for a speedy trial, which is unfortunate indeed. I wish to note as an example that from the record, these men and women seem to have incurred a lot of expenses in legal fees. The present attorneys are a second cost of attorneys to represent them and by any stretch of imagination this would have great cost implications for the accused persons. There can hardly be any remedy for this and the accuseds' arguments suggests that the only remedy available to them, in the circumstances, is for this Court to grant them a permanent stay. - see **Wild and Another v Hoffert** No and others 1998 (3) S.A. 695 (cc) at (a).

[33] The Crown argued very vociferously on factors that are relevant to trial prejudice, and I should state that, that is an argument for another day. In fact, that argument could be used in favour of the accused persons, in the event that the Director of Public Prosecutions ultimately prefers charges against them. All other negativities like attrition of witnesses etc could prejudice the accused persons.

[34] At this juncture, I wish to refer to the principles and guidelines on the right to a fair trial and legal assistance in Africa, principles that have been produced by the African Commission on Human and Peoples' Rights, of which Swaziland is a signatory. These principles articulate what a fair trial is. I am aware that the principles can only be used as an interpretative guide, since the African Charter on Human and Peoples' Rights has not been domesticated by Swaziland, but they further demonstrate the need for compliance with fair trial principles.

[35] Regarding the time factor, it is trite that what is reasonable time has not been defined. In the case of Sejammitlwa v the Attorney General and others (2002) 2 Botswana Law Reporter 75 and 85D, the Court noted that the accused had waited 7 years to be tried, and the Justices of Appeal found this to be an unreasonably long time and granted a permanent stay.

[36] In Modume Mareko MCHFT - 000079-06, a Botswana case, although the facts are not similar to those in this application, the Court found a period of over three years unreasonable, especially given some of the reasons that were proffered by the State, for example that the accused was a serving prisoner who could afford to wait for the new trial. Another delay cited was for that for a year the trial magistrate was away on study leave. Similarly, the Court granted a permanent stay. A proper reading of these cases, indicates that a balance has to be struck between the period it takes to charge and try the accused and the reasons for the delay. In this particular application, can 18 months, as the accused say it is, or 12 months as the State says it is, be said to be a reasonably long period?

[37] The accused persons wish to persuade me that, in the absence of a statutory period, I should invoke Section 194 (4) of the Constitution, which requires Disciplinary Proceedings against public servants to have been completed within six months. I find this analogy untenable for the reason that this application has to do with a criminal matter, which involves investigation and which is said to be complex, as evidenced by the need to send documents to South Africa for forensic verification.

[38] One must also ask whether sending the documents to South Africa can be said to be a good reason? Much as I observed that the Director of Public Prosecutions is keeping the nature of the documents close to her chest, the fact that they have had to be sent to South Africa indicates that there is no expertise in Swaziland, to verify them forensically, and this could further demonstrate the complexity of the investigation.

[39] The Director of Public Prosecutions avers that the forensic investigation is a matter beyond her control and that since South Africa offers this service to the whole of Africa, of necessity there will be delays. This could be true, but the Director of Public Prosecutions should have made efforts to demonstrate what follow up, if any, she has made. But to the extent that, logically this could be true, I am prepared to give the State the benefit of the doubt.

[40] A run through cases in different jurisdictions indicates that, by their nature, criminal cases cannot be completed within an ascertainable period of time. Courts deciding such cases are therefore required to consider whether the Director of Public Prosecutions has transgressed the limitations of her office or whether the exercise of her discretion is not bona fides - see Sibusiso Ndlangamandla v Rex supra.

[41] It is my considered view that, given the totality of

this case and this application, and the explanation given by the Director of Public Prosecutions, I cannot say that the Director of Public Prosecutions has transgressed the limitations of her office, neither can it be said that she has not exercised her discretion bona fides. But the State should bear in mind that prosecutions should be completed speedily for the integrity of the criminal justice system to be upheld.

[42] I am not convinced that this is a case where a permanent stay of the proceedings should be granted. It is trite that a permanent say would bring an end to the matter, and given the explanation that has been advanced by the State, it would be unreasonable at this stage to grant the order, consequently this prayer fails.

[43] Regarding the application to put the Director of Public Prosecutions on terms, I have advised myself that I should consider that and to that extent, I will allow the State to give me an indication of how long they would need to complete their investigations, and to apply for a summary trial. I should observe that we are not going back to the documents that are in South Africa.

[44] I am putting this on the table because much as I am sympathetic to the applicants, I think 30 days is too short a time to put the Director of Public Prosecutions on terms, to have made the application to the Hon Chief Justice, under Section 88 (1) (bis) of the Criminal Procedure and Evidence Act. Quite obviously at this stage the Director of Public Prosecutions is *dominus litis* and I cannot order her to prosecute the applicants, they belong to her, so to say, not to the Court.

[45] State Counsel: We can not give an answer now.

Court: I have an order that I could give.

State Counsel: I would suggested that the Court proceeds.

Defence Counsel: The court can proceed.

[46] **COURT ORDER**

1. The Director of Public Prosecutions is put on terms to have applied for the Honourable Chief Justice' consent under Section 88 (1) BIS of the Criminal Procedure and Evidence Act by 23rd March 2009, failing which she should appear before this Honourable Court, to show cause why the proceedings against the applicants should not be stayed permanently.

2. There will be no order for costs since this is a constitutional and public interest matter.

SM MONAGENG
JUDGE