IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 12/13

In the matter between

THE KING **APPLICANT**

And

LEO NDVUNA DLAMINI **RESPONDENT**

Neutral citation: *The King v Leo Ndvuna Dlamini (12/13*) [2013] SZHC177 (13 August 2013)

Coram: **OTA J**

Heard: **7 August 2013**

Delivered: **13 August 2013**

Summary: **Application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938, as amended (CP&E); guiding principles; application dismissed.**

OTA J

Judgment

[1] The Accused Leo Ndvuna Dlamini is charged with the following counts of offences:-

> **"COUNT ONE**
>
> **The accused is guilty of the crime of CONTRAVENING SECTION 33 (1) (b) READ WITH SECTION 33 (2) (b) (i) of PREVENTION OF CORRUPTION ACT 30 OF 2006.**
>
> **In that upon or about the 24th November 2011 and at or near Pigg's Peak Magistrates Court in the Hhohho Region, the said accused being a Judicial Officer, did unlawfully demand or accept an advantage to wit, Emalangeni Five Thousand (E5000-00) from one Mihla Dlamini, an act which amounts to violation of duty or a set of rules and/or abuse of position of authority and thus did contravene the said Act.**
>
> **ALTERNATIVELY**
>
> **The accused is guilty of CONTRAVENING SECTION 42 (1) (a) read with section 42(2)(b) (i) OF THE PREVENTION OF CORRUPTION ACT 3 OF 2006**
>
> **In that upon or about the 24th November 2011 and at or near Pigg's Peak Magistrates Court the said accused did unlawfully demand and**

accept an advantage to wit, Emalangeni Five Thousand (E5,000-00) from one Mihla Dlamini, an act which induced the said accused not to continue with laying charges against the said Mihla Dlamini thus amounting to an abuse of authority and violation of a legal duty or a set of rules, and contravened the said Act.

COUNT TWO

The accused is guilty of the crime of ATTEMPTING TO DISTRACT OR DEFEAT THE COURSE OF JUSTICE.

In that wheareas the accused was complainant in a criminal case RCCI 2234/2011, and whereas one Mihla Dlamini was a suspect in the aforesaid matter, the accused did on or about the 24th November 2011 and at or near Pigg's Peak Magistrates Court in the Hhohho Region, unlawfully and with intent to obstruct the course of justice solicit money in the sum of Emalangeni Five Thousand (E5,000-00) from the said Mihla Dlamini, in return for the accused not to pursue the criminal charges for which the said Mihla Dlamini was tried. In the premises the said accused did commit the crime of ATTEMPTING TO DEFEAT OR OBSTRUCT THE COURSE OF JUSTICE."

[2] When the Accused was arraigned before this court, he pleaded not guilty to these counts of offences. Whereupon the Crown led the evidence of six (6) witnesses in proof of their case.

[3] At the close of the Crown's case, learned defence Counsel Mr Bhembe, moved an application in terms of Section 174 (4) of the Criminal Procedure and Evidenc Act 67/1938 as amended, (CP&E), urging the court to discharge and acquit the Accused on grounds that the Crown has not made out a prima facie case against him warranting him to enter into his defence.

[4] Now, Section 174 (4) of the CP&E under which this application is premised, provides thus:-

> **"If at the close of the case for the prosecution, the Court considers that there is no evidence that the Accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him"**

[5] Adumbrating on this provision in the case of **Rex v Elizabeth Matimba and Another, Case No. 184/98,** the Court referred to an article titled **"The Decision to Discharge an Accused at the Conclusion of the state case: A critical analysis, South Africa Law Journal page 286 at 287"**, where the author **A St Q Skeen**, commenting on Section 174 of Act 51 of 1977 of the Republic of

South Africa, a statute which is in *pari materia* with our own Section 174, stated as follows:-

> **"The word 'no evidence' have been interpreted by the Courts to mean no evidence upon which a reasonable man might convict. The issue is whether a reasonable man might convict in the absence of contrary evidence from the defence and not what ought a reasonable man to do. If a *prima facie* case is established, the Accused runs the risk of being convicted if he offers no evidence, but it does not necessarily mean that if he fails to offer evidence the *prima facie* case will then become a case proved beyond reasonable doubt. This may or may not take place. It sometimes happens that a Court, after refusing an application for discharge at the conclusion of the state case, will acquit the Accused where he closes his case without leading any evidence. In other words, what a reasonable man might do does not equate with what a reasonable man ought to do. The test at the conclusion of the whole case is whether the state has proved the guilt of the Accused beyond a reasonable doubt. The issue as to whether there is evidence on which a reasonable man may convict is a matter solely within the opinion of the judicial officer and may not be questioned on appeal".**

[6] See **Rex v Zonke Thokozani Tradewell Dlamini and Another Criminal Case No. 165/10 para [35].**

[7] The only question for determination therefore, is, whether the Crown on the evidence led has made out a prima facie case in proof of the

elements of the offences charged or is there any evidence upon which this Court acting carefully might convict the Accused person? What then are the elements of the offences charged?

[8] Section 33 (1) (b) read with Section 33 (2) (b) (i) under which the Accused is charged in Count one, state the following:-

> **"33 (1) Subject to the provisions of subsection (2), a person who directly or indirectly**
>
> **(b) being a judicial officer, demands or accepts or agrees or offers to accept any advantage from any other person, whether for the benefit of that judicial officer or another person, commits the offence of corrupt activities relating to judicial officers**
>
> **(2) An act under subsection (1) to constitute an offence must induce the judicial officer to act or influence another person so to act in a manner:-**
>
> **(b) that amounts to**
>
> **(i) the abuse of a position of authority**

[9] The alternative charge is brought pursuant to Section 42 (1) (a) read with Section 42 (2) (b) (i) of the Act which state as follows:-

"42 (1) Subject to the provisions of subsection (2), a person who directly or indirectly-

(a) demands or accepts or agrees or offers to accept any advantage whether for the benefit of that person or of another person; or,

(2) For an offence to be committed under subsection (1), the act complained of must cause that person or influence another person to act in a manner-

(b) that amounts to

(i) the abuse of a position of authority".

[10] Then there is Count two, which is attempting to distract or defeat the course of justice, wherein the Accused is alleged to have unlawfully and with intent to obstruct the course of justice solicit money in the sum of E5,000-00 from Mihla Dlamini, in return for the accused not to pursue the criminal charges for which the said Mihla Dlamini was to be tried.

[11] The question is, is there any evidence upon which this Court may safely convict the Accused for the charges preferred without his being called upon to enter into his defence.?

[12] The star Crown witness is PW1 Mihla Dlamini the complainant. Mr Bhembe took issue with his evidence contending that it is fraught with discrepancies which rob it of any credibility. The evidence should thus be rejected.

[13] I am disinclined to acede to this contention. This is because the discrepancy in the evidence of whether or not PW1 knew that the Accused was a Magistrate when he met him at the party on the 24th of September 2011, and whether or not PW1 went together with his father and PW2 to see the Accused which is the evidence upon which Mr Bhembe's grouse is based, is not sufficient to render the whole of PW1's evidence unreliable.

[14] Granted, the credibility of a witness can play a role at this stage of the proceedings, but it is only a limited role, and will only hold sway if

there is a high degree of untrustworthiness that has been shown, which renders relevant evidence unreliable.

[15] Speaking on this issue in **S v Mpetha and Others 1983 (4) SA 262 at 265 D-G Willamson J,** declared thus

> **"Under the present Criminal Procedure Act, the sole concern is likewise the assessment of the evidence. In my view the cases of Bouwer and Naidoo correctly held that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage. If a witness gives evidence which is relevant to the charges being considered by the Court, then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all, it is very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled while rejecting one position of the sworn testimony of a witness, to accept another portion. See R v Khumalo 1916 AD 480 at 484. Any lesser test than the very high one which, in my judgment, is demanded, would run counter to both the principle and requirement of Section 174"**

[16] See **Rex v Zonke Thokozani Tradewell Dlamini and Another (supra) para [41] – [43], Rex v Mitesh Valob and Others Criminal Case No. 188/04.**

[17] PW1 lead relevant evidence to the charges proffered which I am persuaded to consider.

[18] Now, the relevant portions of the evidence of PW1 are that on the 24th of September 2011, he attended a party at a Da Silva homestead at the Luhlangotsini area, in the company of his sister one Sibongile Tsabedze who is a staff at the Pigg's Peak Magistrates Court. He had been drinking heavily from the morning of that day and was thus heavily drunk by around 4pm when the Accused arrived at the party.

[19] It was PW1's evidence that he jokingly said to the Accused *"Hey Leo you are here, what can you say if I can shoot you now"*

[20] A few days after the party his sister Sibongile Tsabedze telephoned him and informed him that the Accused was making enquiries as to his residence. Later police officers from the Pigg's Peak Police

Station also phoned him. PW1 went to the police station. This was on 12th October 2011, where a complainant of common assault laid by the Accused was read to him (exhibit A). PW1 admitted that he was guilty of the complaint. He then requested the police officers to foster a meeting between him and the Accused so that he could tender his apologies. Based on the advise of the police that he should go and see the Accused together with some elders in the society, he approached his father one Samson Dlamini (now deceased) and his uncle Chief Mnikwa Dlamini PW2, to accompany him to the Pigg's Peak Magistrates Court to apologize to the Accused who is a Magistrate and presides at the said Court. When they got to the Pigg's Peak Magistrates Court Accused refused that PW2 should participate in the dialogue and asked PW1 and his father to come back at 2pm.

[21] PW1 told the Court that himself and his father met with the Accused at 2pm in his chambers at the Pigg's Peak Magistrates Court, where PW1 apologized to the Accused, but the Accused didn't want to hear him and told his father to leave the room because he wanted to fine PW1. After PW1's father left the room, the Accused and PW1

continued talking and that was when he saw a criminal docket with his name written on it on Accused's table.

[22] PW1 told the Court that it was then the Accused told him that he had to pay a fine of E5,000-00 and if he failed to do so, Accused will take the docket to another Magistrate who might convict him to more than 7 years imprisonment without an option of a fine.

[23] PW1 tried to negotiate the fine downwards. He showed the Accused exhibit B a letter demonstrating that his office is in provisional liquidation therefore he did not have the funds. Accused insisted on the fine of E5,000-00 and asked PW1 to show commitment that he will pay it. PW1 offered to pay a deposit of the sum of E900-00 which he had in his pocket. But Accused insisted on a down payment of E1,000-00. PW1 then went to his father and collected E100-00 to make up the amount of E1000-00 which he gave to the Accused, who put it in a Standard Bank card holder and then put the card holder into his pocket in the presence of PW1 and his father.

[24] It was further PW1's evidence that the Accused then put him on terms to pay the balance of E4,000-00 before the 31st of December 2011 because, he the Accused, was going to be transferred from Pigg's Peak Magistrates court thereafter.

[25] There is also evidence from PWI that after this transaction in Accused's office he never heard of the matter again until he was telephoned by one Sgt Mlangeni of the Pigg's Peaks police station who asked him when he was going to pay the balance of E4,000-00. It was at this juncture that PW1 reported the matter to the Anti Corruption Commission for investigation.

[26] PW2 Chief Mnikwa Dlamini corroborated the evidence of PW1 that indeed himself, PW1 and PW1's father went to the Pigg's Peak Magistrates Court to apologize to the Accused for the insults to him by PW1 He however stated that he did not know the outcome of the meeting between Accused, PW1 and PW1's father because the Accused refused him audience. He was thus not a part of that meeting.

[27] PW3 was Sipho Sabelo Dlamini a Court clerk at the Pigg's Peak Magistrates Court. His duties as such include registering new dockets. PW3 told the Court that the normal procedure is that he receives new dockets with 2 charge sheets from the prosecutors based at the Pigg's Peak Magistrates Court or police officers sent by them.

[28] That upon receipt of a docket he will make an entry of it into the Court register. Then allocate a case number. Thereafter, he will retrieve one charge sheet from the docket put it into the court record folder. Then it will be taken to court as a fresh matter. The docket and the other charge sheet will be returned to the prosecutors.

[29] PW3 told the Court that regarding the docket of assault common in which the Accused was the complainant and PWI the Accused, this laid down procedure was not followed. He said he received the docket with No RCCI 2234/2011 from the Accused personally on the 16th of February 2012. After making an entry of it into the court register exhibit D, he then allocated a Case No which is 70/12. After this he took the docket exhibit E back to the Accused because he received it from him and Accused had told him to take it back to him.

PW3 told the Court that this was the first time he ever received a docket from a Magistrate for registration.

[30] PW4 Nelsiwe Felicia Simelane and PW5 Elsie Matsebula are prosecutors. They were based at the Pigg's Peak Magistrates Court at the material time in question. They told the Court that when a docket is brought to the Pigg's Peak Magistrates Court it is given to them. They go through the docket to ascertain if there is sufficient evidence to prosecute. If there is, they then give the docket to the clerks of court who register it and allocate a case number and then return the docket to them. If on the other hand they find insufficient evidence to prosecute, they will return the docket to the Pigg's Peak police station for further investigation. This, they say is the established practice at the Pigg's Peak Magistrates Court.

[31] PW4 and PW5 told the Court that the docket of the common assault charge laid by the Accused against the complainant was never brought to them. PW4 said she has never seen the docket. PW5 for her part told the Court that she first saw the docket with Sgt Mlangeni who had come to ask her to issue summons in the case and by then the

docket already had a case number. PW5 said she told Sgt Mlangeni that she does not issue summons and even if she did, she will not issue the summons sought because she did not approve of the case before it was allocated a case number. She directed Sgt Mlangeni to go to the clerks who are seized of that duty.

[32] PW6 was Bheki Dlamini an investigator with the Anti Corruption Commission. He told the Court that in the course of investigating this matter, he telephoned the Accused who came to the Anti Corruption Commission together with his attorney on the 19th of March 2012. PW6 told the Court that himself and his colleague, one Sipho Mthethwa, who is also an investigator with the Anti Corruption Commission, first introduced themselves to the Accused and his attorney as investigators with the Anti Corruption Commission. Thereafter, PW6 cautioned the Accused in terms of the judges rules. Accused responded by requesting to explain about the said allegation. He asked to be given time to prepare a statement.

[33] On the 21st of March 2012, the Accused approached PW6 at their office and after cautioning Accused in terms of the judges rules,, the

Accused submitted to PW6 a statement which he Accused, voluntarily made (exhibit H). In paragraphs [8] and [9] thereof, the Accused states as follows:-

> **"8. Then sometime past without much activity in relation to this matter until on or about the 12th October 2011 when Mihla Dlamini appeared unannounced at my chambers. He said that he has come to apologize for what happened at Luhlangotsini. I told him that he was too late as the matter was now being handled by the police and my attorneys. He pledged to pay me E5,000-00 as full and final compensation. I accepted his offer and told him to make it in writing and state when and how he is going to pay E5,000-00.**
>
> **9. I also informed him that I never handled a matter against him as reflected in case R v Mihla Dlamini Case Number 746/2011, and, further accused (Mihla Dlamini) did not pay the deferred fine to date. He conceded and said that he was drunk and pleaded for forgiveness. He never came back with the written offer or the E5,000-00 he had promised. I also did not put pressure on my attorneys because of the then boycott. He paid one E1,000-00 only as what was agreed to a partial payment for the agreed E5,000-00. The amount of E4,000-00 is still outstanding".**

[34] In the light of the totality of evidence led, Mr Bhembe contended that there is no evidence adduced to prove commission of the offences

with which the Accused is charged. Whilst agreeing that the evidence of PWI to the effect that the Accused fined him the sum of E5,000-00 out of which he paid a deposit of E1,000-00 to the Accused and the balance was to be paid by the 31st of December 2011, is the only evidence that somewhat goes to the root of the case, Mr Bhembe however contended, that this evidence is not enough to found a *prima facie* case.

[35] Mr Bhembe further submitted that the evidence of PW6 only goes to affirm what was put to Crown witnesses that the sum of E5,000-00 was compensation for the insult occasioned to the Accused by PW1.

[36] Counsel contended that it is trite that parties can settle a matter without the involvement of the Court, and that the Court infact encourages this. It is for the DPP in whom the power to prosecute criminal charges lies, to either accept the withdrawal of the charge or refuse it, even in the face of agreement by the complainant that the charge should be withdrawn. Therefore, it was not up to the Accused to withdraw the criminal charge. There is also no evidence that the agreement to pay the E5,000-00 was made for the Accused not to

pursue the criminal charge, moreso, as it is common cause that the criminal charge is still pending and the refusal of the DPP's office to prosecute it compelled the Accused to file an application at the High Court to compel the DPP to either prosecute it or enter a certificate of non-prosecution. Mr Bhembe prayed the Court to grant the application.

[37] On the other hand Advocate Kades S.C contended, that the only evidence before the Court is that of PW1 which is to the effect that the Accused fined him E5,000-00. The group of people who are empowered to impose such fines are judicial officers of which the Accused is one. He contended that the Accused used his position of authority as a Magistrate to manipulate the system at the Pigg's Peak Magistrates Court. He not only fined PW1 E5,000-00 for the assault common, he accepted the down payment of E1,000-00 and ordered PW1 to pay the balance of E4,000-00 on or before 31st December 2011. The Accused then withheld the docket which only saw the light of day in February 2012 apparently when PW1 failed to pay the balance in December 2011,was when the docket surfaced in February 2012.

[38] It was further Senior Counsel's contention that the Accused circumvented the laid down procedure of registering criminal cases through the prosecutors stationed at the Pigg's Peak Magistrates Court, who first peruse the file to ascertain that there is sufficient evidence to prosecute, because he gave the docket directly to PW3 a clerk of court who registered same, allocated a case number and then returned the file back to the Accused on his instructions, in contradistincion to the laid down procedure of the docket being returned to the prosecutors. This is clearly abuse of a position of authority as charged in Count one.

[39] Further that the Accused himself in his statement admits receiving the sum of E1,000-00 out of the E5,000-00, although he says PWI tendered it to him as compensation. Advocate Kades S.C then posed a pertinent question "compensation for what?"

[40] Senior Counsel further contended, that Count two has also been established, because although there is no evidence from PW1 that Accused said that if he pays he wont prosecute, however, that is the

intention of the Accused as expressed in his manipulation of the docket and the system at the Pigg's Peak Magistrates Court. Senior Counsel therefore urged the Court to dismiss the application.

[41] Without the necessity of evaluating the evidence, giving reasons or expressing opinions, which is clearly undesirable at this stage of the proceedings since the defence has not been entered upon, I am inclined to agree with Advocate Kades S.C that the evidence led by the Crown exhibits a *prima facie* case. The question as to whether or not the E5,000-00 was tendered to the Accused by PWI as compensation and what the compensation was for, is a mere suggestion by Mr Bhembe to PWI, of which there is no proof at this stage of the proceedings. A prima facie case has in my view been made out by the Crown requiring an answer from the Accused.

[42] In the result, I order as follows:-

1) That the application in terms of Section 174(4) of the Criminal Procedure and Evidence Act 67/1938, as amended be and is hereby dismissed.

2) That the Accused person be and is hereby called upon to enter into his defence.

DELIVERED IN OPEN COURT IN MBABANE ON THIS ……DAY OF ……..….2013

OTA J

JUDGE OF THE HIGH COURT

For the Applicant: Advocate N. Kades S.C
(Instructed by DPP Chambers)

For the Respondent: S. Bhembe