



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 12/13

In the matter between

THE KING

And

LEO NDVUNA DLAMINI

ACCUSED

Neutral citation: *The King v Leo Ndvuna Dlamini (12/13) 2013*
[SZHC] 241 (22 October 2013)

Coram: OTA J

Heard: 18 October 2013

Delivered: 22 October 2013

Summary: Criminal procedure: The Accused a Magistrate was convicted on two counts of offences namely, under the Prevention of Corruption Act 30 of 2006 and for attempting to defeat the ends of justice; sentence of 5 years and 3 years imposed in counts one and two respectively. Sentence ordered to run concurrently.

OTA J

Judgment

- [1] Leo Ndvuna Dlamini, on 18 October 2013, I convicted you on two counts of offences, namely, contravening Section 33(1)(b) read with Section 33(2)(b)(i) of The Prevention of Corruption Act 30 of 2006 and Attempting to Distract or Defeat the course of justice.
- [2] I now proceed to the imposition of sentence which is concomitant to the event of your conviction.
- [3] I should first remind myself that this stage of the trial is as important as the investigation and trial stage and must be given due attention. This is in appreciation of the fact that the imposition of sentence is a delicate and challenging process. It is therefore a discretion which the law requires the sentencer to approach judicially and judiciously with a view to doing substantial justice. As such, it is not an arbitrary discretion.

[4] In a bid to achieve this judicial and judicious exercise of discretion, and as rightly contended by learned defence counsel Mr Bhembe in mitigation, the law enjoins the sentencer to consider the triad of circumstances, consisting of the circumstances of the offender, the interest of the society and the antecedents of the offence, which include the mitigating and aggravating factors.

[5] Adumbrating on this question in the case of **Bhekizwe Motsa v Rex Criminal Appeal No. 37/2010** [para 13], the Supreme Court of Swaziland per Agim JA with Ramodibedi CJ and Moore JA concurring, made the following apposite remarks:-

“This consideration of the Court accords with the guide on what is an appropriate punishment laid down by the South African Court of Appeal per Holmes JA in *S V Rabie* (1975) 4 SA 855 (A) at 862 (9) that ‘punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances ---’. It is clear from the judgment of the trial Court that it considered the personal circumstances of the appellant and other mitigating factors, the circumstances and nature of the crime and the interest of society in arriving at the sentence in question. The Swaziland Court of Appeal per Ramodibedi JA (as he then was) in *Sam Dupont v The King* (Criminal Appeal No. 4/2008) held that ‘In sentencing the Appellant to 13 years imprisonment, the learned judge a quo took into account the triad consisting of the crime, the offender and the interest of the society as laid down in *S v Zinn* 1969 (2) SA 537 (A)’ ”

[6] Leo Ndvuna Dlamini, in honour of the foregoing dictate of the law, I have thus considered your personal circumstances as urged by Mr Bhembe in mitigation. I have considered the fact that you are a 54 year old man approaching retirement age. The fact that you have been convicted under Section 33 of the Act, as rightly contended by Mr Bhembe, means that in

terms of Section 37 of the Act, you stand to lose your job as a judicial officer. Admittedly, this carries weight as a mitigating factor when one considers that the fact of the conviction itself will surely hang over your head for the rest of your life. Further still under this head, I have not shut my eyes to the fact that the advent of such a conviction in our world of the legal profession, will not only serve as a disabling factor to any desires you may nurture of future practice as an admitted attorney, but it will most certainly, pose difficulty in your quest for other gainful employments.

- [7] I am very much alive to the fact that in the face of the very dire circumstances depicted above, your wife and six children, two of who are still school going stand to bear the full brunt of the aftermath of an offence which is not of their own making. As Mr Bhembe has rightly contended, the imminent loss of your job, means the loss of your wherewithal to contribute to the sustenance of your family, especially the school fees of your two school going children. This indeed calls for my sympathy.
- [8] Then, there is the fact that you have no previous convictions. You have been an upright man for the past 54 years of your life. I agree that this factor should go to your account. It should elicit some leniency saving you from being condemned to the maximum punishment for this one indiscretion in your 54 years of life.
- [9] I will not close this chapter without commenting that I have seen some remorse in you during this trial. You have confirmed my perception in this regard by offering to pay back the complainant the sum of E1,000 you received from him. This is indeed a noble move, which I account to your favour.

- [10] I also take cognisance of Mr Bhembe's passionate plea that, inasmuch as the offence committed is frowned upon by the society, the Court should however, consider the peculiar circumstances of the offence namely, the amount involved which is E5,000; the fact that you received only E1,000 out of this amount; the fact that the offence in count two is inchoate, being an attempt to defeat the ends of justice; as well as the fact that both offences arose from the same transaction thus calling for a concurrent sentence.
- [11] Mr Bhembe premised on the above factors, called upon the Court not to impose a custodial sentence but to accord you the benefit of the option of a fine, preferably in the amount of E5,000 solicited.
- [12] Leo Ndvuna Dlamini, having stated as above, I must also point out to you that the offence you committed is not only serious, but it also naturally elicits public indignation. Corruption is globally rated with other serious crimes with grave and dangerous consequences for countries and the international security system, such as money laundering, terrorism as well as economic and financial crimes. This is because of the devastating impact these offences have on the society. Universally, corruption just like other economic and financial crimes and the laundering of proceeds abroad, frustrate national development plans and budget of countries, arrest development and result in large scale pauperization and dehumanization of citizens of the country, break down of governance, law, order, security and collapse of state structures.
- [13] Therefore, no matter the scale of corruption, whether it is the soliciting of a mere E5,000 by a judicial officer which we are faced with *in casu*, or the looting of billions from government coffers by public officials, it is an

offence which we must all join hands to stamp out in the interest of the sanctity, stability and progress of the Kingdom of Swaziland. In recognition of this fact and the persistent geometric increase in the pandemic of corruption in the country, parliament in a concerted effort passed the Prevention of Corruption Act of 2006 (the Act), in a bid to investigate and punish the corrupt activities detailed therein, as well as provide for other matters incidental to the prevention of corruption. Punishment for the offence you committed under Section 33 of the Act, is detailed in Section 35(2) thereof to be “*a fine not exceeding two hundred thousand Emalangeni or imprisonment not exceeding twenty years or to both*”. This in itself spells the mood of the Swazi society towards this offence.

[14] Leo Ndvuna Dlamini, it follows from above, that the gravity of your offence lies not in the mere amount of E5,000 which you solicited as anxiously canvassed by Mr Bhembe. Furthermore, I find that the gravity of your offence is compounded by the fact that as a judicial officer, you bear the flagstaff of justice, with the duty to uphold the rule of law and maintain public confidence in the administration of justice. You violated this legal duty and abused your position of authority by your unethical conduct. In your venture to undo the complainant for his utterances at the party, you became very high handed, arbitrary and vengeful. Unfortunately, some of the actions you took had criminal connotations. You therefore shot yourself squarely in the foot.

[15] As judges we must remember that judicial office is not an ego trip. It is a sacred office. Sacred because of the fundamental importance of its task to the well being and existence of the society. The way and manner this office conducts itself, both inside and outside the Court room, is the most

important determinant of the failure or success, weakness or efficiency of a country's legal system. The wrongful exercise of judicial power leads to weak governance, anarchy and a total break down of the rule of law. Your conduct thus left much to be desired and ought to be seriously inveighed by the imposition of a sentence which will accord with legitimate public expectation of law enforcement.

- [16] Before I draw the curtain on this exercise, let me observe here that this whole saga calls to mind the pronouncement of the distinguished **Hon. Justice Benjamin Nathan Cardozo, Associate Justice of the U.S Supreme Court**, who remarked in words which have now become memorable to the profession, that he did not:

“doubt the grandeur of the conception which lifts (the judges) into the realm of pure reason, above and beyond the sweep of perturbing and reflecting forces. Nonetheless---- they do not stand aloof on these chill and distant heights..... The great tides and currents which engulf the rest of men do not turn aside their course and pass the judges by”.

- [17] The foregoing is food for thought.

- [18] Leo Ndvuna Dlamini, having carefully weighed the triad in a delicate balance, I hereby sentence you to five (5) years imprisonment in count one and two (2) years imprisonment in count two. In my view, this sentence is condign of the offences committed and will serve as a deterrent to others. The sentence is to run concurrently and is backdated to the date of your arrest and incarceration.

- [19] It is so ordered.

DELIVERED IN OPEN COURT IN MBABANE ON THIS
.....DAY OF2013

OTA J
JUDGE OF THE HIGH COURT

For the Crown: Q. Zwane holding for
 M. Matsenjwa
 (Crown Counsel)

For the Accused: S. Bhembe