



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No. 421/2010

In the matter between

THE KING

And

NATHI ELIJAH DLAMINI

ACCUSED

Neutral citation *The King vs Nathi Elijah Dlamini (421/2010)*
[SZHC] 402 (3December 2014)

Coram: Ota J.

Heard: 15 NOVEMBER 2014

Delivered: 3 DECEMBER 2014

Summary: **Criminal procedure: application for a discharge in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938, as amended, Crowns case disclosed a prima facie case**

against the Accused person warranting him to be called into his defence; application dismissed

JUDGMENT

OTA J.

[1] The Accused who was the former Managing Director (MD) of the Swaziland Post and Telecommunications Corporation (SPTC), was on 14 August 2009, arrested by officers of the Anti-Corruption Commission (the Commission). He was arraigned before the Court charged with contravening Section 12 (3) (a) of the Prevention of Corruption Act 2006 (the Act). The Indictment reads as follows:-

“ INDICTMENT

The Director of Public Prosecutions presents and informs the Honourable Court that the above mentioned person (hereinafter referred as the accused) is guilty of the following offence:

Accused is guilty of the offence of Contravening Section 12 (3) (a) of the Prevention of Corruption Act No. 3 of 2006.

In that upon or about the period from the 25th May 2009 to 24th July 2009, all dates inclusive and at or near Mbabane in the Hhohho Region, the said accused in his then capacity as Managing Director of Swaziland Post & Telecommunication Corporation, a Public Enterprise, and having been

lawfully and duly requested by the Anti-Corruption Commission (in terms of The Prevention of Corruption Act No. 3 of 2006) to furnish certain documents, to wit:

- (i) Authority from Cabinet/SCOPE – authorizing the Incorporation of Horizon Mobile Limited;**
- (ii) Authority from the Ministry of Information, Communication and Technology – authorizing the Incorporation of Horizon Mobile Limited;**
- (iii) Authority from the Public Enterprise Unit – authorizing the Incorporation of Horizon Mobile Limited.**
- (iv) Swaziland Post & Telecommunications Corporation Board of Directors’ Minutes – authorizing the Incorporation of Horizon Mobile Limited.**
- (v) Certified copies of any correspondence, minutes of meetings and or official notices relating to the engagement of the Swaziland Post & Telecommunications Workers Union (SPTWU) in the formation of Horizon Mobile Limited.**

WHEREAS the said accused did unlawfully and without reasonable excuse fail (sic) or neglect (sic) to produce the aforesaid requested documents, and did thereby contravene the said Act.”

[2] Section 12 (3) (a) of the Act under which the Accused is charged provides as follows:-

“(3) Any person who

(a) Without reasonable excuse fails or neglects to disclose any information or produce any account, books or documents required by an investigating officer under subsection (2) (b)
commits an offence and shall on conviction, be liable to a fine not exceeding Fifty Thousand Emalangeni or to imprisonment not exceeding five years or to both.”

- [3] The Accused pleaded not guilty to the charge. The prosecution, thereafter, led the evidence of two witnesses in proof of its case.
- [4] At the close of the case for the prosecution, learned Defence Counsel Advocate Bedderson, moved an application for a discharge in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938, as amended. This application was opposed by Advocate Kades who appeared for the Crown.
- [5] The enquiry at hand, therefore, involves a consideration as to whether there is evidence led by the Crown upon which a reasonable man acting upon carefully might or may and not should or ought to convict, either for the offence charged or for any other offence see **The King v Duncan Magagula and 10 Others Criminal Case No. 188/04, Gascoyne v Paul and Hunter 1917 TPD 170.**
- [6] Advocate Bedderson contended that there is no evidence upon which a reasonable man might convict the Accused, for the following reasons:-

- a. Both prosecution witnesses did not show that the Accused had the intention not to comply with the request. The prosecution did not prove criminal intent;
- b. The Accused was at all times represented by the Legal Adviser of SPTC. There is no proof that the Accused on his own, after taking legal advise, intentionally disregarded the Act;
- c. The court should interpret the Act restrictively and not give it a liberal interpretation because it makes considerable inroads into people's liberties;
- d. By section 12 of the Act, the investigating officer has the power to request for documents, both the letters of request of 11 June 2009 and 25 May 2009, all show that it is the late Commissioner of the Anti-Corruption Commission, Justice Mtegha that made the request. The prosecution was obliged to comply strictly with the Act. The Commissioner does not have the power to make the request as he sought to do. His power of request in this regard lies in Section 11 of the Act, which is not applicable here.
- e. In a reply to a request for further particulars by the defence, the Crown stated that they relied on section 12 (1) (d) of the Act in requesting for the documents. That section deals with a specific class of documents. Majority of the documents they requested do not fall into that class. The documents requested in terms of paragraphs 1–2 are out. Under paragraph 3, the Accused supplied the strategic rollout

plan via the executive summary. The details relating to the payphones and other products, the audited financial statements, that is all the documents the Commission was entitled to request in terms of Section 12 (1) (d) of the Act, for the commission cannot just ask for any documents willy nilly. Since the Accused supplied the documents that the Commission was entitled to request, he, in principle, met with the request.

- f. The former Director of Public Prosecutions (DPP) had suspended the warrants of arrest and there is no evidence that she reversed the suspension before the warrants were executed.
- g. The judgments handed up by the Crown are not evidence before the Court, and the Court cannot place reliance on them.

[7] Learned defence Counsel finally urged the Court to discharge the Accused because, it is trite law that an Accused person cannot be expected to be called to his defence in order to supplement deficiencies in the Crown's case against him. To do so would negate the right of fair trial and constitute an abrogation of the presumption of innocence. Counsel urged the **King v Mitesh Valob and Others (supra)** in support of his submissions.

[8] For his part Advocate Kades tendered vehement submissions in opposition of the application. He contended that according to the Act, when the commissioner authorizes investigating officers to carryout a certain act, he does not go out on his own to carryout the function again. However, since an investigation is team work, it is absurd to suggest that the Commissioner,

once he delegates the authority to investigate, is precluded from participating in the investigation.

[9] Counsel referred the court to Section 2 of the Act, which is the interpretation section, for the definition of the terms, account books, business and company books. Counsel further referred the court to section 2 (2) & (3) of the Act on the import of the documents requested and contended that the documents requested are contemplated by the relevant sections. Counsel further submitted that the paramount factor is that the Accused did not comply and his criminal intent could be drawn from that. It was only after the Accused was arrested that he sought to tender an explanation for his non-compliance, which is that those documents do not exist.

[10] Advocate Kades further contended that the warrant of arrest was not withdrawn because the DPP's stance did not affect the warrant. In any case, the DPP personally went to the court of appeal to represent the Crown when the Accused challenged his warrant of arrest.

[11] Learned Counsel urged the Court to call upon the Accused to enter into his defence.

[12] In reply, Advocate Bedderson submitted, that when Advocate Kades urged the court to draw the inference of *mens rea* from the evidence, he conceded that the Crown had failed to prove *mens rea*. The onus is on the Crown to prove criminal intent and they did not do it. They had a duty to prove that there was intentional violation of the section they rely on and they failed to do this.

[13] Now, it is common cause that a complaint dated 29 March 2009 was laid by the SPTC Workers Union, led by PW1 Mduduzi Zwane, to the Commission alleging corruption in the formation and registration of Horizon Mobile Ltd (Horizon), as a subsidiary of SPTC.

[14] The letter of complaint which enures in these proceedings as exhibit B states as follows:-

**“The Commissioner
Anti Corruption Commission
P. O. Box 4842
Mbabane
H100**

Dear Sir/Madam,

RE: Request for Your Assistance

- 1. The above subject matter refers,**
- 2. We request your office to lend a helping hand on two issues at SPTC;**

Firstly, the Managing Director of the Swaziland Posts and Telecommunications Corporation, SPTC, notified us in a meeting held on 02 February 2009 that he registered a subsidiary company by the trading name of Horizon Mobile Limited for SPTC around January 2008. The news of the new company has not gone down well with the employees. We are gravely concerned with the manner in which this company was registered in that:

- i. We were not informed of the concrete reasons behind its formation prior to its registration.**
- ii. We were told during the briefing that the company was formed to safeguard the assets of SPTC in case SPTC is liquidated for bankruptcy. We do not subscribe to this justification because SPTC is a public company not a private company. This effectively means that whatever financial problems SPTC encounters the government will**

come on board to solve those problems just like she has done recently. The issue of a possible attachment of assets for this public enterprise is misdirected in this instance.

- iii. We were also told that the company is the same as the other business units of SPTC namely Swazi.net and Phutfumani Couriers. To the best of our knowledge these are internal brands of some of the services offered by SPTC that do not have independent directors. The newly formed company has separate directors, the MD inclusive. We ask ourselves why?

The objectives of Horizon Mobile Limited are the very core objectives and reasons for the existence of SPTC. Why should these objectives be executed by another company other than SPTC herself?

- v. The directorship and shareholding of Horizon Mobile Limited is not clear and controversial to us employees.
- vi. A legal representative of SPTC or at least a government representative does not feature in the registration and share holding of this company.
- vii. If SPTC is being privatized and a new company is formed we need to be officially and formally engaged by the government as the owner of SPTC so as to negotiate our future. We do not want to loose employment under such a cloud of uncertainly and controversy.

Please help us establish the legitimacy of this company before it is too late. We want to know if the proper channels were regarded and followed in registering this company.

Secondly SPTC has embarked on a number of lucrative projects namely: the installation of new pay phones, ADSL broadband internet and the Next Generation Network (NGN). All these are multi-million projects. The sad part of it is that the tenders for these projects, save for the ADSL project, were never made open to the public and the international community as per the requirements for projects of this magnitude. All we were told is that selective tendering was used to choose the supplier.

We strongly suspect that there are some elements of corruption involved in the above mentioned issues.

It is in these premises that we request your honourable office to prove or disapprove our suspicions.

Please find herein attached the Memorandum and Articles of Association of Horizon Mobile Limited.

Your cooperation in this regard will be highly appreciated.

Yours faithfully

Mduduzi Zwane

General Secretary-SPTWU (5053684/6037658)”

- [15] In the wake of this complaint, the former Commissioner of the Commission Justice Harrys Michael Mtegha, duly appointed PW2, Barry Haselsteiner, as the investigating officer into the alleged offence. This appointment was done in terms of Sections 8 and 12 (1) of the Act. PW2 then consulted the complaint by the Union.
- [16] Thereafter, the Commissioner wrote a letter of request, dated 25 May 2008 (exhibit H), to the Accused requesting several documents, namely, authorization for the formation and registration of Horizon from Cabinet, Public Enterprise Unit, Ministry of ICT, SCOPE and the Board of Directors of SPTC. They also requested for correspondence, letter or minutes of meetings where SPTC engaged SPTC Workers Union relating to the formation and registration of Horizon as well as the financial statements of SPTC. There was also a contractors enquiry form attached to the request.
- [17] The letter was delivered to the Accused on 20 May 2009 and on 25 May 2009, the Accused afforded them, that is PW2 and two of his colleagues, Mr. Thwala and Sipho Mtetwa audience at a meeting where the Accused was in attendance with the former legal adviser of SPTC, Miss Nandisa Matsebula.

[18] The purpose of the meeting was to run through the letter of request with the Accused, so that the Accused was aware of what the Commission's expectations were as to their request in the letter. They went through each item in the letter with the Accused to ensure that he was clear on what they were requesting.

[19] PW 2 detailed the essence of the documentation requested as follows:-

(a) The approval from SCOPE. SCOPE stands for The Standing Committee on Public Enterprises, which comprises of Cabinet Ministers and the Committee is charged with making decisions relating to Public Enterprises, undertaking major investments, as prescribed by the Public Enterprise Control and Monitoring Act. Since it was stated that transfer of asset were to be considered with regards to Horizon, this would constitute a major investment for the disposal of SPTC's assets. The formation and registration of Horizon, in these circumstances, would have to be authorized by cabinet and SCOPE.

[20] 1.2 The approval from Ministry of Information Communication and Technology (ICT) which is the parent Ministry of SPTC. Normal course of business and protocol required that SPTC would engage with the relevant officials at the Ministry for matters pertaining to major investments, divestment or disposal of assets.

[21] 1.3 The approval from Public Enterprise Unit was to establish whether SPTC had corresponded with the Public Enterprise Unit with the view to the registration of the company for the reasons presented to them.

- [22] 1.4 Consent by SPTC Board members was requested to establish if the Board duly authorized and was aware of the registration of Horizon.
- [23] 2 Certified copies of any correspondence, minutes, meetings, minutes of meetings and official notes relating to the engagement of the union in the formation of Horizon was requested because the union was principally concerned about its members future employment prospects, given that there may be some likelihood that SPTC may file for liquidation or go bankrupt.
- [24] Item 3 Certified copy of SPTC strategic rollout plan was requested to establish if the company Horizon was part of the strategic rollout plan; to determine the financial liability of available cash flow resources to SPTC to establish if the new pay phone installation ADSL and HM projects were incorporated in the strategic rollout plan.
- Item 4 The contractor inquiry form that was attached to the letter of May 25 arose from a paragraph on the initial complaint which was that SPTC had embarked on a series of costly capital projects, therefore, the need to establish the extent and the scope of these capital projects, more importantly, how much each of these capital projects had collected and budgeted for. It was established that the budget was more than E300M.

[25]Item 5 A certified copy of SPTC audited financial statement for the year ended 2008. These were requested because the 2009 financial statements were not ready and would not be ready at the time the investigation was to start. These financial statements were relevant to again look at the overall balance sheet presentation to assess the solvency of SPTC, to determine the total asset base of SPTC and to determine if Horizon has been disclosed as an investment in the balance sheet.

[26] PW2 stated that all the documents requested related directly to the investigations into the complaint that was filed by the Union.

[27] After the request was made, the Accused wrote exhibit I, a letter dated 28 May 2009 addressed to Mrs T Fruworth who is the former Deputy Commissioner Investigation and Assets Recovery Anti-Corruption Commission. The letter requested for extension of time to 5 June 2009 for the Accused to submit the documents requested, to facilitate the expeditious investigation of the case.

[28] PW2 testified that the next day 29 May 2009, they wrote a letter, exhibit J, to the Accused granting his application to submit the documents by 5 June 2009 at their offices and the address of the office was given therein. The letter was signed by PW2 for the commissioner of investigations.

[29] The next correspondence received from SPTC was exhibit K, the letter of 5 June 2009 raising certain concerns. Exhibit K states as follows:-

**“THE ANTI CORRUPTION COMMISSION
P. O. Box 4842
Mbabane
Swaziland**

**Re: INVESTIGATION OF HORIZON MOBILE/NEW PAYPHONE
INSTALLATION/ADSL PROJECT/NGN PROJECT**

Preliminary issues

The above-caption refers.

Prior to embarking on the requested responses to your letter dated the 25th May 2009 we would like to raise the following preliminary issues:

We note with concern and wish to place it on record that we find it irregular that the Commissioner tasked with this matter is one former employee of the corporation who was very involved in most of the issues in question in fact, in some of the questions being raised she is the very same person who would be in the best position to answer, by virtue of her position at that time. We therefore feel that there may be an inconspicuous objective at play here, that is so strong as to relegate the apparent conflict of interest in this matter.

Against this backdrop therefore, we wish to respond as follows:

Ad paragraph 1

The Managing Director has never, nor does he represent the Swaziland Government as alleged in your letter. Kindly furnish us with proof of this allegation to enable us to adequately respond to it.

We attach hereto the Swaziland Posts and Telecommunications Act which expressly gives the Corporation the power to hold shares in any corporation and to establish and acquire any corporation. This would appear to be conclusive evidence that the Corporation has this power, and the Managing Director in his capacity aforesaid has the power to represent the Corporation in such transactions, but not government.

AD paragraph 2.0

We attach hereto the recognition agreement between the Corporation and the workers union which we believe may guide you in terms of instances

where the parties need to consult/negotiate. We further attach various correspondences.

AD paragraph 3.0

For confidentiality reasons the strategic rollout plan cannot be released. You are however at liberty to come and view it within the premises. We do however attach the executive summary.

All notices issued to employees dated the 16th April 2009 are attached hereto.

AD Paragraph 5.0

Please see attached.

We have taken the initiative to include further information which we believe will be helpful in your investigation, including the recent Commission of Enquiry report, Forensic Audit which was also finalized recently, and the forensic action agenda as presented to government.

Should you require any further information please do not hesitate to contact the undersigned.

Yours Sincerely,

Mandisa Matsebula
Corp Sec & Legal Advisor

Cc Minister ICT
Chairman SPTC” (underlining mine)

[30] PW2 told the Court that the strategic rollout plan and the audited financial statements were the only two documents provided via the letter of 5 June 2009, as per the request. Every other document forwarded under cover of the said letter were not requested by the Commission and have no relevance to the investigation.

[31] The letter of 11 June 2009, exhibit L, was written by the Commissioner personally. Exhibit L consists of 2 letters one to address the Accused's concern of conflict of interest and the other was to correct the error made in the letter of 25 May that the Accused was representing the government of Swaziland. The letter also reiterated the request for the documents contained in paras 1 – 5 thereof not later than 15 June 2009. Exhibit L states as follows:-

**“The Managing Director
Swaziland Posts & Telecommunications Corporation
P. O. Box 125
Mbabane
H 100**

Dear Mr. Dlamini,

**RE: INVESTIGATION OF HORIZON MOBILE LTD, NEW PAYPHONE
INSTALLATION, ADSL AND NGN NETWORK PROJECTS.**

Reference is made to your letter dated 5th June 2009 on the above matter.

Your concerns about conflict of interest are justified. There was a lapse of judgment on our part. You are, however assured that the investigations have no sinister or ulterior motives or objectives.

Reverting to the substantive issue, our letter of 25th May 2009 should be ignored. I have written a fresh letter which is hereby attached.

I would be grateful to receive the requested information.

**JUSTICE H. M. MTEGHA, SC
COMMISSIONER (underlining mine)**

Our Ref: EF 24/2009

11th June 2009

**The Managing Director
Swaziland Posts & Telecommunications Corporation
P. O. Box 125
Mbabane
H 100**

Attn: Mr. Nathi Dlamini

Dear Sir,

**RE: HORIZON MOBILE LIMITED
NEW PAYPHONE INSTALLATION ADSL PROJECT
NEW GENERATION NETWORK PROJECT**

The subject matter above refers. In accordance with Section 11 (1) (a), (b), and (c) as read with sub-section (2) (a), (b) and (3) and Section 12 (1) a, b, (i) (ii) (iii), c, d, e, and Section 18 of the Prevention of Corruption Act of 2006, you are hereby requested to furnish directly to us the following information listed below:-

- 1.0 Certified copy's of correspondence authorizing / approving the formation & registration of Horizon Mobile Ltd and the MD representing Swaziland Posts & Telecommunications Corporation from:**
 - 1.1 Cabinet / SCOPE;**
 - 1.2 Ministry of Information, Communication and Technology;**
 - 1.3 Public Enterprise Unit;**
 - 1.4 SPTC board minutes.**
- 2.0 Certified copy's of any correspondence, minutes of meetings and or official notices relating to the engagement of the Union in the formation of Horizon Mobile Ltd.**
- 3.0 Certified copy of SPTC's Strategic (Rollout) Plan that is currently being implemented together with the notice issued to SPTC employees dated 16 April 2009.**

- 4.0 Full details of the contractors engaged in the new payphone, ADSL & NGN projects. See attached contractor enquiry form guideline.**
- 5.0 Certified copy of the SPTC audited annual financial statements for the year ended 2008.**

Now kindly take note of the following:

- › **That this correspondence now supersedes our previous request for information dated 25th May 2009;**
- › **Supply information as specially requested in items 1-5 above or respond to the contrary.**
- › **The response to this request should be delivered to our offices 3rd Floor, Mvanzeni House, Mbabane no later than 12 00hrs Monday 15th June 2009.**

Should you wish to discuss any matter referred to above please do not hesitate to Contact the undersigned. Thank you in advance for your co-operation in the matter.

Yours faithfully,

**JUSTICE H M MTEGHA, SC
COMMISSIONER ”**

[32] There was no response to exhibit L. Thereafter, the Commission wrote exhibit N, letter of 21 June 2009 written to Accused referring to the letter of 11 June 2009 and indicating that the Commission had not received the requested information. Exhibit N charged the Accused to furnish the information forthwith and failure to do so by not later than 1500 hrs on 29 June shall constitute an offence in terms of section 2 (a) and (b) of the Act.

[33] Thereafter, the Accused wrote exhibit O, letter dated 30 June 2009, in his capacity as MD, which letter was received by the Commission on 1 July 2009. There, the Accused acknowledged receipt of the letter of 21 June and

confirmed that SPTC furnished the requested documents to the Commission, particularly, Mrs. Fruworth, on 5 June 2009 and that duplicated submissions were also made to various Ministries on the same day and they have confirmed receipt.

[34] PW2 stated that the documents they did receive were the strategic rollout plan. They received the executive summary only and were told that they could only view the strategic rollout plan at the SPTC premises, but they were satisfied to work with the Executive summary. They also received the audited financial statement for the year ended 31 March 2008. The other information received were not requested. These included SPTC Procurement Regulations, a copy of a forensic audit report by KPMG in 2005, documents relating to the action plan arising from the KPMG report as well as a copy of the SPTC Act. These documents were admitted in evidence as exhibits P1 – P4 respectively.

[35] In the letter of 8th June (exhibit Q) which was written following receipt of the letter of 30 June 2009 from SPTC, the Commission confirmed what document it had received, the information not requested that was received and identified the missing information to the date of that letter and requested the Accused to supply the information listed as detailed in the correspondence to the Accused dated 11 June 2009 and the letter listed the documents not received. Exhibit Q states as follows:-

Our Ref: EF 24/2009

8th July 2009

**The Managing Director
Swaziland Posts & Telecommunications Corporation
P. O. Box 125
Mbabane
H 100**

Attn: Mr. Nathi Dlamini

Dear Sir,

**RE: REQUEST INFORMATION ON THE INVESTIGATION OF HORIZON
MOBILE LTD, NEW PAYPHONE INSTALLATION, ADSL AND NGN
NETWORK PROJECTS**

The subject matter above refers. We are in receipt of your correspondence to us dated 30th June 2009. We wish to reiterate that we have not received the requested information in full and in the format requested from your office.

The information received from you consist of the following:-

- 1. We have received only a copy of the Swaziland Posts & Telecommunications Corporation Act of 1980 from your office, this Act was not requested.**
- 2. We have received only a copy of Recognition and Procedural Agreement between SPTC & SPTCWU, this agreement was not requested.**
- 3. We have received the executive summary of the Strategic Roll-Out Plan which shall suffice our needs.**
- 4. We have received the NGN tender evaluations which again where not requested by the Commission.**
- 5. We have received a copy of the Audited Annual Financial Statements for the year ended 31 March 2008 as requested.**

Therefore kindly supply the information listed below as detailed to you in our Correspondence to you dated the 11th June 2009:-

- 1.0 Certified copies of correspondence authorizing / approving the formation & registration of Horizon Mobile Ltd and the MD representing Swaziland Posts & Telecommunications Corporation from:
 - 1.1 Cabinet / SCOPE;**
 - 1.2 Ministry of Information, Communication and Technology;**
 - 1.3 Public Enterprise Unit;**
 - 1.4 SPTC board minutes.****
- 2.0 Certified copy's of any correspondence, minutes of meetings and or official notices relating to the engagement of the Union in the formation of Horizon Mobile Ltd.**
- 3.0 Certified copy of SPTC's Strategic (Rollout) Plan that is currently being implemented together with the notice issued to SPTC employees dated 16 April 2009.**
- 4.0 Full details of the contractors engaged in the new payphone, ADSL & NGN projects. See attached contractor enquiry form guideline.**

The Commission looks forward to a positive response from you at the earliest possible time.

**JUSTICE H M MTEGHA, SC
COMMISSIONER ”**

[36] No response was received to exhibit Q. The Commission then wrote exhibit R the letter of 21 July 2009, intimating that they had still not received the requested information in full and in the format requested of SPTC. The letter notified that failure to receive the requested information by 24 July 2009 will result in the invocation of section 12 (3) (a) of the Act.

[37] PW2 stated that no response was received to that letter, and that further investigation carried out revealed that ICT had received information from

SPTC apprising them of the ongoing investigations but that they did not receive carbon copies of any documents as alleged by the Accused. This was contained in a formal written notice exhibit S. The series of printouts exhibits T to T7 were given to PW2 by the Registrar of Companies.

[38] The final letter from SPTC was received on 24 July 2009 written by the Legal Adviser and Company Secretary (exhibit U) and its attachments U2 – U4. The attachments included the contractor enquiry forms. That was the last compliance by SPTC, which means that the Commission received only three (3) out of all the documents requested.

[39] Thereafter, the Accused was arrested on 14 August 2009. He launched litigation up to the Supreme Court challenging his arrest warrant amongst others, but he lost.

[40] Under cross-examination, PW2 insisted that the Accused holds public office in terms of Section 11 (c) of the Act. He stated that this is because, at the time of the offence, the Accused was the Managing Director of a government wholly owned parastatal. He stated that the Act requires the Commission to question just about anybody holding a position in any office and in any institution.

[41] PW2 agreed that the initial letter written to the Accused referring to him as a representative of government was returned by the Accused on the basis that he is not a representative of government. The Commission accepted this protestation and amended the letter.

[42] PW2 reiterated that though the Accused was not viewed as a government representative, he was however viewed as a government official by virtue of his position as the head of a parastatal. He agreed that the Accused was an employee of a parastatal employed as such as its MD. PW2 agreed that SPTC has a Board which is headed by a Chairman, who at that time was Mr Sabelo Masuku. He stated that the MD who is an employee and Board member takes instructions from the Board and also lobbies in the same breath.

[43] He admitted that if the MD has a good idea and presents it to the Board, it is for the Board to decide whether or not to move forward with the idea.

[44] He stated that the MD can also make certain decisions on his own, for instance, he has the power to sign cheques up to the value of E100,000 without the Board's knowledge or consent. PW2 alleged that this was how the Accused signed the cheque that registered Horizon. He however agreed that the 999 shares of Horizon are held by SPTC duly represented by the MD (Accused).

[45] PW2 further admitted, that as appears in the bundle pages 283 and 389, the incorporation of Horizon was discussed at the SPTC Board meeting held on 14 December 2006. He stated that he could not confirm, however, if the Accused had been the MD for only 4 weeks prior to the said Board meeting. He agreed that the subsequent Board meeting held on 27 March 2007 (page 402) also highlighted the progress made on the new subsidiary company, Horizon, but maintained that in spite of these Board meetings, there was no approval given by the Board to the Accused to form and register Horizon

and that the Accused failed to furnish the Commission with such approval as per their request.

[46] PW2 admitted that the SPTC strategic rollout plan was approved by Cabinet on 2 October 2007 as seen from the Minutes of meeting of Cabinet on Public Enterprises (SCOPE) held on 2 October 2007 as appears on page 465 of the bundle. He also stated that the Accused failed to furnish the Commission with this approval as per their request. He also stated that though there was no Ministry called ICT at that material time of this request, the functions of ICT were however being carried out by a similar Ministry under a different name, which was very well known to the Accused.

[47] PW2 admitted that in terms of Section 13 (2) (a) of the Act, SPTC could hold shares in any other Corporation and has the power to establish or acquire any subsidiary. He accepted that Horizon never had any assets at the material time of its inception and still doesn't have any assets.

[48] PW2 admitted that there is no obligation on the Board or Management of SPTC to engage the union before registering a subsidiary, but stated that it would have been more prudent for the sake of good corporate governance, to engage the Union.

[49] He confirmed that exhibit P4 is a recommission of a procedural agreement between SPTC and the Union, but insisted that this document does not fall within the purview of their request.

- [50] He further stated that the DPP did not suspend the warrant of arrest for the Accused as indicated in the bundle, she merely asked the Commission to hold it off until after the meeting of 3 August 2009, thereafter, the warrant was executed.
- [51] He denied that the documents requested, save for the audited financial statement of SPTC year ended 2008, do not fall within section 12 (1) (a) – (d) of the Act.
- [52] He also admitted that the terms of reference of the commission of inquiry set up to interrogate the affairs of SPTC were similar to the terms of reference of the request for further documents from the Accused, he, however, indicated that he had not had sight of the forensic report prior to the Accused's arrest.
- [53] I have carefully considered the preliminary points raised *vis a vis* the applicable provisions of the Act, the issues raised on the substance of the matter, and the totality of the evidence and I am of the considered view that the prosecution has established a *prima facie* case against the Accused warranting his entry into his defence to rebutt it.
- [54] I refrain from commenting in extenso on all the issues raised by the defence because to do so will prejudice the substantive issue i.e. the merit of the case. It is trite law that when a Court overrules a no case submission in a criminal case, it is not supposed to write a detailed ruling reviewing and analysing the evidence and in the process forming opinions and reaching conclusions, as it will run the risk of prejudging the merits of the case between the parties

before it. See **Sicelo Dlamini v Joe Gumedze NO and Others Civil Case No. 65/13, Rex v Zonke Tradewell Dlamini and Another Criminal Case No. 165/10.**

[55] Accordingly, this application is dismissed and the Accused is hereby called upon to enter into his defence.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THEDAY OF.....2014**

**OTA. J
JUDGE OF THE HIGH COURT**

**For the Crown: Advocate N. Kades
(Instructed by the DPP's Chambers)**

**For the Accused: Advocate B. S. M Bedderson
(Instructed by Mlangeni and Company)**