IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Civil Case No.22/2015

In the matter between:

Emmanuel Dumsani Hleta	**Applicant**
and	
Swaziland Revenue Authority	**1st Respondent**
The Director of Public Prosecutions	**2nd Respondent**
The Attorney – General	**3rd Respondent**

Coram:	Annandale J, Mabuza Q.M, Hlophe N.J
Plaintiff's Counsel:	Mr. M. Mavuso
Defendant's Counsel:	Mr. M. Ndlovu
Counsel for the 2nd Respondent:	Mr M. Vilakati

Neutral citation: *Emmanuel Dumsane Hleta v Swaziland Revenue Authority and The Director of Public Prosecutions and The Attorney-General (22/2015) [2015] SZHC197 (13th November 2015)*

Case summary: Constitutional Challenge: Section 274 of the Criminal Procedure and Evidence Act, 1988(Act 67 of 1938). Prosecution under section 87 (2) read with of the Customs and Excise Act, 1971 (Act 21 of 1921). Non-invocation of section 274 Act 67 of 1938 in course of the prosecution. Presumption of Innocence under Section 21(2) (a) of the Constitution of Swaziland, 2005(Act 1 of 2005) Reverse onus under Section 274 Act 67 of 1938 not applicable to the Applicant-Doctrine of Ripeness in Constitutional Litigation-Actionable upon establishment of actual or imminent harm. Application dismissed-no adverse costs order made.

Judgment

Annandale J

[1] The lines for an epic battle between a proverbial David and Goliath were drawn when a young articled clerk was stopped for a routine inspection of the car he was driving. Having passed Muster, before he could drive off, the first blow for the mighty machinery of the State came when an official of the Swaziland Revenue Authority arrived on the scene and questioned the legitimacy of the South African registered which being used within the kingdom.

[2] The vehicle that was driven by the applicant was attached by the Revenue Authority (SRA) when the official was not satisfied with the explanation given to him by the driver. The applicant laboured under the impression that the use of a foreign registered motor vehicle within the Kingdom was sanctioned by payment of a Road Tax upon entry into Swaziland for a period of 30 days on each occasion. Furthermore, the vehicle did not belong to himself and was not imported because the lawful owner is a foreign citizen who authorised him to use the vehicle in order to conduct business on her behalf.

[3] In the magistrate's Court, civil proceedings were instituted to seek recovery of the impounded vehicle. Technicalities such as the lapse of a *rule nisi* and efforts to revive it resulted in an appeal being noted. Generally, those anteceding proceedings have no bearing upon the present matter but the criminal proceedings which were instituted against the applicant caused the constitutional challenge at hand.

[4] The gist of the challenge is that the applicant is apprehensive that in the course of his prosecution under the taxation laws, his right to a fair trial and presumption of his innocence will be jeopardised by the impugned section of the criminal procedure and Evidence Act,

1938 (Act 67 of 1978 – the "CPE Act"), which creates a reverse onus on an accused person.

[5] In order to decide this matter, it is not necessary to delve into the pleadings filed of record by the protagonists, in any detail. The facts and issues are mainly common cause but obviously at odds insofar as the contentious issue is concerned. The record, which was filed by the first respondent's attorneys and not by the applicant, consists of some 262 pages.

[6] The salient fact which culminated in the prosecution of the applicant are by and large beyond dispute. In July last year, the applicant used a certain motor vehicle in Swaziland, which had not been taxed by the SRA official an imported vehicle. The lawful owner, a business associate of his, authorised him to use it. On production of the permission to use the vehicle by its owner, together with a current Road Tax Certificate, the SRA would not accept his explanation that he could lawfully use the foreign registered vehicle in Swaziland, hence it was seized and detained under the provisions of section 88 (1) of the Customs and Excise Act of 1971.

[7] The Swaziland Revenue Authority has contended in legal proceedings in the Magistrates Court that the vehicle has been having been improperly imported and used in Swaziland, without it having been taxed. The Commissioner has it that since January 2010, the vehicle has entered into and departed from Swaziland at least one hundred times, as evidenced by those movements captured on a computer records. From the data captured during the numerous border crossings, the vehicle was almost invariably driven by the applicant.

[8] The applicant in turn relies on the fact that he is not the owner of the vehicle, which he uses for business purposes, but that he is only authorised to use it by the lawful South African owner. His main and often and repeated excuse for not being liable for impartation duties is his reliance on road fund toll receipts which he contends to afford 30 days clearance every time the vehicle enters the Kingdom. He has attached some 26 copies of such receipts, collected over the time he has been using the vehicle in Swaziland.

[9] The Road Traffic Act, of 2007 (Act 6 of 2007) clarifies the aim and purpose of the Road Tax or Tolls, the source from which there receipts originate as follows:

"Imposition of toll, levies, charges or fees.

109. (1) the Minister may, for the purposes of the improvement and maintenance of the roads infrastructure of Swaziland, road safety programmes, or any other purpose relating to the objectives of this Act, from time to time in consultation with the Minister responsible for Finance by notice in the Gazette impose-

(a) a toll based on the mass of and the distance travelled on any public road by any motor vehicle registered and licensed in Swaziland or in any other country;

(b) a toll on any other vehicle registered and licensed in any other country;

(c) any other general or special levy, charge or free on any motor vehicle,

But subject thereto that no toll, levy, charge or fee shall be payable under this section in respect of-

(i) a vehicle which is the property of the iNgwenyama or Government of Swaziland;

(ii) a vehicle belonging to diplomatic mission, the head of a diplomatic assigned to Swaziland and bearing-

(aa) in the case of a diplomatic mission situated in Swaziland or the head or diplomatic agent of such

mission, a Swaziland registration mark identifying it as such; or

(bb) in case of a diplomatic mission accredited to but situated in country other than Swaziland, or the head or diplomatic agent of such mission, a registration mark of that other country identifying it as registered in connection with a diplomatic mission.

(2) A different roll, levy, charge or free may be determined for different classes of vehicle or in relation to the use of any class of vehicle or the country in which it is registered and licensed.

[10] From this statutory excerpt, I fail to find any justification for the reliance which is placed on Road Tax or Toll receipts by the applicant. Should he wish to argue otherwise, it is his prerogative to do so. However, there can be no question that the impugned section of the CPE Act requires anything more of him than a mere motivational argument as to why it should be found that his vehicle has been exempted from importation taxes because Road Tax or Tolls have been paid. It is an exercise in statutory interpretation, not a reverse onus, as he contends.

[11] It is also possible that the applicant might be aware of other legislation which places the Road Tax o Toll receipts on a different footing. If so, he has not disclosed it to this Court.

[12] The Commissioner of the Revenue Authority is patently not satisfied with the reasons advanced by the applicant to absolve himself from declaring the vehicle as a dutiable and taxable import into the kingdom. The vehicle has already been seized and detained by the SRA, resulting in a non-finalised civil suit to regain possession of it. Over and above this, the Director of Public Prosecutions, obviously prompted by the SRA, decided to institute a criminal prosecution of the applicant.

[13] He is charged with a contravention of Section 81, as read with section 87 (1) of the Customs and Excise Act, number 21of 1971. It is allayed that he "wrongfully, unlawfully having imported", the particular motor vehicle and "failed to declare it at any border post of Swaziland, thus contravening the Act".

[14] This section, as last amended in 1988, reads:

"Non-declaration of goods.

81. Any person who fails to declare any dutiable goods or goods the importation or exportation of which is

prohibited or restricted under any law and which he has upon his person or in his possession, or makes any statement for customs or excise purposes aa to any dutiable goods or prohibited or restricted goods upon his person or in possession form which any dutiable goods or prohibited or restricted goods are omitted, shall, if, any such goods are discovered to be or to have been upon his person or in his possession at the time of the failure, or of the statement, be guilty of an offence and liable on conviction to a fine of five thousand emalangeni or treble the value of the goods in question, whichever is the greater, or imprisonment for two years, or to both, and the goods in question and any other goods contained in the same package as well as the package itself shall be liable to forfeiture".

[15] Section 87(1) of the Act provides as follows:

"Goods irregularly dealt with liable to forfeiture.

87. (1) any goods imported, manufactured, warehoused, removed or otherwise dealt with contrary to this Act or in respect of which any offence under the is Act has been committed (including the containers of any such goods) or any plant used contrary to this Act in the manufacture of any

goods shall be liable to forfeiture whosesoever and in the possession of whomsoever found:

Provided that forfeiture shall not affect liability to any other penalty or punishment under this Act or any other law, or entitle any person to a refund of any duty or charge paid in respect of such goods."

[16] Counsel for the applicant informed this Court that a plea of not guilty has been recorded in the magistrates' court. Further, that when requested to refer the matter to the High Court for adjudication of the impugned section, the learned magistrate declined to do so but in instead advised that a separate constitutional challenge be brought before the High Court, with criminal proceedings put on hold pending the outcome of this application.

[17] In the Notice of Motion dated the 13th January 2015, relief is prayed for as follows:

"Declaring Section 274 of the Criminal Procedure and Evidence Act No 67 of 1938 to be unconstitutional and Void

in so far as it at variance with Section 21 (2) (a) of the Constitution of the kingdom of Swaziland, Act No. 1/2005".

[18] Immediately apparent is that the charge sheet under which the applicant is prosecuted, makes no reference whatsoever to the impugned section. Section 274 under the Criminal Procedure and Evidence Act that the applicant seeks to have set aside reads as follows:

> "if a person is charged with any offence whereof failure to pay any tax or impost to the Government, or failure to furnish any information to any public officer, is an element, he shall be deemed to have failed to pay such tax or impost or to furnish such information unless the contrary is proved".

[19] The respondents argue that if this Court had to go so far as to actually consider whether or not section 274 of the CPE Act passes constitutional muster due to a reverse onus, it would be tantamount to an academical exercise. This is argued to be so because the prosecution places no reliance whatsoever upon Section 214, nor has it made any reference to it in the charge sheet. If no reliance is made on the provisions of the impugned section by the prosecution, it is said, there is also no risk to the applicant to be

adversely affected by it, or at all, even potentially so. He simply does not stand to suffer any prejudice whatsoever by a section in the CPE Act which plays absolutely no role in his prosecution.

[20] The respondents further argues that no right to a fair trial stands to be affected by a section in the Criminal Procedure and Evidence Act which has no bearing on his prosecution and his right to be presumed innocent or his right to taciturnity likewise cannot be infringed by "something which is not there". They bolster these arguments by saying that there can be no duty on the accused to discharge any reverse onus based on a legal presumption that does not feature in the case against him.

[21] Instead, the burden of proof remains entirely in the prosecution to prove all the elements of the alleged offence and the guilt of the accused beyond a reasonable doubt, as in every other criminal prosecution under our law. The respondents accordingly contend that in the prosecution of a matter under section 81 of the Customs and Excise Act, where a person has failed and / or omitted to declare dutiable goods, if those are found in his possession at the time when the goods were not declared, he/she shall be guilty of an offence. The onus of proof herein is on the prosecution to prove that;

i. Indeed the goods were not declared;
ii. That the goods were dutiable goods;
iii. That the non-declaration was mala-fidei, in that was meant to evade the tax so imposed.

Once the above have been successfully proved, those non-declared goods may be liable to forfeiture under Section 87 (1) of the Act.

[22] It is trite that at common law the presumption of innocence is a fundamental component of our system of criminal law and procedure (See Woolmington v DPP 1935 Ac 462 (HL); R v Ndhovu 1945 Ad 369. The presumption means that the prosecution bears the burden of proving all the elements of a criminal charge beyond reasonable doubt. Reverse onus provisions relieve the prosecution of the burden of providing all the elements of a criminal charge. They require an accused person to prove an element of the offence on a balance of probabilities. This may result in a conviction despite the existence of a reasonable doubt. Thus reverse onus provisions implicate Section 21 (2) (a) of the Constitution.

[23] However, a reverse onus provision created under Statutory Law only reaches a potential to potentially prejudice an accused person once it has been involved in the course of a criminal trial, which is not the case in the present matter. As long as it remains dormant and unused, "sleeping in the statutes" as it were, it remains harmless and without prejudice to the applicant herein.

[24] By way of analogy, a dangerous and lethal loaded shotgun, for as long as it remains securely under lock and key, holds no threat to an innocent toddler at play right next to the locked gunsafe.

[25] In his guest to impugn section 274 of the CPE Act, the applicant seeks protection against the spectre which he fears that might rise like a sphinx from vachallaxx under the comfortable blanket of the Constitution of Swaziland. Specifically, sections 21 (1) and (2) (a) guarantees everyone's right to a fair hearing as follows:

> "Right to fair hearing
>
> 21. (1) 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.

(2) A person who is charged with a criminal offence shall be-

(a) presumed to be innocent until that person is proved or has pleaded guilty;"

[26] The applicant's case is premised on his assumption that Section 274 of the CPE Act is not only applicable his trial but that it in fact is the overriding and governing principle that permeates the trial and thereby infringes his presumption of innocence. That is not so as has already been demonstrated above. Section 274, is insofar as the trial of the applicant is concerned, is dormant, not involved and not needed by the prosecution.

[27] On the facts which are common between the litigants in the criminal trial, there is no dispute as to the fact that no importation taxes, duties or import has been paid to the Government. What has been paid, any many times over and over between January 2010 until the vehicle was seized and detained by the SRA on the 31st July 2014, is the Road Tax or Toll upon entries into the Kingdom. There is nothing to the contrary that could be expected to be proven by the applicant under section 274, to discharge a reverse onus. His defence to the charge is that the road toll taxes exempted him from declaring the vehicle for importation purposes, also that

it is not his property but that it belongs to a South African citizen, who has authorised him to use it for business purposes.

[28] The question which remains is whether this Court, in the exercise of its jurisdiction, should entertain the application to declare the impugned section to be unconstitutional. Prior to embarking on such an exercise, the jurisdictional facts of actual or imminent harm of a constitutionally guaranteed right must first be established. Otherwise put – before impugned legislation which is said to deprive a personal of his constitutional rights comes to be considered for a declaration of unconstitutionality, it must be established that it holds actual, imminent or at least potential harm to the applicant, it does not suffice to be a theoretical threat a harmful obstacle that possibly could one day be unleashed and should therefore be challenged simply because it is there. If not so, a floodgate of academic exercises would erupt if any piece of legislation could at any time be challenged simply because it has the potential to someday infringe constitutional rights of anybody.

[29] Presently, the presumption and reverse onus of the impugned legislation has not been demonstrated to be anymore than a fictional threat, and which has any adverse personal impact on the criminal prosecution of the applicant.

"While the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed".

[33] These sentiments were also echoed locally by our Supreme Court in **Jerry Nhlapho and 24 Others vs Lucky Howe No, Appeal Case 37 of 2007 where Ramodibedi JA** had this to say at paragraph 5:

"It is fundamental principle of litigation that a court will not determine a constitutional issue where a matter may properly be determined on another basis. In general, a court will decide no more than what is absolutely necessary for an adjudication of the case. This more so in constitutional litigation .... Constitutional jurisprudence must be developed in a cautious and orderly manner rather than haphazardly".

[34] Even though the matter of **Lomvula Hlophe OBO Acting Chief Ntsetselelo Maziya vs Officer In Charge Big Bend Prison and 4 Others**?.... Dealt with a constitutional challenge to a common law principle and not a statutory provision, I remarked therein that:

"I full align myself with this salient principle. Just as in Warfare where nuclear weapons are only reverted to as a last resort, after all else has failed, litigation should first explore all available avenues before constitutional challenges against our common law are brought for adjudication."

[35] In his effort to persuade us that the potential harm under the impugned section of the CPE Act is not hypothetical but real and an immediate threat to his constitutional right to a fair trial, his attorney referred to a number of decided cases where the doctrine of ripeness was dealt with.

[36] In the case of Dawood and Another v Minister of home affairs and Others; Shalabi and Another v Minister of Home Affairs and others; Thomas and Another v Minister of Home Affairs and others 2000 (1) SA 997 (c) it was held at page 1031 as follows, in relation to an objection that the matter was not ripe for determination:

"...This objection is misplaced and appears to rest upon a confusion between ripeness in administrative, as opposed to constitutional, matters. As pointed out by applicant's counsel, under administrative law an application to a Court

would indeed be premature if the relevant public authority had not yet completed its decision – making processes (see Lawrence Baxter Administrative law (1984) at 719 – 20). In constitutional matters, on the other hand, doctrine of ripeness 'prevents a party from approaching a court prematurely at a time when s/he has not yet been subjected to prejudice, or the real threat of prejudice, as a result of the legislation or conduct alleged to unconstitutional' (Loots (op cit at 8-12) emphasis added".

[37] The Dawood case is clearly distinguishable from the present matter. It dealt with an administrative decision concerned with the "receipt" of applications of immigration permits and prejudice to the applicants who were adversely affected by certain statutory requirements which rendered their applications "incomplete", resulting in an adverse administrative decisions. However, after correctly pointing out the difference between administrative and constitutional requirements for repiness, the Court yet again reiterated the same approach to the doctrine of ripeness as administrated in the three cases cited above. Before the applicant herein has demonstrated that he stands to be prejudiced by the impugned legislation, it remains premature to decide his prayer for relief. He has brought his case not only too early, but also in the

absence of any cogent fear of a violation of his constitutional rights to a fair trial or the presumption of innocence. As matter stand, there is no reverse onus on him to prove anything contrary to a statutory impingement of his rights, more than any other person prosecuted by the crown.

[38] As accused person in the magistrates court, the applicant is not "...obliged to produce any evidence of reasonable cause to avoid conviction even of the prosecution leads no evidence regarding reasonable cause, as stated in." **S v Manamela and Another (Director of General of Justice Intervening) 2000 (3) SA (1) CC**, another authority relied upon by the applicant. The facts at hand are totally different and distinguishable.

[39] As stated above, virtually all of the elements of the crime, which has to be proven beyond reasonable doubt by the crown, are common cause. It is only the defence upon which accused relies upon, also set out above, which requires a finding by the magistrates. Such a finding will by necessity have to be made according to the terets of the legislation under the Customs and Excise Act. Section 274 of the CPE Act has no role to play in the prosecution of the matter and there is no risk of a reverse onus,

under section 274 of the CPE Act, which could infringe upon constitutional right of the applicant.

[40] In my considered view, the application is misplaced. It is premised on a non- existing threat of a reverse onus, challenged merely because of its existence, but in a vacuum. The perceived threat has no application in his prosecution. It rather seems that he clutches at any imaginary straw in order to avoid the consequences of a potential conviction, but his challenge to the impugned legislation, even if it was to have succeeded, brings him no closer to absolution.

[41] Finally, counsel for the respondents have gracefully suggested that no adverse costs order needs to be made by this court. That applicant is fortunate to such concession made in his favour.

[43] In the event, for the aforestated reasons, the application is ordered to be dismissed. No costs order is made, resulting in each party to bear its own costs.

Jacobus P. Annandale

Judge: High Court of Swaziland

I agree_____

Q. M. Mabuza

Judge of the High Court

I agree_____

N.J Hlophe

Judge of the High Court