



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 268/2020

In the matter between:

NOKULUNGA ZAMBANE SIMELANE

Applicant

And

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Neutral Citation: *Nokulunga Zambane Simelane v Director of Public Prosecutions (268/2020) [2023] SZHC 274 (04 October 2023)*

CORAM:

N.M. MASEKO J

FOR THE APPLICANT:

P.M. DLAMINI

FOR THE RESPONDENT:

N. MASUKU

DATE HEARD: 20/07/2022

DATE DELIVERED: 04/10/2023

Preamble:

Criminal Procedure – Interlocutory application to expunge evidence of a witness who is testifying via AVL after a consent order by the Crown and defence was entered to have this witness testify on

Evidence Act 67/1938 as Amended not mandatory for a witness who has agreed to testify on AVL and has duly provided a statement to the Crown – Sections 2, 4, 5 and 8 of the Court's (Remote Participation) Act No. 08/2018 considered in these proceedings.

Held: that the application by the accused is hereby dismissed and that the evidence of PW7 is ordered to continue on AVL.

JUDGMENT

MASEKO J

- [1] On the 14th July 2022 the accused launched interlocutory motion proceedings for an order in the following terms:-
- (1) Directing and ordering that all the evidence of prosecution witness No. 7 (PW7) be and/or is hereby omitted and/or expunged from the record of these criminal proceedings.
 - (2) Grant further and/or alternative relief.
- [2] It is common cause that the affidavit of the accused is in support hereof and the affidavit of Sibusiso Phakathi a Crown Counsel in the Chambers is used in opposition of this application.
- [3] I must highlight that this application was filed in the middle of the proceedings when PW7 had already testified and was under cross-examination from the defence counsel Mr. P.M. Dlamini. It is therefore in the nature of an interlocutory application.

Accused's Case:

[4] The Accused's case is captured from her Founding Affidavit especially in paras 7-12 as follows:-

- “(7) On the 14 July 2022 the seventh witness (PW7) to be precise, who is a peregrine of this Honourable Court permanently staying and/or domiciled in the Republic of South Africa was first led by the Crown and further cross-examination of that witness commenced by the Defence representing me in my criminal case.
- (8) Of great note is the fact that during the course of the cross-examination by my Defence Attorney of PW7 it transpired in the evidence which had been obtained from PW7 that he was never formally and/or personally served with a subpoena to appear in my trial to testify save for an erratic subpoena which did not relate to him received by PW7 through his cellphone.
- (9) To buttress the above point the above Honourable Court is respectfully referred to a correspondence by PW7's South African attorneys attached and marked **Annexure “NM1”** to the Crown's urgent application dated 05 May 2021, which letter discloses that PW7 had been served with a subpoena which did not comply with Section 206 of the Criminal Law and Procedure and furthermore that it does not relate to our client.
- (10) The Crown then convened a meeting with PW7 and/or his South African Attorneys in terms of **Annexure “NM2”** to the Crown's application aforementioned supra and in light of Annexure “NM2” no new or amended subpoena is mentioned to have been served on PW7 or his South African Attorneys by the parties thereto.

- (11) I am advised by my attorneys and verily believe that in terms of the Criminal Law Procedures of the Kingdom of Eswatini as this Honourable Court is aware legislation *vis* Criminal Procedure and Evidence Act 67/1938 as Amended the Act in a nutshell provides for the manner and procedure in which witness ought to be produced before for testifying before the courts of the Kingdom.
- (12) Section 206 to be precise provides that **“if a subpoena to give evidence in any criminal case has been issued out of any Court and it appears that the person whose attendance is thereby required resides or is for the time being in a district outside the area of jurisdiction of such Court, a Magistrate of such district shall endorse on such subpoena his order that it be served on the person named therein ---- when delivered to the proper officer within such district be served on him as soon as possible on such person.”**

This is in essence the case of the accused in this interlocutory application.

The Crown's Opposition

- [5] In opposition to the accused's application the Crown has filed the affidavit of Crown Counsel Sibusiso Phakathi who states the following:-
- (i) that the Crown did receive correspondence from PW7 wherein they were concerned about the traveling costs to Eswatini and also the issue of COVID 19 since the pandemic was still there;
 - (ii) that subsequent to the receipt of the aforesaid correspondence, the Crown then filed the application for PW7 to testify through audio visual link (AVL);

- (iii) that the application for AVL was not opposed by the defence and an order was granted for the witness to testify through AVL;
- (iv) that after the order for the AVL testimony was granted, the Crown and the witness agreed that the witness will be informed through his email address of the dates wherein he will be expected to give his evidence;
- (v) the issue of the subpoena is irrelevant for purposes of this witness as he was granted leave to give evidence through AVL in his own country being the Republic of South Africa;
- (vi) the application of Section 206 of the Criminal Procedure & Evidence Act is no longer applicable and has no effect in this trial, and that the Act does not provide that non-compliance with the Section 206 may result in evidence being expunged from the record.

This is the response in opposition to the accused's application as filed by Crown Counsel Sibusiso Phakathi.

Analysis of the Merits and the Law Applicable:

[6] The application by the accused is predicated on the provisions of Section 206 (1) and (2) of the Criminal Procedure & Evidence Act No. 67/1938 as Amended. For ease of reference it reads as follows:-

"206 (1) If a subpoena to give evidence in any criminal trial has been issued out of any Court and it appears that the person whose attendance is thereby required resides or is for the time being in a district outside the area of jurisdiction of such Court, a Magistrate of such district shall endorse on such subpoena his order that it be served on the person named therein, and such subpoena so endorsed shall, when delivered to the proper officer within such district, be served by him as soon as possible on such person:-

Provided that –

- (a) the necessary expenses to be incurred by the person subpoenaed, in going to and returning from the Court whereat the subpoena was issued and his detention at the place whereat and for the purpose of which his attendance is required, shall be tendered to him with such subpoena; and
- (b) if such subpoena is not sued out by the Crown a sum sufficient to cover the expenses of serving such subpoena shall be lodged with the Registrar or Clerk of the Court by the person suing out such subpoena.

- 2. If any such person who has been served with a subpoena and to whom has been tendered such expenses fails, without lawful excuse, to attend at the time and place mentioned in such subpoena, a Magistrate of such district may issue a warrant for the apprehension of such a person, who shall be liable to be dealt with in the same manner as he might have been dealt with if he had failed to attend without lawful excuse when served with a subpoena to attend a like court in an area wherein he resides or is for the time being.”

[7] I have carefully considered Section 206 (1) (2) herein referred to above and which is the subject matter of the contention raised by the accused in this matter, and I am in agreement with the statement rendered by Crown Counsel Sibusiso Phakathi that the letter from Swartz Attorneys addressed specific concerns of COVID 19, loss of business and issues of personal safety and security. For ease of reference, I will refer to the aforesaid letter verbatim herein below:-

“

Your Ref: CRI T. 268/20

Our Ref: T. Swarts/pc/B525

The Royal Swazi Police

Email:cosymlangeni@gmail.com

“By Email”

Dear Sirs,

RE: NOKULUNGA ZAMBANE SIMELANE & ANOTHER – CRI T. 268/20

- 1. The above-mentioned matter bears reference.

2. We act on behalf of Davide Chiminello (hereinafter referred to as "our client").
3. Your email dated the 19th of March 2021 together with a subpoena attached thereto has been handed to ourselves for our attention and reply.
4. We are of the respectful view that the subpoena does not comply with Section 206 of the Criminal Law and Procedure Act and furthermore that it does not relate to our client.
5. Our client has serious concerns regarding his attendance at the High Court of Swaziland as more fully set out hereunder:-
 - 5.1 Our client is concerned for his safety. This concern is borne out by the fact that our client continued to receive telephone calls from the suspects in the matter after he provided the state with a witness statement;
 - 5.2 Our client has concerns regarding travelling during the COVID pandemic and the health risks associated therewith; and
 - 5.3 Our client is unable to be away from his business for three days.
6. Our client's first language is Italian, and he may require the services of an Italian interpreter in order to give evidence.
7. It has always been our client's intention to assist with the investigation and co-operate with the Royal Swazi Police and authorities.
8. In the circumstances, our client is willing to testify however, we do believe that for the reasons stated above it would be more cost efficient for our client to give evidence virtually either by means of zoom or a Microsoft teams meeting.
9. Our client is also willing to give evidence on commission as contemplated in Section 208 of the Criminal Law and Procedure Act.
10. We look forward to receiving your favourable responses thereto."

[8] It is common cause that after receiving this correspondence from Swarts Attorneys, the Crown set out to formalize the AVL testimony of PW7 by filing the application in terms of The Court's (Remote Participation) Act No. 08 of 2018 (the Act). This application was filed and served on the accused's attorneys on the 06 May 2021, and no opposition was ever extended by the accused's attorneys on the 06 May 2021, and no opposition was ever extended by the accused, as a result on the 01 June 2021 this Court granted a consent order for PW7 to testify via AVL. It is common cause that he testified after having taken the oath and the defence also started to cross-examine him, and it was during his testimony that this issue of Section 206 of the CP & E Act was then raised.

- [9] I gave the accused leave to file a full blown application in an endeavour to afford the aforesaid accused her constitutional right of fair trial.
- [10] The suggestion of an AVL came from PW7's attorneys themselves, and the Crown realizing that opportunity grabbed it with both hands and filed the application which was not opposed, and the order of the 01 June 2021 was granted with the consent of both parties.
- [11] Evidence before Court is on the strength of the order of the 01 June 2023 and not based on the subpoena which was issued in terms of Section 206 of the CP & E Act.
- [12] There is no unlawfulness which was committed by the Crown when it acceded to the suggestion by PW7 to testify via AVL. The manner in how a witness is brought to testify by the Crown is not an issue which taints the evidence or proceedings unless it can be shown by the accused that the witness was unlawfully brought to Court to testify. This is not the position *in casu*, because the accused did not come to Eswatini on the basis of what the accused alleges was as a result of a defective Section 206 subpoena.
- [13] The purpose of a subpoena is to secure the physical attendance and presence of the witness, it is for that reason that traveling costs to and from Court are provided for in Section 206. On the other hand the AVL is provided for in the Act (No. 08/2018). *In casu* no prejudice has been demonstrated by the accused in so far as the utilization of the AVL in this matter.

[14] The Crown is the *dominis litis* in criminal matters and has the duty and onus to lead evidence to prove the commission of the offence beyond reasonable doubt. The introduction of Act No. 8 of 2018 enables the Crown to lead evidence via the AVL mode. For ease of reference; Section 2 of the Act provides as follows:-

“2. In this Act unless the context otherwise requires –

Audio – Visual link or AVL in relation to appearance of a participant at any proceeding, means facilities that enable both audio and visual communication between participants, when some of them are not physically present at the place of hearing of all or part of the proceeding;

“**Criminal substantive matter**” means any matter in a criminal proceeding, in respect of which evidence is to be called.

Participant in relation to a proceeding, means a person who is, in that proceeding, any of the following –

- (a) a party
- (b) accused person
- (c) counsel
- (d) amicus curiae
- (e) a witness
- (f) a member of the bench such as but not limited to court session;
- (g) Registrar, assistant registrar or clerk
- (h) judicial officer who is presiding over the proceedings;
- (i) any other person who has a direct interest in the matter or who the judicial officer considers appropriate.”

[15] The proceedings *in casu* are fully compliant with the Act No. 08/2018 Section 4 of the Act provides as follows:-

4. (1) In every criminal or civil proceeding, the judicial officer shall make a determination whether or not to use AVL for the appearance of any participant in the proceeding.

(2) In making the determination, the judicial officer shall consider the following as criteria for the use of AVL –

- (a) the nature of the proceeding

- (b) the availability and quality of the technology that is to be used.
- (c) the potential impact of the use of technology on the effective maintenance of rights of other parties to the proceeding; including:-
 - (i) the ability to assess the credibility of witnesses and the reliability of evidence presented in Court.
 - (ii) the level of contact with other participants; and
 - (iii) any other relevant matters.

[16] In making the determination *in casu* whether to use or not to use AVL *in casu*, I fully considered these provisions of Section 4 herein referred to above and found that it is in the best interest of justice that the AVL be utilized, and this was over and above the fact that there was no opposition from the accused. Further just to clarify the position as I have explained above herein, the application *in casu* is not about the operation or utilization of the AVL process but is about the challenge to Section 206 which deals with issuance of subpoenas.

[17] In criminal proceedings a subpoena is usually issued to a witness after the witness has recorded a statement which the Crown is satisfied will advance its case. A subpoena is then issued to order the witness to present himself/herself physically before Court to testify on the basis of the statement he/she has made. However, in AVL proceedings the situation is a bit different because the witness presents himself via the AVL

technology, he/she does not physically come to Court. *In casu* PW7 suggested the use of the AVL himself which was accepted by the Crown, and the Crown duly filed the application for this Court to make that determination, and indeed on 01 June 2021 that determination was made having taken into account the crucial factors as well as the additional criteria outlined in Section 4 (2) Section 5 (a) (b) (c) of Act 08/2018.

[18] In my view the issue of the subpoena falls away, and should not be used to attack the testimony of PW7 on AVL. The defence is at liberty to cross-examine PW7 to whatever length regard being had that in criminal proceedings the defence is entitled to present the accused's case through lengthy and rigorous cross-examination and the Court is expected to accommodate such cross-examination as long as it is relevant and aimed at presenting the defence of the accused. Infact Section 8 (1) (a) and (b) strengthens the Crown's argument that a subpoena is not necessary for purposes of the AVL and it also strengthens the observation of this Court that it is the consent of the parties to utilize the AVL is a factor that cannot be easily frustrated or obstructed by a participant who raises an issue that is totally unrelated to the operation of the AVL or to the other factors as listed in Section 4 and 5 respectively.

[19] For ease of reference Section 5 deals with additional criteria for allowing use of AVL in criminal proceedings, namely:-

5. A judicial officer shall also consider, in making a determination under this Act, whether or not to allow the use of AVL for the appearance of any participant in a criminal proceeding, the potential impact of the use of the technology on the effective maintenance of the right of the accused person

to a fair trial, and on the accused person's right associated with the hearing and, in particular –

- (a) the ability of the accused person –
 - (i) to comprehend the proceedings
 - (ii) to participate effectively in the conduct of their defence
 - (iii) to consult and instruct counsel privately
 - (iv) to access relevant evidence
 - (v) to examine the witnesses for the prosecution
- (b) the level of contact the accused person has with other participants; and
- (c) any adverse impression that may arise through the accused person or any participant appearing by means of AVL, and whether that adverse impression may be mitigated.

[20] *In casu* all of these additional criteria and factors relevant to this trial were fully considered for purposes of making the determination to allow AVL to be utilized in these proceedings, again bearing in mind that the parties consented to the AVL as regards the evidence of PW7. This is in compliance with Section 8 (1) (a) (b) which reads as follows:-

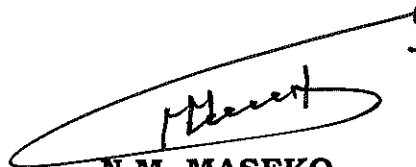
- 8 (1) AVL shall not be used in any criminal substantive matter for the appearance of a participant unless a judicial officer determines to allow its use for the appearance of that participant in the proceeding –

- (a) in accordance with the criteria in Sections 5 and 6;
and
- (b) taking into account whether the parties to the proceedings consent to the use.

[21] *In casu* the parties consented to the use of AVL for purposes of the evidence of PW7, and this Court also fully considered the criteria as laid down in Section 4 and 5 of the Act as these are criminal proceedings excluding Section 6 which deals with civil proceedings.

[22] In the premises, I hereby hand down the following order:-

1. The application filed by the accused on the 14th July 2021 seeking for an order to expunge the evidence of PW7 from the record of proceedings *in casu* is hereby dismissed forthwith.
2. The matter is to be allocated trial dates for continuation of the evidence of PW7.


N.M. MASEKO
JUDGE