# IN THE SUPREME COURT OF SWAZILAND

**JUDGMENT**

**Case No. 14/2012**

**In the matter between**

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| **SANDILE FRANCIS XAVIER DLAMINI** | **First Appellant** |
| **PROTRONICS NETWORKING CORPORATION (PTY) LTD** | **Second Appellant** |

**and**

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| **REX** | **Respondent** |

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| **Neutral citation:** | Sandile Francis Xavier Dlamini *v Protronics Networking Corporation (Pty) Ltd (*14/2012) [2012] SZSC 2 (31 May 2012) |
| **Coram:** | RAMODIBEDI CJ, DR TWUM JA, and AGIM JA |
| **Heard:** | **02 MAY 2012** |
| **Delivered:** | **31 MAY 2012** |
| **Summary:** | **Criminal law and procedure – Several counts of fraud, theft, corruption, money-laundering and** |

**making false statements – The appellants applying to the High Court to quash the indictment – The *court* a quo dismissing the application – The appellants applying for leave to appeal but thereafter withdrawing the application – The appellants subsequently filing a notice of appeal against the High Court's ruling refusing to quash the indictment – Section 4 (1) of the Court of Appeal Act read with s 147 (1) (a) of the Constitution on jurisdiction of the Court – No application for leave to appeal – No application for condonation of the appellants' failure to file the record of proceedings as well as heads of argument – The appellants guilty of delaying tactics in the circumstances – Appeal dismissed.**

**RAMODIBEDI CJ**

[1] Seldom have accused persons sought to resist the commencement of criminal proceedings against them as persistently as the present appellants have. In the process, they have sought to use every conceivable trick in the book to attain their objective as will become apparent shortly.

[2] It all began on 25 July 2011 when the appellants and others were indicted in the High Court in Criminal Case No. 158/2010 on several counts of fraud, theft, corruption, money-laundering and making false statements at an earlier commission of inquiry. Thereafter, a brief chronology of the relevant events reveals the following sad state of affairs which can only be described as the worst form of delaying tactics one can ever imagine in the circumstances.

[3] On 9 February 2012, the appellants, acting in terms of s 152 of the Criminal Procedure and Evidence Act 67/1938, filed an application in the High Court (Levinhson AJ) for the quashing of the criminal charges against them on the ground that their constitutional rights to a fair trial had been infringed by the Crown during the investigations preceding the laying of the charges against them. The application was heard on 14 February 2012.

[4] On 15 February 2012, the court *a quo* dismissed the appellants' application to quash the indictment.

[5] On 17 February 2012, the appellants filed an application in the Court for leave to appeal against the court's *a quo's* refusal to quash the indictment.

[6] On 2 March 2012, the appellants withdrew the application for leave to appeal.

[7] On 13 March 2012, the appellants filed the present appeal against the court *a quo's* refusal to quash the indictment.

[8] It is clear, however, that the appellants' appeal is hit by the provisions of s (4) (1) of the Court of Appeal Act. This section provides for the right of appeal in criminal cases in the following terms:-

> *"4 (1) A person convicted on a trial held by the High Court may appeal to the Court of Appeal against his conviction or against the sentence passed on conviction unless such sentence is one fixed by law"*. (Emphasis added.)

It is plain, as it seems to me, that in criminal matters it is only a convicted or sentenced person who has the right of appeal. The main underlying reason for this provision is to discourage piecemeal litigation or multiplicity of suits. It accords with good public policy, therefore, that the appellate court should only deal with concluded matters as opposed to interlocutory ones.

[9] When this problem was pointed out to Mr Manzini, counsel who appeared for the appellants at the hearing of the appeal, he made a disingenuous submission, in my view. He submitted that the application in the High Court to quash the indictment was not a criminal application. He contended that it was a constitutional case. Accordingly, so he argued, the appellants had the right of appeal to this Court in terms of s 147 (1) (a) of the Constitution. This section provides for the appellate jurisdiction of the Court in the following terms:-

> *"147. (1) An appeal shall lie to the Supreme Court from a judgment, decree or order of the High Court –*

*(a) as of right in a civil or criminal cause or matter from a judgment of the High Court in the exercise of its original jurisdiction."* (Emphasis added.)

[10] The word "judgment" used in s 147 (1) (a) of the Constitution is defined in Black's Law Dictionary: Eighth Edition at p 858 to mean *"a court's final determination of the rights and obligations of the parties in a case."* Construed in this way, s 147 (1) (a) of the Constitution and s 4 (1) of the Court of Appeal Act have the same effect, in my view. Put differently, s 4 (1) of the Act fits into the framework of s 147 (1) (a) of the Constitution. In criminal matters an appeal lies as of right only when there is a final judgment as to conviction or sentence.

[11] It is common cause that there is no judgment of the court *a quo* in the matter. There is neither a conviction nor a sentence. What the court *a quo* did was simply to grant an interlocutory ruling dismissing the appellants' objection to the indictment. The court has not said the last word.

[12] Through sheer piece of misguided ingenuity as indicated above, Mr Manzini sought to shift the goal posts by submitting that the application in the court *a quo* was a constitutional matter. This is clearly incorrect for at least three reasons:-

(1) The appellants' application in the High Court was specifically made under s 152 of the Criminal Procedure and Evidence Act. This section provides as follows:-

*"152. (1) The accused may, before pleading, apply to the court to quash the indictment or summons on the ground that it is calculated to prejudice or embarrass him in his defence.*

*(2) Upon such motion the court may quash the indictment or summons, or may order it to be amended in such manner as the court thinks just, or may refuse to make any order thereon.*

*(3) If the accused alleges that he is wrongfully named in the indictment or summons, the court may, on being satisfied by affidavit or otherwise of such error, order it to be amended."*

(2) The application was specifically made under Criminal Case No. 158/10 as the notice of motion itself shows. It was not a constitutional case as such.

(3) The application was evidently heard by the High Court exercising its criminal jurisdiction and not as a constitutional court. The ruling to dismiss the appellants' application to quash the indictment was made in that capacity.

[13] What Mr Manzini has sought to do is ominous. He has sought to raise a collateral constitutional issue simply to block the criminal proceedings without following proper procedures. It bears repeating what this Court said in Jerry Nhlapho and 24 Others v Lucky Howe N.O. (in his capacity as liquidator of VIP Limited in Liquidation), Civ. Appeal No. 37/07 at paragraphs [5] and [6], namely:-

> **"***[5] It is a 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 is more so in constitutional litigation. The reason behind this approach is that constitutional jurisprudence must be developed in a cautious and orderly manner rather than haphazardly. Constitutional issues must therefore ordinarily be properly pleaded and canvassed. See for example Prince v The President, Cape Law Society and Others 2002 (2) SA 794 (CC); S v Mhlungu and Others 1995 (3) SA 867 (CC); Kauesa v Minister of Home Affairs and Others 1996 (4) SA 965 (NM SC).* The remarks of Ngcobo J in Prince's case at paragraph [22] are singularly apposite, namely:-
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> '*[22] Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions.*

*Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as (sic) allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.'*

*[6] Furthermore, it requires to be stressed that in our jurisdiction litigants in constitutional litigation are ordinarily entitled to the benefit of decisions of two courts, namely, the High Court and this Court. The raising of a constitutional point for the first time in this Court, disguised as a point of law, denies them that benefit. Each case must, however, be judged in the light of its own particular circumstances."*

[14] As guidance in the future, I discern the need to stress that it is not any breach of the constitutional rights of an accused that vitiates criminal proceedings. In this regard, I find myself in respectful agreement with the following apposite remarks of Kentridge JA in the Botswana Court of Appeal in AG v MOAGI 1982 (2) BLR 124 (CA), namely:-

> *"I cannot, with respect, agree that any breach of the constitutional right of an accused must ipso facto result in a failure of justice at his trial … If there has been an infringement of the constitutional rights of the accused, while being careful not to nullify or abridge his protection, one must consider what effect it has had on the case in question. I see no reason why a constitutional irregularity should in this respect differ from other types of irregularity."*

I should add that the appropriate stage in determining whether a constitutional breach has resulted in a failure of justice is at the judgment stage after proceedings have terminated. In *casu*, it is simply premature to make a determination at this stage.

[15] Mr Maseko, the learned Director of Public Prosecutions who appeared for the respondent, correctly submitted in my view that the court *a quo's* decision dismissing the appellants' application to quash the indictment was a preliminary or interlocutory ruling. Hence, the appellants were obliged to seek and obtain leave to appeal. Admittedly there is no such leave. See, for example, Jerry Nhlapho and 24 Others v Lucky Howe N.O. (in his capacity as liquidator of VIP Limited in Liquidation) (supra); Swaziland Water Agricultural Development Enterprises Ltd v Doctor Lukhele, Case No. 7/2012.

[16] Reverting now to the appellants' delaying tactics as indicated above, it is necessary to make one further observation. It is this. The appellants have failed to prepare the record of proceedings in the matter. While properly tendering his apology for the omission, Mr Manzini surprisingly raised as an excuse the fact that there is no judgment in the matter. The absence of a judgment cannot, however, be justification for failing to file the record of proceedings. The conclusion is thus inescapable in my view that this was yet another ploy to delay finality in the matter. Crucially, no application was made for condonation.

[17] As they say, it never rains but it pours. In this regard Mr Manzini's dilatoriness was not only confined to his failure to prepare the record of proceedings. He also failed to file heads of argument. He simply had no explanation for treating the Court in this shabby manner. No application for condonation was made for this blatant omission and it appears that the Court was treated with disdain.

[18] Perhaps not surprisingly for that matter, on several occasions during his submissions Mr Manzini had to be warned for using intemperate and insulting language towards the Court. To his credit, counsel apologised for his unethical behaviour. There is of course always room to learn. We would be failing in our duty, however, if we did not remind legal practitioners in

this Kingdom, as we hereby do, to live up to the ethical demands of their calling, which is not called an honourable profession for nothing. They must always bear in mind that they were admitted on the basis that they are fit and proper persons to be admitted to the legal profession. Indeed, it is useful to recall that as long ago as 18 May 2006, and in the case of Gugu Prudence Hlatshwayo v The Attorney General, Civil Appeal No. 2/2006 at para [31], reported on line under Case No. [2006] SZSC 8, I had occasion to make the following remarks (Banda JA and Magid AJA concurring) which bear repeating:-

> *"[31] Now, to say that a judicial officer, let alone the Chief Justice, acted mala fide is undoubtedly an insult of the first order. It cannot be deprecated strongly enough especially coming as it does from counsel of Mr Ntiwane's experience. It is deplorable and irresponsible language that can only bring the justice system as well as the legal profession in this country into disrepute. It cannot be stressed strongly enough that it is the hallmark of our judicial system that it is indeed the duty of every legal practitioner to treat the court with courtesy, decency and respect. It is for this reason that this Court immediately pulled up Mr Ntiwane on the issue. In fairness to him, he promptly and unreservedly apologised for his unfortunate remarks. One hopes that it will never again be necessary for this Court to have to deal with a similar issue in future."*

Legal practitioners have, therefore, sufficiently been warned.

[19] It follows from the foregoing considerations that the appeal cannot succeed. It is accordingly dismissed.

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**M.M. RAMODIBEDI**

**CHIEF JUSTICE**

**I agree**

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**DR. S. TWUM**

**JUSTICE OF APPEAL**

**I agree**

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**E.A. AGIM**

**JUSTICE OF APPEAL**

**For Appellants** : **Mr. N.M. Manzini**

**For Respondent** : **Mr. N. Maseko**