



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

**Criminal Appeal Case No. 21/2013**

**In the matter between:**

**LEO NDVUNA DLAMINI**

**APPELLANT**

**V**

**REX**

**RESPONDENT**

Neutral citation : *Leo NdvunaDlamini v Rex (21/2013) [2014]*  
SZSC 2 (24 JANUARY 2014)

Coram : A.M. Ebrahim J.A., S.A. Moore J.A., P. Levinsohn J.A.

Heard : 23 January 2014

Delivered : 24 January 2014

## **JUDGMENT OF THE COURT**

### **INTRODUCTION**

[1] This appeal is, fortunately, atypical in this kingdom. The appellant is a magistrate who has alleged in his Notice of Appeal that he was wrongly convicted and inappropriately sentenced for ‘contravening Section 33(1) (b) read with Section 33(2) (b) (i) of the Prevention of Corruption Act 30/2006 - The Act - and the offence of attempting to defeat or obstruct the ends of justice, by the judgment of the High Court contained in the written judgment of Her Ladyship the Honourable Justice Ota dated 22<sup>nd</sup> day of October, 2013’.

### **THE APPEALS**

[2] The appellant has, to date, filed the following Notices of Appeal:

- Dated 22 October 2013 upon the following grounds:
  - 1) ‘That the sentence imposed by the Court *a quo* induces a sense of shock in that the Appellant was a first offender.

- 2) That the Court *a quo* misdirected itself in not considering sentencing the Appellant with an option of a fine despite that the Act provides for a fine as the first option in sentencing a person found guilty of committing an offence under Section 33 of the Prevention of Corruption Act 30/2006.
- 3) That the Court *a quo* misdirected itself in imposing a custodial sentence against the Appellant without having given reasons why the Appellant should not be afforded the option of a fine.'

- Dated 17 January 2014 in terms of Rule 12 of the Court of Appeal Rules, 1971 which reads as follows:

**“BE PLEASED TO TAKE NOTICE THAT** the Appellant hereby applies in the terms of **Rule 12 of the Court of Appeal Rules** to be allowed to amend his **NOTICE OF APPEAL** dated the 22<sup>nd</sup> October, 2013 in the following manner:-

**BE PLEASED TO TAKE NOTICE THAT** the Appellant having been convicted of contravening Section 33(1)(b) read with Section 33 (2) (b) (i) of THE PREVENTION OF CORRUPTION ACT No. 30/2006 and the offence of ATTEMPTING TO DEFEAT OR

OBSTRUCT THE ENDS OF JUSTICE, by the judgment of the High Court contained in the written judgment of Her Ladyship the **Honourable Justice OTA** dated the 22<sup>nd</sup> October, 2013 hereby appeals to the Supreme Court against both conviction and sentence on the following grounds:

**AD CONVICTION**

- 1) The learned judge a **quo** erred in law and in fact by approaching the whole matter as if the onus was upon the appellant to prove his innocence.
- 2) The learned judge a **quo** erred in law and in fact by convicting the appellant yet the totality of the evidence did not prove his guilt beyond a reasonable doubt.
- 3) The learned judge a **quo** erred in law and in fact in not holding that the provisions of the statute were not applicable as there was nothing to show that the alleged conduct of the appellant had anything to do with his position as a judicial officer.

**AD SENTENCE**

- 4) The learned judge a **quo** acted improperly and misdirected herself in imposing a sentence that induces a sense of shock in view of the peculiar facts and circumstances of this particular case.

- 5) The learned judge a **quo** misdirected herself and committed a gross irregularity in not considering sentencing the Appellant with an option of a fine despite that the statute provides for a fine as the first option in sentencing a person found guilty of committing an offence under Section 33.
- 6) The learned judge a **quo** erred in law and misdirected herself in imposing a custodial sentence against the Appellant without even giving reasons why he should not be afforded the option of a fine.
- 7) The learned judge a **quo** misdirected herself in laying undue emphasis on the seriousness of the offence at the expense of the manner in which the alleged offences were committed as well as the personal circumstances of the Appellant.

**DATED AT MBABANE ON THIS 17<sup>TH</sup> DAY OF JANUARY, 2014.”**

[3] Rule 12 of the **Court** of Appeal rules reads as follows:

*‘The Court of appeal **may** allow an amendment of the notice of appeal and arguments, and allow parties or their counsel to appear, notwithstanding any declaration made under Rule 11 upon such terms*

*as to service of notice of such amendment, costs and otherwise as it may think fit.*’ Emphasis added.

The wording of Rule 12 makes it clear that an application for an amendment will only be granted if, in all the circumstances of the case, this Court thinks that that is fair and just to all parties concerned to allow the proposed amendment.

[4] The respondent’s retort to the appellant’s belated application to amend the notice of appeal to include an appeal against the convictions and to expand the grounds of appeal against sentence was embodied in a Notice of Motion seeking the following reliefs:

1. That paragraphs 1, 2 and 3 of the Notice of Appeal in terms of Rule 12 of the Court of Appeal Rules be struck out.
2. Other or alternative relief.
3. Costs including the cost of Counsel and his travel expenses.

The supporting affidavit posited inter alia that:

“6. On 22<sup>nd</sup> October 2013 Appellant noted an appeal against sentence only.

7.

7.1. A copy of the appeal record was served on Respondent on 15<sup>th</sup> January 2014, the appeal in regard to sentence only having been set down for hearing on 23<sup>rd</sup> January 2014.

7.2 On the same date Respondent received the letter, annexure “A” hereto from attorney Bhembe Attorneys acting on behalf of Respondent.

8. Paragraph 3 of the aforesaid letter states:

*‘Our instructions are that he would be able to only file the amended notice of appeal on Friday 17<sup>th</sup> January 2014 and the Heads will be filed on Monday January 2014.’*

9. What is referred to as a “Notice in Terms of Rule 12 of the Court Appeal Rules 1971” being annexure “B” hereto was served on Respondent at 4:16 p.m. on 17<sup>th</sup> January 2014. A copy thereof is annexed hereto marked “C”.

10. It is submitted that the said application contained in annexure “B” and which purports to be in terms of Rule 12 of the Court of Appeal Rules is irregular and falls to be struck out in that:

- (a) it does not follow upon the events specified in Rule 11 of the Court of Appeal Rules;
- (b) assuming that it is not so irregular (which is not conceded), the aforesaid Notice does not constitute an amendment to the Notice of Appeal dated 22 October 2013 which Notice of Appeal was in respect of sentence only and did not encompass an appeal against conviction.
- (c) having regard to the fact that Appellant now seeks to appeal against his convictions which appeal is out of time and should have been noted within 14 days of 22<sup>nd</sup> October 2013, no Affidavit is annexed to the application wherein Appellant, for the reasons stated, seeks condonation for the late filing of the aforesaid Notice of Appeal regarding his conviction.

11. Respondent files herewith its Heads of Argument relating to sentence only in terms of its oral undertaking to do so as communicated to Appellant's attorneys on Friday 17<sup>th</sup> January 2014."

[5] The appellant's amended notice of appeal provoked an application dated 20 January 2014 which gave warning that 'when this matter is called on



Thursday 23<sup>rd</sup> January 2014, the respondent would seek to have ‘paragraphs 1, 2 and 3 of the Notice of Appeal in terms of Rule 12 of the Court of Appeal Rules be struck out’ with ‘the cost of Counsel and his travelling expenses.’ That application, supported by the founding affidavit of State Counsel Ayanda Matsenjwa was accompanied by the respondent’s Heads of Argument on ‘an appeal against sentence only imposed by the Court a quo on 22<sup>nd</sup> October 2013.’ Almost identical papers were filed on the 21<sup>st</sup> January 2014.

[6] The very next day the 22<sup>nd</sup> January 2014 - the day before the scheduled hearing of the appeal on 23<sup>rd</sup> January 2014 – sometime after 4.00 PM the members of this court received a Notice of Motion praying:

- “1. *That the hearing of the appeal of the matter of Leo Ndvuna Dlamini v The King be and is hereby postponed to the May 2014 Session of the Supreme Court.*
2. *Any further and/or alternative relief.”*

A Founding Affidavit containing some 20 paragraphs and 2 annexures together with what was described as a Confirmatory Affidavit sworn by the Appellant were appended to the Notice of Motion. In addition to the Notice

of Motion referred to above and Answering Affidavit sworn by the Appellant, which was in fact a response to the affidavit of Ayanda Matsenjwa referred to in paragraph [5] above, was also filed on the 22<sup>nd</sup> January 2014.

[7] Before considering the affidavits themselves it is pertinent to recite the observations of the learned Chief Justice upon the flysheet of the court file:

“13/01/2014 Meeting scheduled for the 14/01/2014 CJ Chamber’s

Appellant Counsel : Mr Bhembe

Respondent : Mr

14/01/2014 Mr. Bhembe for the Appellant, Mr. Maseko the DPP for the Respondent.

Court : 1. By Consent the Appellant will file heads of arguments on or before 17 January 2014

2. The Respondent will file heads of argument on before 20 January 2014

3. The appeal will be heard on 23<sup>rd</sup> January  
2014 at 9.30 a.m.

Signed

CHIEF JUSTICE”

The schedule to which the parties had agreed before the Learned Chief Justice, was eminently reasonable, having regard to the fact that the Notice of Appeal against Sentence only was filed on 22 October 2013.

[8] When the matter was called in Court on the morning of the 23<sup>rd</sup> January 2014 Advocate Maziya explained that the principal reasons behind the application for a postponement were set out in the supporting affidavits. He also indicated to the court that:

- The record was incomplete.
- It did not contain the judgments of the court a quo.
- It did not contain the submissions of counsel in the court a quo in mitigation of sentence.
- Because of the above imperfections in the record it was not possible to prepare heads of arguments even in support the appeal against

sentence which had been filed on the 22<sup>nd</sup> October 2013 and more so in support of the amended notice of appeal which had been filed on the 17<sup>th</sup> January 2014.

[9] This court was in possession of a complete record of appeal which was certified by the Registrar on the 14<sup>th</sup> January 2014. So was Advocate Kades who appeared for the respondent. With the assistance of the Registrar Counsel for the appellant was soon in possession of the complete record, the three relevant judgments of the court a quo and buoyed by the assurance of both the Registrar and Advocate Kades that they would collaborate with each other and with Advocate Maziya to ensure that he was in complete possession of every last fragment of material which was requisite and necessary to enable MrMaziya to conduct the case of the Appellant as fully and amply as he and his client thought necessary.

[10] To this end this court was of the opinion that an agreed chronology prepared by Counsel for the contending parties would be of assistance not only to the parties themselves but of the court as well in considering the merits or otherwise of the application for a postponement. At this point the hearing of

the instant appeal was adjourned to enable Counsel to prepare such an agreed chronology and to cooperate with each other and with the Registrar to ensure that all of the papers were in order upon the resumption.

[11] It is germane to point out at this stage that Advocate Kades had earlier telegraphed his unwillingness to oppose the application for a postponement in the light of the appellant's state of un-readiness.

[12] When the parties were once again before the court Advocate Maziya's last remaining complaint was that Counsel for the appellant's submissions in mitigation of sentence could not be found in the record. Counsel's attention was drawn to the judgment on sentence in which Ota J recorded the factors which she had taken into account in mitigation of sentence. Advocate Maziya was reluctantly mollified: but in order to ensure that there could be no lingering cause for complaint if the matter were adjourned to the May session of this court Advocate Maziya was invited, with no demur from Advocate Kades to submit such amendments to the record as would encapsulate in full the submissions in mitigation which he thought would advance his client's case to the maximum on this issue.

[13] At this point, both Advocates Maziya and Kades were ad idem that nothing now lay in the way to a full and fair hearing of the appellant's case by this court. The adjournment was then taken upon the undertaking that this court would deliver its judgment at 9.30 AM on Friday 24<sup>th</sup> January 2014.

[14] Having considered the whole matter this court has decided that, notwithstanding the slothfulness of the appellant's counsel, and of his failure to prepare and file heads of argument upon the flimsy pretext that the record was incomplete, this court, in the interest of justice, and in the light of the seriousness of the charges for which the appellant stood convicted, it should afford him every facility for an ample hearing of his appeals against his convictions and sentences.

[15] It is the common practice of experienced counsel, particularly those who have had carriage of the case at the trial courts, to prepare and file notices and grounds of appeal as well as heads of argument even in the absence of the record or of the judgment of the trial court full well knowing that it would be open to them to apply for such amendments as might be necessary

at any stage before the actual hearing of the appeal. Counsel for the Appellant would have been well advised to follow that practice.

**ORDER**

[16] It is the order of this court that:

1. The application for a postponement be granted.
2. The matter be enrolled for hearing at the May 2014 sitting of this Court.

Signed

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**A.M. EBRAHIM**  
**JUSTICE OF APPEAL**

Signed

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**S.A. MOORE**  
**JUSTICE OF APPEAL**

Signed

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**P. LEVINSOHN**  
**JUSTICE OF APPEAL**