IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 336/2013

In the matter between:

REX

And

MIKE MAMBA **Respondent**

Neutral citation: *Rex vs Mike Mamba (336/2013) [2016] [SZHC] 168 (19th September, 2016)*

Coram: **MAPHALALA PJ**

Heard: **6th August 2014**

Delivered: **19th September, 2016**

For Applicant: **Mr. M. Nxumalo (Prosecuting Counsel) (from DPP's Chambers**

For Respondent: **Mr. S. Bhembe (from Bhembe Attorneys)**

Summary: *Criminal Procedure – during the evidence of the Crown a crucial exhibit was released by the Crown to the complainant – the Crown was to answer whether it can proceed with the prosecution of the case whilst such an exhibit was not before court – the parties agreed that the matter to start* ***de novo*** *– the Crown contends it was the court which made a mistake for the matter to start* ***de novo*** *– However, the transcript of the Record shows – that it was an agreement of both parties – therefore, the case to proceed before High Court* ***(Maphalala P.J.)***

JUDGMENT

The issue for decision

[1] On the 15th February, 2016 this Court issued an order that the representatives of the Crown, Mr. Macebo Nxumalo, to provide a legal authority to the effect that a criminal trial can be conducted without an exhibit which is the subject matter of Count 1 in this case being brought before court.

[2] On the 16th February, 2016 instead of addressing the Court on what was ordered learned Counsel informed the Court that his superiors have instructed him to apply that order granted by the Court that the matter start **de novo** be rescinded on the ground that it was granted in error. Crown Counsel further informed the Court that his instructions from his superiors were that the matter

be referred back to the Registrar for allocation before another Judge or be referred to the Chief Justice for direction.

[3] The basis of the Crown's Application was that this court erred in ordering the matter be started **de novo** before it because it had heard evidence particularly evidence allowing certain documents as exhibits to form part of the record. The argument was that the court will have difficulty in applying its mind if the attorney for the accused raised an objection to the admissibility of the documents yet the Court had admitted them before.

[4] It is contended for by the Defence that this Application by the Crown is vehemently opposed. That it has no merit in law and that it is a ploy by the Crown to remove the case from this Court to be heard by another Judge. That this is unacceptable. That it is not only tantamount to forum shopping but to cast aspersions to this Court.

The back ground

[5] The facts of the matter as can be gleaned in the main Heads of Arguments for clarity are reproduced as follows:

BACKGROUND

The accused stand charged with three count being

Count 1 – Theft of a Motor Vehicle

Count 2 – Forgery & Uttering

Count 3 – Corruption

The accused pleaded not guilty to all the charges and this necessitated the Crown to lead evidence to prove its case beyond reasonable doubt.

During trial an inspection in loco was done at Lobamba where the truck was parked. The witnesses who testified in relation to the inspection of the truck was the owner, who showed the court the unique identification marks he had made in the truck.

The legal representative of the Accused Mr. Martin Dlamini applied that the truck should not be released until the matter was finalized and the Crown did not object to that application. The matter was postponed to another date for continuation. When the matter resumed the accused told the court that he had acquired the services of another Attorney Mr. Sabelo Bhembe. Mr Bhembe applied to the court to be furnished with a transcribed record of the proceeding.

Even before Mr Bhembe took over the matter during the period of postponement the complainant applied for the release of the truck before

this same Honourable Court and the court granted the order releasing the truck.

Unfortunately, the transcribed record could not be furnished to Mr. Bhembe and efforts to reconstruct the record proved futile. In essence Mr Bhembe made a written application and one of the prayers was to the effect that the truck be returned back and witnesses recalled. The Crown objected to the return of the truck and recalling of the witnesses, however, the court pointed out that it was the right of the defence.

When the matter came to court towards the end of 2015 the defence emphasized that the matter started afresh and the Crown tried to object to that but ended up consenting that the matter should be started afresh and the matte be referred back to the Registrar. However, the defence quickly rose up and suggested that the matter be postponed to 15th February 2016 to start afresh before the same court.

When the matte came to court on the 15th February, 2016, the accused refused to lead as per the normal procedure and argued that the matter could not start without the presence of the exhibit (truck) in court. The Crown submitted that the matter should continue as it was not intending to lead the complainant and expert witness on that day and that is when the confusion started in this matter which led to the present state.

The court ordered that the Crown should furnish the court with authorities that the matte can continue without the presence of an exhibit despite the Crown having submitted that the matter can continue without an exhibit for example in cases of robbery where the money had not been recovered still the accused is required to plead and the issue of the exhibit is for the court to determine whether the failure of the Crown to being the exhibit was fatal blow to its case or not.

The matter was stood down until 16th February 2016 for the Crown to provide authorities as stated above. Counsel who is representing the Crown looked for the authorities and found one involving John Spokes Madelege. While the matte was being discussed in the Director of Public Prosecution's Chambers it was indicated to counsel that the order to the effect that the matter starts afresh was granted in error and therefore an application to set aside be made before this Honourable Court.

[6] On the 6th August, 2016 this Court heard arguments on the question for decision outlined in paragraph [3] of this judgment and ordered that the attorneys of the parties file Heads of Arguments to assist the Court. Indeed both attorneys have done justice to the case and have filed such Heads of Arguments for which I am grateful. The Crown even filed Supplementary Heads of Arguments to dispel certain perceptions. I shall in brief outline a summary of

each parties arguments for one to understand the issue for decision. I shall start with the arguments of the Crown and then those of the Defence.

(i) The Crown's arguments

[7] The essence of the Crown's arguments is the order of the Court of the 16 February, 2016 that it was granted in error by this Court. That the reasoning behind this issue on the order being granted in error was that the court should have invoked section 199 of the Criminal Procedure and Evidence Act of 67 of 1938 which empowers the Court to call witnesses to give evidence where necessary or the Court should have ordered that the matter should start afresh before another court hence the mater should have been referred to the Registrar to consult with the Chief Justice who will give directions.

[8] It was contended for the Crown that the problem of the matter starting afresh before this same Court is that it will have some difficulties when a new attorney objects to the admissibility of certain exhibits that were submitted and admitted during the previous trial and therefore this will prejudice either the accused or the Crown.

[9] Based on the above the Crown contended that in order for justice to be seen to be done that this Court set aside the order to the effect that the matte starts

afresh be set aside and order that the matter be or either referred to the Registrar or invoke section 199 of the Criminal Procedure and Evidence Act no. 67 of 1988.

[10] That this court is now **functus officio**. However, this court is at liberty to change its own decision as long as certain requirements are shown by the party who is making the Application being that:

(i) There were facts that were not present to the court;

(ii) That if the court was aware of the existence of such facts it could have issued a different decision.

[11] In this regard this Court was referred High Court case **of Msiko vs Pefile and Another 134/1252** which cited with approval **H.J Erasmus, Superior Court Practice, (1994 ed)** as follows:

> **"An order of judgment is erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order, or if there existed at the time of its issue a fact which the Judge was unaware, which would have induced the Judge, if he had been aware of it, not to grant the judgment. Though in most cases such an error would be apparent on the record of the proceedings, it is submitted, that in deciding whether a judgment was erroneously granted a court is not confined to the record of proceeding."**

[12] The Crown Counsel further advanced the following argument at page 5 of his Heads of Arguments:

> **It is humbly submitted that during the proceedings on the 16th February 2015, the defence submitted that the order cannot be varied because it was entered into by consent of the parties. However, Counsel for the Crown disputed such consent but after the proceedings Counsel for the Crown was advised by the Assistant Registrar that there was such a consent order. It is therefore humbly submitted that even if counsel for the Crown consented to the order it does not mean that the court should be bound by the consent to the parties as long as it is shown that the order was granted in error.**

[13] Lastly, the Crown contends it will be in interest of justice that the matter be referred to the Registrar if section 199 is not invoked which is also an alternative in this matter.

(ii) The defence's arguments

[14] The attorney for the accused filed Heads of Arguments advancing his opposition to the Crown's Application stating **inter alia** that in paragraph 4 thereof the basis of the Crown's Application was that this court erred in ordering the matter to be started **de novo** before it because the court had heard

evidence particularly evidence allowing certain exhibits to form part of the record. The argument was that the Court will have difficulty in applying its mind if the attorney of the accused raise an objection to the admissibility of the documents yet the Court had admitted them.

[15] It is contended, for the accused that the Application by the Crown is vehemently opposed by the Defence. That it has no merit in law and it is just a ploy to remove the case from this court to be heard by another Judge. That it is unacceptable. It is not only tantamount to forum shopping but it cast aspersions to the Judge in this case.

[16] At paragraph 6 to 9 of his Heads of Arguments the attorney for the accused outlined the background of the matter to the following:

> **6. The accused person at the start of the trial was represented by Mr. Martin Dlamini. That attorney withdrew and the accused person's present attorneys were instructed to represent him. On the 6th of August 2014 the present attorneys applied that certain witnesses be recalled so that they may be cross-examined by accused's new attorneys. The Honourable Court ordered that the record of proceedings be transcribed and be furnished to accused's new attorneys and thereafter the accused must file his application to recall the witnesses within seven (7) days being served with the**

record. The trial of the matter was then postponed to the first session of 2015.

7. **The accused person, through his attorneys filed an application to recall certain of the Crown witnesses for purposes of cross-examination and to have the motor vehicle which is the subject matter of the case brought to court for inspection.**

8. **The Crown did not file any opposing papers to the application. The matter eventually came back to court on the 20th October where the court informed by both Mr. Nxumalo, the representative of the Crown, and Accused person's Counsel that the record of proceedings was incomplete and that it could not be reconstructed even using the Judge's notes. For instance, the whole of PW1's evidence and cross-examination was missing.**

9. **It is on that date that both parties by consent asked that the matter be started de novo or afresh on the 15th February 2016. The Honourable Court issued that order by consent and postponed the matter to the 15th February 2016 for trial de novo before the very same Principal Judge.**

The Court's analysis and conclusion thereof

[17] Having considered the papers filed of record and the arguments of the attorneys of the parties it is abundantly clear from the record that on the 20th October, 2015 this matter appeared before this Court. In the hand written transcription of

the Record it is recorded that on that day the Crown was represented by Mr. M. Nxumalo and the Defence was represented by Mr. Bhembe the current attorneys of the parties in this matter. On that day it is recorded as follows: **"the matter was postponed to 15th**

+February, 2016 for trial to commence de novo by agreement of the parties".

[18] In view of the above record of what happened on the 20th October, 2015 I agree with the Defence contentions that the Crown cannot then argued and say this Court made a mistake by ordering the matter to start **de novo**. Therefore the Crown's Application is without merit in view of the clear evidence on the Record. The arguments of the Crown are clearly unethical on the face of such glaring facts.

[19] In my assessment of these competing arguments it would appear to that arguments of the Crown cannot succeed because it was an agreement of the parties that the case start **de novo** before the same court. I do not accept the Crown position in the matter.

[20] Therefore, the matter is ought to proceed before this court **de novo.**

[21] Furthermore, the Crown Counsel has failed to cite a legal authority on whether it was possible to proceed with the prosecution of the matter in the absence of a crucial exhibit.

[22] I wish to comment **en passant** that the Crown has created a reason to say it was the court that made a mistake when the court record itself dispel that view.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE