



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No. 109/15

In the matter between:

EMMANUEL DUMISANI HLETA

Applicant

And

**SWAZILAND REVENUE AUTHORITY
THE DIRECTOR OF PUBLIC PROSECUTIONS
THE ATTORNEY GENERAL**

**1st Respondent
2nd Respondent
3rd Respondent**

Neutral citation: *Emmanuel Dumisani Hleta vs Swaziland Revenue & 2
Others (22/15) 2016 SZHC 22(02nd March 2016)*

Coram: Annandale J.
Mabuza J.
Hlophe J.

Counsel for the Applicant: Mr. M. Mavuso

Counsel for the 1st Respondent: Mr. M. Ndlovu

Counsel for the 2nd Respondent: Mr. M. Vilakati

Date Heard: 28th October 2015

Date Handed Down: 02nd March 2016

Summary

Constitutional Law – Whether Section 274 of the Criminal Procedure And Evidence Act of 1938 is unconstitutional and therefore liable to be struck down – Applicant charged with violating Section 81 as read with Section 87 (1) of the Customs and Excise Act of 1971 in that he failed to declare a motor vehicle he had allegedly imported into the country – Applicant denied having imported the motor vehicle into the country – During the trial at the Magistrates Court, Applicant raised a Legal question as regards the Constitutionality of Section 274 of the CP&E Act – Matter stayed to enable Applicant move an application challenging same before the High Court – Whether in the circumstances of the matter, this court has power to deal with and determine the constitutional question raised – Whether impugned section amounts to a reverse onus.

JUDGMENT

[1] This matter brings into sharp focus the question of the constitutionality or otherwise of Section 274 (4) of the Criminal Procedure and Evidence Act No. 67 of 1938 (the CP&E). At the heart of these proceedings therefore is the determination of that question in the context of the facts of this matter.

[2] Whereas the Applicant contends that the section in question is unconstitutional and that this court is entitled to determine the question concerned in these proceedings, the Respondents contend otherwise. They claim that the section is not only constitutionally compliant, but that this court has no jurisdiction to determine such a question because it does not arise as yet in the context of this matter. This they said was because the section concerned was not going to be applied in the determination of the Applicants trial. For that reason they contend that this court ought not determine a constitutional question if the matter could be decided on another point. In other words it was argued that this is a matter where the principle of avoidance as envisaged in the determination of constitutional matters ought to be applied.

[3] The facts of the matter are that sometime in July 2014, the Applicant, whilst driving a certain motor vehicle along the Matsapha-Manzini Public Road, was stopped at a road block mounted by the Royal Swaziland Police and officials of the Swaziland Revenue Authority (the first Respondent). The motor vehicle in question was impounded by the officers of the first Respondent on the grounds that the said motor vehicle had been imported into the country without being declared as required in terms of the Customs and Excise Act of 1971. In other words it had been imported into the country without the payment of the necessary customs dues or in a manner that sought to avoid the payment of such dues.

[4] The Applicant denied having imported the motor vehicle in question into the country but contended that same had been given to him by its owner, a South African citizen for it to be used by Applicant in furtherance of a certain business venture belonging to the two of them. It was however not in dispute that the motor vehicle had been in and out of Swaziland repeatedly and that on each occasion of its being driven into the country the Applicant would be issued with or given a Road Tax Clearance Certificate; which is a receipt issued to drivers of foreign registered cars upon their entry into the country at each applicable Border Post on the occasion of their entry as a road usage levy. The Applicant's contention was that since he would be issued with the certificate in question on each such occasion of entry, it was proof of the fact that no import tax was due when the vehicle concerned was brought into the country.

[5] After the motor vehicle's impoundment, the Applicant was charged with the contravention of Section 81 as read with Section 87 (2) of the Customs and Excise Act, 1971. The upshot of the alleged contravention it was alleged, was that the Applicant wrongfully and unlawfully imported a certain motor vehicle into the country and failed to declare it at any border post in Swaziland, thus contravening the Customs and Excise Act. The Applicant was caused to appear before the Manzini Magistrate's court in order for him to answer to the charges in question.

[6] Sections 81 and 87 (2) of the Customs and Excise Act of 1974 reads as follows:

“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 as to any dutiable goods or prohibited or restricted goods upon his person or in his possession from which any dutiable or prohibited goods 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.

Goods irregularly dealt with liable to forfeiture

“87 (1) Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to this Act or in respect of which any offence under this 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 wheresoever 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”.

[7] On the date allocated for the trial of the matter, the Applicant was caused to plead to the charge and it is common cause he pleaded not guilty to the charge. Instead of having the trial commenced with, the Applicant raised an issue with the application of Section 274 of the Criminal procedure and Evidence Act in his matter. He contended that the Section in question was applicable in his matter, apparently in view of the nature of the changes he faced and that the said section shifted the onus of proving the guilt of the accused from the prosecution or the crown to the accused person, who is thus required to prove that he did not commit the offence.

In other words, the contention was that the Section in question created what is known as a reverse onus.

- [8] Section 274 of the Criminal Procedure and Evidence Act of 1938 provides as follows:

“Onus of Proof in Prosecution under Taxation Laws”.

“274. 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”.

- [9] Owing to the wording of the Section in question, the Applicant contended that it violated his constitutional right to a fair hearing as envisaged by Section 21 of the Constitution particularly Sections 21 (1) and 21 (2) (a) thereof. In this regard he contended that his trial would not be fair because contrary to the well-established principle of our law, he would not be presumed innocent as he would be required to prove that he did not commit the offence. Although this means that he would be deemed to have committed the offence in question he could escape liability if he was

able to show that he was not guilty. In other words he would be required to prove his innocence. The Sections concerned read as follows:

“Right to a 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;”

[10] It is not in dispute that after the Applicant had raised the point of law he had on the application or otherwise of Section 274 of the Criminal Procedure and Evidence Act, to his matter, he asked the presiding Magistrate to refer the matter to this court for a determination whether the said Section was inconsistent with or in conflict with the Constitution, particularly Section 21 as read with Section 21 (2) (a) thereof. It is

contended and again without being disputed, that the presiding Magistrate did not accede to the request of referring the matter to this court for determination, but instead directed the Applicant to move an application for the said determination before this court. As the determination was awaited, the criminal proceedings instituted against him before the Magistrate's court were stayed pending the outcome of the application referred to. The current proceedings must therefore be seen in this light.

[11] It merits mention that whereas it is common cause that the Applicant applied for the reference of the matter to this court for the determination of the question whether or not Section 274 of the Criminal procedure and Evidence Act of 1938 was constitutionally compliant; there is an allegation or indication that the crown counsel involved in the matter never clarified that there was not going to be any reliance on Section 274 of the Criminal Procedure and Evidence Act by the Prosecution. I say this for the reasons that will become apparent later on in this judgment. Of course had this been clarified and made an issue by the crown in the proceedings before the Magistrate, it may well be that it would have been decided then, with speculation being avoided, whether the application would have been filed or not.

[12] There is an inescapable inference that for the crown or the Respondents to now contend that the crown was not going to rely on Section 274 of the Criminal Procedure and Evidence Act, their contention could easily be seen to be an afterthought. The position of our law is settled on the fate of an afterthought which is that it falls to be disregarded. See *Dominic Mngomezulu and 9 Others v The King, Criminal Case No. 94/1990 (Unreported)*.

[13] In these proceedings the Applicant seeks the following reliefs or orders:-

1. Declaring Section 274 of the Criminal Procedure and Evidence Act No. 67/1938 unconstitutional and void in so far as it is at variance with Section 21 (2) (a) of the Constitution of the Kingdom of Swaziland Act No. 1/2005;
2. Awarding costs of this application in the event of unsuccessful opposition against such opposing party;
3. Granting Applicant any further or alternative relief.

[14] The case advanced by all the Respondents in these proceedings is somewhat similar – its heart being that the applicant has approached this court prematurely in that the section complained of was not one to be, or

was not one being, relied upon by the crown in the prosecution of its case against the Applicant. Otherwise, it is contended, the crown had ample evidence against the Applicant as an accused person and that it was going to lead such evidence in court. In other words, the Applicant was not going to suffer any prejudice as the case against him was not going to rely on the reverse onus suggested by or brought about by the impugned section but the crown was allegedly going to rely on its own evidence to establish the applicant's (accused's) guilt.

[15] The contention went on, a court would not determine a constitutional provision unless it was evident that same was going to apply against an affected party who was himself going to be affected prejudicially. This it was contended was in line with the principle of ripeness or that of avoidance. The effect of the latter principle being that a court would not decide a constitutional provision if it could decide a matter on a different point altogether. This principle, there is no doubt, is a long standing one and is supported by such cases as *Jerry Nhlapho and 24 Others v Lucky Howe N. O. Civil Appeal Case No. 37 of 2007* and *Thokozile Dlamini v The Attorney General and Others Civil Appeal Case No.../2010*.

[16] It was further contended by the Respondents that the crown had not indicated to the Applicant that he was going to be subjected to the dictates of Section 274 of the Criminal Procedure and Evidence Act and that therefore there was no imminent threat of prejudice on him to justify his having had to approach this court for the reliefs he seeks. It was further contended that the Applicant (as the accused) had not been asked by the crown to adduce or produce any evidence of a reasonable cause to enable him avoid a conviction.

[17] In so far as the section had been referred to as a reverse onus, it was argued, on behalf of the Respondents, that it was not every reverse onus that would be viewed as unconstitutional. Whether or not this one was unconstitutional it was argued, that was not a matter for decision in these proceedings.

[18] The purpose of the Criminal procedure and Evidence Act is to regulate the procedure and the adducing of evidence in Criminal Cases dealt with by the courts in Swaziland. In my view Section 274 of the Criminal procedure and Evidence Act regulated the procedure on how matters in which a failure to pay any tax or impost to Government or any failure to furnish any information in that regard to any public officer was to be

dealt with or determined by the court and not the prosecution. The section directs the court in such matters to deem or treat the accused as if he has committed the tax offences concerned, unless he produces evidence to the contrary.

[19] The Act is not ambiguous at all to call for any interpretation by this court as opposed to it giving the said words their ordinary meaning, which is that where the court is dealing with a matter where the accused is alleged to have failed to pay any tax or impost due to the Government or he is alleged to have failed to give any information to a public officer relating to a tax matter, he shall be deemed or taken to have committed such an offence unless he proves the contrary.

[20] I therefore cannot agree that the Applicant's application can be said to be prematurely or to have been brought in the absence of a serious threat of prejudice to him in the special circumstances of this matter. The fact of the matter being that he had been charged with a tax matter which had to be dealt with in the manner stated or regulated in the impugned section by the Judicial Officer concerned. I do not see, and I was not directed to anything in that regard, why the prosecution should inform an accused

person whether or not it was to rely on any independent evidence or the section itself in a case where the directive provision of the Act states how a certain matter should be dealt with. I was in this regard not referred to either a provision of the Act itself or to any decided cases to that effect.

[21] Whereas I agree with the principle of ripeness or avoidance, and its meaning and effect, I am convinced it is not applicable in this matter. If the prosecution of the matter was being pursued, I do not understand how the application of the section in question could be avoided particularly at the instance of the crown or prosecution when in fact the application of Section 274 as mentioned above was a matter for the court rather than for the prosecution to apply. I am convinced the only meaningful undertaking of non-application of the section would in reality have to come from the court itself. However, it is itself without such a discretion, in my view. It cannot choose whether or not to deviate from the provisions of the section; where same is applicable the court has no discretion. I am convinced therefore that the principle enunciated in a long line of cases which include *Jerry Nhlapho and others v Lucky Howe N. O. (Supra)*; *Thokozile B Dlamini v The Swaziland Government (Supra)* as well as *National Coalition for Gays and Lesbians Equality v Minister of Home Affairs 2000 (2) SA 1 (cc)*, is not

applicable in this matter as in my view it cannot be realistic to say that there was no imminent threat of prejudice to the Applicant.

[22] I am supported in the view I have taken of the matter by the fact that when the question of the constitutionality or otherwise of the section was raised before the Magistrate meant to hear the criminal trial no mention was made by the Respondent's Legal Representatives in that court that no reliance was going to be placed on Section 274 of the Criminal Procedure and Evidence Act. The Magistrate himself made no mention that he was not going to pay any attention to the act, assuming he had such a choice to make or discretion to exercise. I therefore cannot agree that there was any lack of ripeness in the matter.

[23] The question is now whether or not the section in question amounts to what is known as a reverse onus and whether or not if it is; it follows that the section ought to be struck down and removed from the statute in question.

[24] In my understanding a reverse onus provision or presumption is a statutory provision that places the burden or onus of proof on someone else other than the person who is normally required to bear such onus or

burden of proof in the determination of matters or disputes in terms of the common law. I cannot say there is a doubt that Section 274 of the Criminal Procedure and Evidence Act in the manner in which it is couched does just that. For emphasis sake there can be no arguing that the said section places the onus of proving that he was not guilty of the tax offences mentioned therein on the accused person contrary to the normal requirement that it is the crown that is required to prove the accused person's guilt. I must say I did not hear the Respondent's attorneys to be arguing differently during the hearing of the matter. It was in fact an indirect acknowledgment that this was the position when they contended that they were not going to rely on the same section during the provision and when they argued it was not every reverse onus that was unconstitutional when referring to the excerpt from *S v Zuma And Others 1995 (4) BCLR 401 (CC)*.

[25] A safe conclusion to draw from the *S v Zuma and others (Supra)* case and that of *S v Mbatha; S v Prinsloo 1996 (3) BCLR 293 CC* is that a reverse onus provision or presumption where a criminal sanction may be imposed, prima facie violates the rights of an accused to a fair trial as envisaged by Section 21 (1) of the constitution and the right to be presumed innocent as envisaged in Section 21 (2) (a) of the Constitution.

See in this regard the article by GK Goldswain titled The Application And Constitutionality Of The So called “Reverse” Onus Of Proof Provisions And Presumptions in the Income Tax Act; the revenue’s unfair advantage: available on internet from the Department of Taxation, University of South Africa.

[26] The argument advanced on behalf of the Respondents that it is not every reverse onus that is unconstitutional can be correct but such an onus, can only avoid being declared unconstitutional if it can be shown that same is reasonable. This would, for instance be the case in a situation where there is a pressing social need for the effective prosecution of the crime. For example in a case where the crime is very common and there is a need to stamp it out. It is disputable that we have reached that stage and no evidence was led in that regard. As a result this cannot be the case if it conflicts with a guaranteed right in the constitution, which should be upheld at all times.

[27] I am for the foregoing considerations convinced that Section 274 of the Criminal Procedure and Evidence Act of 1938, is unconstitutional and that it should be struck down. I take it that by their assertion they were

not going to rely on it in prosecuting this matter the Respondents, are confirming it is not so paramount in the prosecution of tax matters, particularly under the constitutional dispensation and can therefore be struck down without major prejudicial consequences to the effective prosecution of such matters.

[28] Consequently I make the following order:

28.1 Section 274 of the Criminal procedure and Evidence Act of 1938 be and is hereby declared unconstitutional and is to be struck down from the statute books.

28.2 Each party is to bear its costs.

N. J. HLOPHE J
JUDGE - HIGH COURT

I agree

**J. P. ANNANDALE J
JUDGE – HIGH COURT**

I also agree

**Q. M. MABUZA J
JUDGE – HIGH COURT**