IN THE HIGH COURT OF SWAZILAND

RULING

HELD AT MBABANE **CASE No. 191/15**

In the matter between:

REX

VS

SIBUSISO BONGINKHOSI SHONGWE

SIBUSISO BONGINKHOSI SHONGWE & ASSOCIATES

Neutral citation: REX V Sibusiso Bonginkhosi Shongwe and another (191/2015) [2019] SZHC 57 (25 March 2019)

CORAM : MAMBA J

HEARD : 14 March 2019

DELIVERED: 25 March 2019

[1] *Criminal Law and Procedure – essential elements of an indictment, charge or summons. Section 122 of Criminal Procedure and Evidence Act 67 of 1938 (as amended). Indictment to contain in clear, precise and intelligible language all the essential elements of the crime and the time, place or property (if any) in respect of which the offence was committed, including, where applicable, the statutory provisions contravened.*

[2] Criminal Law and Procedure – exception or objection that indictment has formal defects. Sections 146, 147 and 152 of Act 67 of 1938. Objection to be made before pleading and not after.

[3] Criminal Law and Procedure – application to quash indictment on ground that it is calculated to embarrass or prejudice the accused. Section 152 of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). Application to quash indictment to be made before pleading – court has a discretion to quash or order an amendment of the charge or to refuse to make any order.

[1] The two accused persons have been charged with about 22 counts. Some of these counts have alternative charges to them. Save for the charge of Perjury on count 6 and that of Fraud on count 7, all the charges are framed under specific provisions of the Prevention of Corruption Act 3 of 2006 (hereinafter referred to as POCA).

[2] The charges of Perjury & Fraud referred to above are under the common law and the accused have not registered any complaints in respect of these.

[3] In the notice of the motion the accused have sought 2 prayers namely:

> '1. Quashing the indictment against the [accused] on the basis that the charges therein are calculated to prejudice or embarrass them in their defence as they do not disclose offences cognisable by the court.
>
> 2. Excepting to the charges in the indictment on the basis that they [do] not disclose an offence cognisable by the court.'

[4] It is noted herein that this application is only in respect of the statutory offences and not the two common law crimes in counts 6 and 7 of the indictment.

[5] The application is opposed by the crown; stating that the charges do clearly disclose the statutory offences which are stated in the cited provisions of POCA. The crown has submitted infact that the various counts or charges

complained of by the accused, have been framed or drafted in almost word for word as stated in the applicable provisions of POCA.

[6] The starting point in this debate, I think is Section 21 of the Constitution. Section 21 (1) states as follows:

> 21 (1) In the determination of Civil rights or 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 [and]
>
> (2) A person who is charged with a criminal offence shall be - - -

(b) informed as soon as reasonably practicable in a language which that person understands and in sufficient detail, of the nature of the offence or charge.'

As can be seen in the accused's prayers cited above, the accused do not complain about the language used; which is English. Their complaint is that the charges as framed, do not disclose an offence cognisable by the court or the law or that it is so framed as to cause them prejudice in their defence. The objection or exception is, I think, in terms of section 146 of the Criminal Procedure and Evidence Act 67 of 1938 (as amended)

(hereinafter referred to as the Act), the application to quash the charges is in terms of Section 153 (1) of the Act.

[7] Section 146 stipulates as follows:

'146 (1) Every objection to an indictment or summons for any formal defect apparent on the face of thereof shall be taken before the accused has pleaded but not afterwards.

(2) Every court before which any such objection is taken for any formal defect may if it is thought necessary, and the accused is not prejudiced in his defence, cause the indictment or

summons to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.'

Thus this section regulates the amendment of formal defects on the indictment or summons rather than issues where the objection is that the indictment is aimed or geared to embarrass or prejudice the accused in his defence.

[8] Section 122 of the Act lays down the essential elements of an indictment, summons or charge:

122 (1) Subject to the provisions hereinafter contained and subject also to any special provisions contained in any law relating to any particular offence, each count of the indictment or summons shall set forth the offence with which the accused is charged in a manner, and with sufficient particulars as to the alleged time and place of committing such offence and person (if any) against whom the property (if any) in respect of which such offence is alleged to have been committed, as are reasonably sufficient to inform such accused of the nature of the charge.

(2) In criminal proceedings in the High Court or any Magistrate's Court - - -

(a) the description of any offence in the words of any statutory enactment or statutory regulation creating such offence, or in similar words, shall be sufficient; and

(b) any exception, exemption, proviso, excuse or qualification, whether it does or does not in the same section accompany the description of the offence in the statutory enactment or statutory regulation creating such offence, may be proved by the accused but need not be specified or negatived in the indictment or summons, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the prosecution.

(3) If any of the particulars herein referred to are unknown to the prosecutor it shall be sufficient to state such fact in the indictment or summons.'

[9] In *S V Hugo 1976 (4) SA 536 (A) at 540,* the Court stated as follows:

'An accused person is entitled to require that he be informed by the charge with precision, or at least with a reasonable degree of clarity, what the case is that he has to meet and this is especially true of an indictment in which fraud by misrepresentation is alleged. *(CF.RV Alexander and others 1936 AD 445 at P.457; S V Heller and another 1964 (1) SA 524 (T) at P.535H).'*

And in *Alexander (Supra)* the court explained the rationale for the requirement of clarity and precision in an indictment or summons in the following words:

> 'The purpose of a charge sheet is to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the crown intends to lay against him.'

[10] I have referred above to the Constitutional provisions regarding a fair trial and that, to my mind, goes to the root of the issue because one cannot meaningfully prepare his defence where it is not clear to him what is the case that he has to meet or defend in court.

'[20] The question whether an accused person has been prejudiced by a defective charge in the proper conduct of his or her case speaks to the fairness of the trial. Section 35 (3) (a) of the Constitution guarantees every accused person the right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it and the warranty to be presumed innocent until proven guilty.'

(That was the South African Constitutional Court in *Moloi and Others V Minister of Justice and Constitutional Development & Others 2010 (2) (SACR 77 (CC).*

[11] To use an old yet useful cliché, what may be sufficient details on an indictment or summons will also depend on the particulars supplied by the crown and ultimately the relevant offence charged. The same is true of what would be a fair trial. In *S V Thobejane 1995 (1) SACR 329 (T)* at 334 the Court held that:

'At common law the accused, according to principles of a fair trial, is entitled to sufficient information to;

(a) Enable him to understand what the charge against him is and what conduct on his part is alleged to constitute an offence and

(b) Sufficient information to enable him to instruct his legal advisor and to prepare his defence (which in practice would largely overlap with (a) above, and

(c) Insofar, as the charge sheet and summary of facts supplied by the state is inadequate for the above purposes to such further disclosure or information that may be required to achieve such purposes.'

Ultimately, the charge or indictment must be framed such that it contains all the essential elements of the crime that the crown needs to prove to

sustain a conviction – bar of course the formal evidence that would be led to sustain such a conviction. That, in my judgment, is what the charge or summons must contain. Over and above the essential elements of the crime charged, the indictment must also contain the facts alleged by the crown. Facts such as the place, time and nature of the act complained of by the crown must be clearly specified. Where the accused is left to guess or even deduce from the little or scant material supplied in the indictment, he has a legitimate cause to complain that the indictment does

not contain sufficient material to enable him to plead or prepare his defence.

[12] In *R V Preller 1952 (4) SA 452 (A) at 469*, the court stated as follows:

'An indictment, in order to be valid must aver that the accused has committed an act that is a contravention of the criminal law. In the present case the consideration for the receipt of the fee, advantage or reward, is an essential part of the crime charged, and a matter that created doubt in my mind is the wording of the averment in the indictment, namely, 'in consideration of his doing or forbearing to do anything in respect of his doing or forbearing to do anything in respect of any matter whatsoever, or transaction, actual or proposed, in which the said counsel was concerned.' The words that follow this extract do not serve to care the omission, if it be an omission, to aver the commission of an act by the appellant. It does not appear to me that fact that the draftsman has followed the wording of the ordinance assists, as I agree with my brother Van den Heever, that words that may be appropriate to defining an offence in general terms, may be inept in averring that the commission of the offence ---' has been averred to the draftsman slavishly following the words of the relevant section and stressed the need to use clear and

intelligible language. See also *S V Ismail and Others, 1993 (1) SACR 33 (D) at 40.*

[13] Du Toit et al, **Commentary on the Criminal Procedure Act (Revision service 15, 1995) at 14 – 4** makes the following pertinent points; namely:

> 'On the one hand the interests of the accused require that sufficient particulars be included in the charge to inform him of what is to be alleged against him. On the other had ample provision is made for the rectification of defective charges and clarification of vagueness and ambiguity (S.87) makes it possible, for example, to request for further particulars --- Nonetheless the courts will not be satisfied with carelessly and ambiguously drawn up - charges, and drafters of charges should in the interests of orderly and fair litigation present neat and clearly formulated charges (*R V De Bruyn and Another 1957 (4) SA 408 (C) 410 H).*

[14] I now examine the specific objections raised on each of the charges in this case. In doing so I shall where necessary reproduce each relevant count as it appears in the indictment.

[15] On count one:

The [first] accused is guilty of contravening Section 30 (a) as read with Sub sections (c) (i) (d) (i) (ii) and (e) together with Section 35 (2) of the POCA.

In that upon or about the dates 17th and 19th December 2014 at or near Mbabane in the Hhohho Region, the said accused directly or individually, being a politician did unlawfully and intentionally accept and or agree and offer to accept an advantage from another person. Unknown to the prosecution who has links with a company called Impunzi Wholesalers (Pty) Ltd in the form of money amounting to E2 000 000.00 ---- for the benefit of the accused or that of one or more members of the judiciary in order for the accused to influence one or more members of the judiciary to preside over a pending civil litigation involving Impunzi Wholesalers (Pty) Ltd and the Swaziland Revenue Authority (SRA) and rule in favour of the former and thus did thereby contravene the provisions of the said Act.'

The objection by the accused on this court is that;

> 'it is clear from a reading of Section 30 that there is no offence that has been disclosed --- because the amount of E2 000 000.00 was not received by me in my personal capacity as a politician but was received by 2nd accused [the law firm].'

In terms of Section 2 of POCA, unless the context otherwise requires, "advantage" means;

(a) any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest of any description;

(b) any office, employment or contract;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or part;

(d) any other service, favour or gratification other than entertainment;

(e) the exercise or forbearance from the exercise of any right, power or duty; or

(f) any offer, undertaking or promise, whether conditional or unconditional, of any advantage referred to in paragraph (a), (b), (c), (d) or (e).'

This objection is, with respect total misconceived, whilst it may be a defence for the first accused that the money was not received by him in his personal capacity or in his capacity as a politician, it cannot *ipso facto* be said that the charge discloses no offence. Additionally whether the money was received by him or not is a matter of evidence and does not

relate to how the charge is framed. The relevant Section, 30 (a) makes it an offence for any person 'who, directly or indirectly – being a politician, demands or accepts or agrees or offers to accept any advantage from another person, whether for the benefit of that politician or for the benefit of any other person, in order for that politician or that other person to act or to influence another person so to act, in a manner that amounts to' an unlawful or dishonest act or an abuse of position of power or authority. The charge plainly alleges that the first accused received the relevant money from a person unknown to the crown with the aim of bribing or unlawfully influencing a member or members of the judiciary in a pending case involving Impunzi Wholesalers (Pty) Ltd and SRA. The advantage received by the accused was the money involved and this was either for his own benefit or for the benefit of the member or members of the judiciary that was or were involved in the pending case, or both. The charge proclaims that the money was received by the accused either directly or indirectly with the aim to influence unjustly, the outcome of the pending litigation. The objection on this count is unmeritorious and is dismissed.

[16] On count 2 the first accused is charged with the offense of contravening Section 33 (1) (a), 2 (2) (i) and (b) (i) and (ii), 3 (e) as read with section 39 (c) and 35 (2) of POCA, in that

'--- upon or about the month of December 2014 and at or near Mahlanya area in the Manzini Region, the said accused person did unlawfully and intentionally offer to give an advantage of E200 000.00 --- to Justice Mpendulo Simeon Simelane as a form of inducement and or incitement to preside over a pending civil litigation involving Impunzi Wholesalers (Pty) Ltd and the Swaziland Revenue Authority (SRA) and rule in favour of the former and thus did thereby contravene the provisions of the Act.'

In the alternative, the accused is charged with a contravention of Section 21 (1) (a) and (c) as read together with Section 35 (1) of POCA, in that upon the same time and place as stated in the main charge, the accused unlawfully and intentionally offered to give an advantage of E200 000.00 to the said Judge 'as a form of inducement and incitement to preside over a pending civil litigation involving Impunzi Wholesalers (Pty) Ltd and Swaziland Revenue Authority (SRA) and rule in favour of the former and thus did thereby contravene the provisions of the said Act.'

The objection by the accused on this count and its alternative is contained in just a single sentence and it is that:

'it is clear from the affidavit of the said Mpendulo Simelane that

there is no offence that was committed because he alleges that this happened in early 2015 yet the matter was dealt with by Justice S.B. Maphalala on the 16th December 2015.'

Again, this objection does not attack or challenge the framing of the charge but rather the potential evidentiary material in support thereof.

[17] Section 33 (1) (a) and (b) makes it an offence for any person who directly or indirectly:

(a) gives or offers to give or offers any advantage to a judicial officer whether for the benefit of that person or another person; or

(b) being a judicial officer demands or accepts or agrees or offers to accept any advantage from any other person, whether for the benefit of that judicial officer of another person and,

'21. (1) A person who, whether in Swaziland or elsewhere offers any advantage to any public officer as an inducement to, or a reward for, or otherwise on account of that public officer –

(a) performing or forbearing to perform of having performed or forborne to perform any act as such public officer; or

…

(c) assisting, favouring, hindering or delaying or having assisted, favoured, hindered or delayed any other person in

> the transaction of any business with a public or private body, commits an offence [of bribery].'

The charge in effect alleges that the accused unlawfully and intentionally offered a bribe of E200 000.00 to Judge Mpendulo Simeon Simelane in order for the said Judge to preside in a matter involving the named litigants and ultimately to decide or find in favour of Impunzi Wholesalers (Pty) Ltd. There is nothing unclear, embarrassing or ambiguous about these charges. It is, however, noted that Section 21 refers specifically to an offer of an advantage being made to a public officer. The alternative charge does not state that the bribe was made to Judge Simelane in his capacity as a public officer. For the sake of clarity and completeness, the charge must make this allegation and counsel for the crown consider this fact and undertook to amend it. This is of course permissible in terms of Section 146 (2) of the Act; as this is a formal defect in the indictment. Otherwise the objection is dismissed on this count as well.

[18] The third count alleges that both accused are guilty of the crime of contravening Section 34 (1) (b) and (2) as read together with Section 35 (1) of POCA.

It is alleged that 'on or about the period between 17th December 2014 and March 2015 and at or near Mbabane in the Hhohho Region, the said accused persons acting individually and or jointly and in furtherance of a common purpose did unlawfully and intentionally control funds amounting to E2000 000.00 --- and upon being requested to give an explanation by the Commissioner in writing, in a letter dated 18th March 2015 on how the said funds had been acquired and or came under their control, the said accused persons failed to give any explanation within the stipulated time of seven days and as such are presumed to have contravened the provisions of the said Act.'

The first alternative charge to this count (count 3) was abandoned by the crown and nothing needs to be said about it in this ruling.

The second alternative charge alleges a Contravention of Section 57 (b) of POCA. It is alleged that on or about the 7th day of April 2015 and at or near Mbabane in the Hhohho Region, both accused, acting jointly and or individually and in furtherance of a common purpose 'did unlawfully and intentionally control funds amounting to E2000 000.00 --- and upon being requested to give an explanation by the Commissioner in writing in a letter dated 18th march 2015, on how the said funds had been acquired and or came under their control, the said accused persons knowingly gave misleading information that the said E2000 000.00 was held in trust on

behalf of a client in their letter to the Commissioner dated the 7th April 2015 and as such contravened the provisions of the said Act.'

[19] The accused have pointed out that the relevant provisions of Section 34 of POCA do not provide that an explanation to the Commissioner's request must be given within a stipulated period and therefore, it can never be an offence by them in failing to give an explanation within a period of seven (7) days as alleged in the indictment. This point has been properly conceded by the crown. Counsel has undertaken to redraft or recast this charge by deleting or omitting the words "within a period of seven days."

[20] The first accused also challenges these charges on the ground that

> '---the charge does not disclose an offence against me or the 2nd [accused] because in April 2015, I was not only gainfully employed, but I was also running a private law firm which as stated earlier is entitled to hold monies in trust for its clients:'

The accused further object to the charge on the ground that the indictment does not disclose an offence inasmuch as 'it does not state how the explanation was misleading.' That the relevant funds were held in a trust

account which account the accused were legally obliged to keep or hold, in terms of the applicable law, cannot be a ground to say that the indictment does not disclose an offence. Money laundering is often committed through the use of lawfully held bank accounts. Whether the money was lawfully held or not is a matter of evidence, ultimately. It is also noted that counsel for the crown made an undertaking to recast the alternative count to state or explain why the information given to the Commissioner was misleading. (The Commissioner) referred to in this case is the Anti-Corruption Commissioner. Section 57 (a) provides that

> 'any person who, during the course of an investigation into an offence alleged or suspected to have been committed under this Act knowingly –
>
> (a) makes or causes to be made a false report to the Commissioner of the commission of an offence; --- commits an offence ---.'

The charge as drafted, does not say how or in what way or manner is the explanation given by the accused to the Commissioner was or is misleading. It only says that the accused told the Commissioner that the money was being held on behalf of a client. Accordingly, in terms of Section 146 (2) of the Act, I order that the charge for an Contravention of Section 57 (b) be amended so as to cure the formal defect regarding the

falsity of the explanation given to the Commissioner by the accused. The plea to quash it is dismissed.

[21] Again, the first accused is charged with a contravention of Section 30 (a), (d) (i) and (e) as read with Section 35 (2) of POCA. This charge reads as follows:

'The accused is guilty of **CONTRAVENING SECTION 30 (a) AS READ WITH SUBSECTION (d) (i) AND (e) TOGETHER WITH SECTION 35 (2) OF THE PREVENTION OF CORRUPTION ACT NO. 3 OF 2006**.

In that upon or about the 7th of April 2015 and at or near Mbabane area in the Hhohho Region;

(i) **WHEREAS** on the 17th December 2014, an amount of R1 Million was deposited in South Africa by a person unknown to the Crown to First National Bank Account Number 62044869272 being a Business Cheque Account held by Sibusiso Shongwe & Associates to which the accused was a Director;

(ii) **WHEREAS** on the 19th December 2014, two amounts of R500 000.00 each were deposited in South Africa by a person unknown to the Crown to First national Bank Account Number

62044869272, being a Business Cheque Account held by Sibusiso B. Shongwe & Associates to which the accused was a Director;

(iii) **WHEREAS** through a letter of request of information in terms of Section 34 of The Prevention of Corruption Act, 2006 served on the 19th March 2015 to Accused's Personal Secretary one Temantimandze Shongwe, the Commissioner, Anti-Corruption Commission requested the accused in the latter's capacity as Director of Sibusiso B. Shongwe and Associates to give a satisfactory explanation in writing as to how the said total amount of R2 Million came under the acquisition and/or control of Sibusiso B. Shongwe and Associates.

(iv) The accused directly or indirectly being also a politician (Minister for Justice and Constitutional Affairs) did unlawfully demand and/or accept the advantage, from Government as a legal person, of using his office position of authority as Senator and Minister for Justice and Constitutional Affairs and resources attended thereto, to wit, Government Letterheads, and for his benefit and/or for that of Sibusiso B. Shongwe & Associates, and wrote a letter on Government Letterheads dated of April 2015 in response to and addressed to the Commissioner, Anti-Corruption Commission the contents of which abused, intimidated and sought to thwart the

investigations into the acquisition and/or control of the said R2 Million by Sibusiso B. Shongwe and Associates, an act that amounted to:

(i) The abuse of accused's position of authority as Senator and Minister of Justice and Constitutional Affairs.

And an Act designed to achieve the unjustified result of abusing, intimidating and attempting to thwart the investigation into the acquisition or control of the said R2 Million by Sibusiso B. Shongwe and Associates.

AND THEREFORE the accused did contravene the said Act.

Regarding this charge the accused states that

' --- the charge does not disclose an offence in that it does not [allege] how [I unlawfully] demanded or accepted the advantage, from Government as a legal person, or using my office position of authority as Senator and Minister for Justice and Constitutional Affairs.'

Regretfully, both the charge and the objection are less than clear on what they seek to convey. The charge on the one hand charges that the accused, as a politician and Minister for Justice, directly or indirectly and unlawfully demanded or accepted an advantage 'from Government ----

for using his office position or authority --- and resources attended thereto, to wit, Government Letterheads, and for his benefit and or for that of Sibusiso B. Shongwe & Associates, and wrote a letter on Government Letterheads ---." That is the first part of the charge; that the first accused, being a politician and government Minister, used his position to unlawfully demand or accept an advantage in the form of Government stationery or resources (Letterheads) for his private and personal use. This advantage was either for himself or that of the law firm, or both. That seems to fall under Section 30 (a) of POCA.

[22] The second part or segment of the charge relates to the contents of the letter (on Government's Letterheads) inasmuch as such contents '--- abused, intimidated and sought to thwart the investigation into the acquisition of and or control of 'the money in question, and this was an act designed to achieve' an unjustified result.

[23] Count 4 is, in my judgment too confused and confusing. First, it is not clear whether the accused is being charged with using his position as aforesaid to gain or have an advantage of the use of government Letterheads for his personal business, or he is being charged for using his position or status to intimidate the Commission and thus thwart the

investigation that was underway. Secondly, it is not clear to me whether the sting in the charge lies in the use of his position or status by the first accused to gain or achieve an unjustified advantage. Thirdly, whether the mere contents of the letter constitutes the abuse or intimidation complained of; or all three of these things. The charge is too convoluted and the accused cannot be expected to plead thereto. Count 4 is accordingly quashed and the crown is granted leave to amend it should it be so advised or minded.

[24] I now examine count 5 and the challenge or objection thereto. This is a charge for a contravention of Section 42 (1) (b) as read with Section 42 (2) (a) (i), (b) (i) and (ii), (c) and (d) of POCA. It is alleged by the crown that on or about 17 April 2015 and at or near Mbabane in the Hhohho Region, 'the said accused did unlawfully accept and or agree or offer to accept an advantage from Michael Mathealira Ramodibedi for the benefit of the said accused; and through the illegal, dishonest, biased manner and or misuse of information or material acquired in the course of the exercise or carrying out or performance of judicial functions by the said Ramodibedi in a manner that amounted to the abuse of that judicial position of authority and violation of the legal duties or set of rules in a

design to achieve an unjustified result and amounting to an unauthorised act of handing a

warrant of arrest proceedings court file under High Court Case No. 173/2015 to the accused and thus did thereby contravene the provisions of the Act.'

(That is a really long-winded piece).

[25] This charge alleges that the first accused unlawfully and intentionally received an advantage by the mere acceptance by him of the court record from the then Chief Justice. How or in what way such receipt of the court record was an advantage for the accused is not apparent from the indictment as couched or framed. The objection by the accused is that the indictment on this count does not disclose an offence '--- as it [does] not allege what advantage I accepted and or agreed and or offered to accept from --- the then Chief Justice.' I do not think this is entirely correct though. As already stated, the charge states that the receipt or acceptance of the court record constituted or constitutes an advantage within the meaning of the quoted section of the law. In my judgment this is an issue or debate that should not be decided at this stage of the proceedings but rather after hearing evidence. The objection is therefore refused.

[26] In reaching the above conclusion, I have taken into account the fundamental role played by the prosecuting authority in the prosecution of crime. The Director of Public Prosecutions is entrusted with the discretion to decide, - based of course on the facts at his disposal, - what charges to proffer against any individual whose action is deemed to constitute a criminal offence. This discretion is not absolute and may, in a proper case, be review and set aside by the court. The court is also there to safeguard the rights of the accused against unfair and unwarranted prosecution by the crown, thus the provision of, amongst other things, Section 146, 147 and 152 of the Act.

[27] *In S V Wouter Basson (CCT 30/03) [2004] ZACC 13, 2005 (1) SA 171 (CC)*

a case to which I was referred by defence counsel, the court stated as follows:

'[31] The question that arises is whether the quashing of the charges gives rise to a constitutional matter. In our constitutional state the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an

essential means of protecting the rights to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The state must protect these rights through, amongst other things, the policing and prosecution of crime.

[32] The constitutional obligation upon the state to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework. The effect of the High Court's judgment in this case given the interpretation of Section 319 by the SCA and its previous jurisprudence, is that the state will be prevented from prosecuting the accused on the charges which were quashed, without the state being given an opportunity to appeal the correctness of that decision. This case is different from those in which a charge is quashed, but where the state is able to supplement the charge sheet in a manner that enables the prosecution to take place. This course is not open to the state here.

[33] ---

Where therefore the court quashes charges on the ground that they do not disclose an offence with the result that the state cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the state, in turn, is obstructed. The constitutional import of such a consequence is

> particularly severe where the state is in effect prevented from prosecuting an offence aimed at protecting the right to life and the security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter:'

Therefore, in safeguarding the rights of an accused to a fair trial, the court must also take into account the rights of the crown to prosecute criminal offences. It is for these reasons, I think, that Section 152 of the Act gives the court the discretion, where it finds that the accused has made out his case, to either quash the indictment or order that the indictment should be amended in a particular way which appears appropriate, taking into account what is in the best interests of justice in the particular circumstances of the case at hand.

[28] On counts 8 – 22 inclusive, the accused are charged with a contravention of section 41 (1) and (2) of POCA. It is alleged that on the various dates and places stated on each count, the accused did 'unlawfully and intentionally launder the proceeds of unlawful activities by issuing instructions to First National Bank to debit account number 62044869272 held by the second accused and credit various specified accounts or persons with various amounts of money and that such a transaction had the effect of:

> ‘managing, investing, concealing, disguising, disposing of the aforesaid amounts being proceeds of crime, knowing or having reasonable grounds for believing the same to be the proceeds of crime.’

The accused have stated that these charges do not disclose an offence;

> ‘because the charge does not state why the transaction was unlawful.’

I cannot agree. The indictment clearly states on each count that the transaction was unlawful because it involved dealing in the proceeds of crime.’

[29] Section 41 (1) of POCA states as follows:

> ‘41 (1)A person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and –
>
> (a) enters into any agreements or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or,

(b) performs any act in connection with that property, whether it is performed independently or in concert with any other person, commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand Emalangeni or to a term of imprisonment not exceeding ten years or to both.

(2) For an offence to be committed under this section, the agreement, performance, transaction or act in connection with the property mush have or be likely to have an effect of –

(a) concealing or disguising the nature, source, location, disposition or movement of that property or the ownership of that property or any interest which anyone may have in respect of that property; or,

(b) enabling or assisting any person who has committed or commits an offence whether in the country or elsewhere –

(i) to avoid prosecution; or

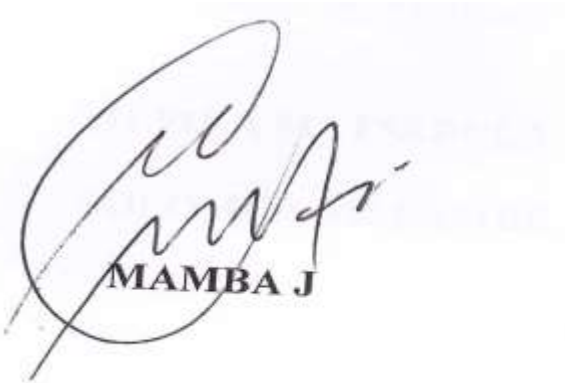
(ii) to remove or diminish any property acquired directly as a result of a commission of an offence.'

Money laundering is by definition a process by which a person hides or disguises the proceeds of crime so that it appears as having its origins from a legal or legitimate source. In the present case, each of the several charges under consideration do allege that the transaction in question was unlawful inasmuch as it involved dealing in the proceeds of crime. As to whether these were proceeds of crime or not, this is a matter for evidence and is a matter to be decided during the trial and not at this stage. Therefore, the necessary conclusion is that the objections on these counts are refused.

[30] The crown has in its final prayer applied for an order for costs against the accused stating that the objections by the accused 'amount to nothing more than yet a further delaying tactic, for which no support exists.' One has to bear in mind though that the accused persons have had a change of attorneys on several occasions since the summons was served on them. They have not be shown to have been blameworthy or culpable in this regard and therefore, although they have been largely unsuccessful in this application, I do not think that a costs order is warranted in this instance. Again **Du toit et al (Supra) at 14 – 17** observes, correctly in my view that;

> ‘An objection in terms of S85 will in certain circumstances not achieve much more than to delay the proceedings or provide the accused with the psychological advantage of winning the first round. As a result of this **Hiemstra** recommended that this section should only be made use of in those circumstances where the accused raises a point of law about which a difference of opinion exists and which affects the question of conviction so drastically that the entire case would collapse if it were found for the accused (210).’

[31] In summary, the crown is ordered to amend counts 2, 3 and its alternative and 4. Otherwise the application is dismissed or refused on the rest of the counts.



For The Crown : Mr G. Lepan (with him Mr T. Dlamini)

For The Defence : Mr S. Bhembe