

SOUTH AFRICA / JUDGMENT

S v Bongo (CC 06/2020) [2021]

ZAWCHC 36 (26 February 2021)

[2021] ZAWCHC 36

COURT

Western Cape High Court, Cape Town

BEFORE

Hlophe JP

CASE / FILE NUMBER

CC 06/2020

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In the High Court of South Africa

(Western Cape Division, Cape Town)

Case Number: CC 06/2020

In the matter between:

The State And Mr Bongani Bongo Accused

judgment delivered on 26 February 2021

HLOPHE, JP:

Introduction

[1] The Accused in this matter, Advocate Bongani Bongo (Mr Bongo) was a member of the National Assembly from 07 May 2014 to 16 October

2017. He was a member of the executive branch of government, having served as the Minister of State Security during the period 17 October 2017 to 26 February 2018. Mr Bongo then became a Member of Parliament on 27 February 2018, a position he still presently hold. The allegation levelled against Mr Bongo is that he offered a bribe to Advocate Nthuthuzelo John Vanara (Mr Vanara), the evidence leader of the Portfolio Committee on Public Enterprises: Eskom Inquiry, in order to delay or collapse the Inquiry. Mr Bongo denied those allegations. He stated that he knew Mr Vanara as a lawyer and had engaged him previously and had discussions with him regarding the parallel processes and enquiries. Furthermore, Mr Bongo referred to a sworn statement submitted by him before the Ethics Committee Inquiry against him. In terms of that statement Mr Bongo denied the allegations relating to collapsing the Inquiry/ and or bribing Mr Vanara.

- [2] When the trial started the following charges were put to the accused by Ms Du Toit-Smit who appeared for the state together with Mr Combrink

Charges

- [3] The State preferred the following charges:

- a) The main count: contravening section 4(1)(b), read with 1,2, 24, 25, 26(1)(a)(ii) and 26(3) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the Act) – Corrupt activities relating to public officers (offering a gratification). In that on or about 10 October 2017 and at or near Cape Town, in the district of the Cape, the accused wrongfully and intentionally, directly or indirectly, offered a gratification to a public officer, Mr Vanara for his own benefit and /or for the benefit of any other person, in order for him to act personally, and/or by influencing another person so to act, in a manner proscribed in section 4(1)(1) of the Act, to wit: to fake illness and/or take sick leave and/or assist the accused to delay and/or to stop the Inquiry into Eskom’s affairs in terms of the Portfolio Committee’s terms of reference from continuing.
 - b) The first alternative charge: contravening section 3(b), read with 1, 2, 24, 25, 26(1)(a)(ii) and 26(3) of the Act– Corruption (offering a gratification). In that on or about 10 October 2017 and at or near Cape Town, in the district of the Cape, the accused wrongfully and intentionally offered a gratification to Mr Vanara for his own benefit and /or for the benefit of any other person, in order for him to act personally, and/or by influencing another person so to act, in a manner proscribed in section 3(i) to (iv) of the Act, to wit: to fake illness and/or take sick leave and/or assist the accused to delay and/or to stop the Inquiry into Eskom’s affairs in terms of the Portfolio Committee’s terms of reference from continuing.
 - c) The second alternative charge: contravening section 10(b), read with 1, 2, 24, 25, 26(1)(a)(ii) and 26(3) of the Act 12 of 2004 – offering an unauthorised gratification – employment relationship. In that on or about 10 October 2017 and at or near Cape Town, in the district of the Cape, the accused wrongfully and intentionally offered an unauthorized gratification for Mr Vanara’s benefit and /or for the benefit of any other person, in respect of him doing an act in relation to the exercise, carrying out or performance of his powers, duties or functions within the scope of his employment relationship, to wit: to fake illness and/or take sick leave and/or assist the accused to delay and/or to stop the Inquiry into Eskom’s affairs in terms of the Portfolio Committee’s terms of reference from continuing.
- [4] Mr Bongo prepared a plea statement in terms of section 115 of the Criminal Procedure Act, 51 of 1977 (Criminal Procedure Act). The document was handed up to court and marked exhibit “A”. The essence of the section 115 statement is that Mr Bongo denied any engagement with Mr Zethembe Khoza (the then Acting Chairperson of the Eskom Board) or engaging in any attempt to collapse the Portfolio Committee on Public Enterprises: Eskom Inquiry (Inquiry Committee). In his response to the 212B notice[1] marked exhibit “B2” Mr Bongo denied all essential allegations levelled against him by the State and put the State to

prove it.

[5] The state's case rested largely on the evidence of Mr Vanara, the evidence leader. There were other witnesses called by the State in an attempt to corroborate Mr Vanara's evidence and to explain the protocol followed by administrative officials in reporting allegations of corruption brought to their attention. When the state closed its case, Mr Hellens SC, who appeared for the accused, Mr Bongo, brought an application in terms of section 174 of the Criminal Procedure Act. The State opposed the application. Heads of arguments were filed by both sides and the matter was fully argued in court on Wednesday, 24 February 2021.

The legal position

[6] Section 174 of the Criminal Procedure Act stipulates the following:

"If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused

committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

[7] It is trite that "no evidence" does not mean that there is literally no evidence, but rather that there is a lack of evidence on which a reasonable court, acting carefully, would convict the accused.[2] Whether or not a discharge should be granted at this stage is a decision that falls in the ambit of the trial court's discretion. This discretionary power is one that must be, self-evidently, judicially exercised.[3]

[8] One of the leading cases regarding section 174 applications is surely *S v Lubaxa*, 2001 (2) SACR 703 (SCA). There the Supreme of Appeal stated the principle as follows:

"[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates

himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the

rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively on his self-incriminatory

evidence.

[19] The right to be discharged at that stage of trial does not necessarily arise, in my view, from considerations relating to the

burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself.

That is recognised by the common law principle that there should be ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before a prosecution is initiated (Beckenstrater v Rottcher and Theunissen 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.”

[9] It has been held that the credibility of state witnesses plays a very limited role at this stage in the proceedings.[4] It must be noted that relevant evidence can only be ignored if “it is of such a poor quality that no reasonable person could possibly accept it”. [5] The S v Agliotti [6] judgment by Kgomo, J (as he then was) developed this approach further by stating the following:

“[272] In S v Lavhengwa 1996 (2) SACR 453 (W) the view was expressed that the processes under s 174 translate into a statutorily granted capacity to depart discretionally, in certain specific and limited circumstances, from the usual course, to cut off the tail of a superfluous process. Such a capacity does not detract from either the right to silence or the protection against self-incrimination. If an acquittal flows at the end of the State case the opportunity or need to present evidence by the defence falls away. If discharge is refused, the accused still has the choice whether to testify or not. There is no obligation on him to testify. Once this court rules that there is no prima facie case against the accused, there also cannot be any negative consequences as a result of the accused’s silence in this context. ...

[273] I agree with the view that it is an exercise in futility to lay down rigid rules in advance for an infinite variety of factual situations which may or may not arise. It is thus, in my view, also ‘unwise to attempt to banish issues of credibility’ in the assessment of issues in terms of s 174 or to ‘confine judicial discretion’ to ‘musts’ or ‘must

nots’.” [7]

[10] The legal position in respect of section 174 applications can be summarised thus:

- a) If there is no possibility of conviction besides having the Accused testify and giving incriminating evidence, such accused is entitled to be discharged at the close of the State’s case;
- b) The court may take into account credibility of State witnesses when the court makes a decision whether or not to grant a section 174 application at the close of the State’s case, even if only to a limited extent;

- c) A section 174 application should be granted where the State's evidence implicating the Accused is of such a poor quality that it cannot be relied upon, and there is no credible evidence upon which a court, acting carefully, may convict the Accused. To refuse a section 174 application in such circumstances would be a misdirection, as Traverso, DJP, as she then was, pointed in *S v Dewani*, supra.[8]

[11] I will now proceed to analyse the evidence against the backdrop of this legal position.

Mr Vanara's evidence-in-chief

- [12] When the trial started the State intimated that 7 witnesses were going to be called. The first witness was Mr Vanara, being the star witness. Mr Vanara is a highly qualified advocate. He holds a B.Proc Degree, LLB, an LLM Degree as well as a Certificate in legislative drafting and Management Development. He served his articles of clerkship from 1997 to 1999 and was an admitted as an Attorney. He practised as an Attorney for about 6 months, which included criminal matters. He left the Attorneys' practice at his own accord and joined the Advocates' profession. He is, however, not a practising Advocate.
- [13] Mr Vanara commenced employment at Parliament from 01 January 2007. In 2017 Mr Vanara was appointed as Senior Manager: Legal and Constitutional matters. He was also the Principal Officer of the Executive Pension Fund and Acting Registrar for the Committee on Ethics and Members' Interest. Mr Vanara was appointed as Evidence Leader for the Inquiry Commission on 01 September 2017.
- [14] On 04 October 2017 Mr Vanara scheduled a meeting with the Acting Chairperson of Eskom, Mr Zethembe Khoza (Khoza) for 05 October 2017 in Johannesburg. On the same day, Mr Bongo made three phone calls to Mr Vanara.
- [15] When Mr Bongo made the first call, Mr Vanara did not recognise the number but took the call. Mr Bongo introduced himself and enquired if Mr Vanara was still at the office. Mr Vanara informed Mr Bongo that he was on his way to Durban but he was in fact on his way to Johannesburg. Mr Vanara intentionally misinformed Mr Bongo about his travelling destination due to security reasons. Mr Bongo asked whether he had a scheduled meeting with Mr Khoza, to which Mr Vanara stated that he was waiting for confirmation of the meeting.
- [16] On the same day Mr Bongo called a second time in order to ascertain at what time Mr Vanara's flight would land and if he could meet up with Mr Vanara at Cape Town Airport. Mr Vanara declined to meet with Mr Bongo at the Airport and agreed to meet with Mr Bongo on Monday, the following week. When Mr Vanara and Mr Mocumi were on their way from the airport to the hotel, Mr Vanara enquired from Mr Mocumi whether he knew Mr Bongo. Mr Mocumi confirmed that he knew Mr Bongo as a Member of Parliament. Mr Vanara told Mr Mocumi that Mr Bongo had a particular interest in the Inquiry Committee. Mr Bongo called a third time, in order to confirm if the

meeting scheduled with Mr Khoza was in Cape Town.

[17] Mr Bongo and Mr Vanara never met on Monday as agreed. On Tuesday, 10 October 2017 Mr Bongo met up with Mr Vanara at his office in Parliament. Mr Vanara relayed the following:

“I let the Accused in my office. He told me he was requested by the Acting Chairperson of the Board to ask me for assistance. When the Accused referred to ‘assistance’, I then asked him what the nature of the assistance required. He said that Eskom’s

people were worried about incriminating evidence against them and there would be police officials waiting to arrest them. I asked him what exactly he meant by ‘assistance’. He said the inquiry is Pravin Gordhan’s brainchild and that he was

conflicted. He said the Inquiry was affecting a number of inquiries.”

[18] Mr Vanara was confused and asked Mr Bongo once again how he could assist. Mr Bongo suggested that Mr Vanara fake an illness and take sick leave so that in Mr Vanara’s absence the Inquiry would not proceed. Mr Vanara told Mr Bongo that the Inquiry Committee was a result of a political decision and that they could stop it themselves as politicians. Mr Vanara told Mr Bongo he could not assist him. This is when Mr Bongo told Mr Vanara “[J]ust name the price and tell me how you would help stop the inquiry. I will then go back to the Eskom people, tell them of your plan to stop the inquiry and the price they would have to pay for your assistance. They will then give me the money and I will hand the money over to you.” Mr Vanara, who said his conscience and integrity would not allow him to assist Mr Bongo, stated: “I was cold on my feet. I told him the meeting is over. I opened the door for him and told him there is nothing to consider.”

[19] Mr Vanara sent Mr Phindela a WhatsApp message asking Mr Phindela to call him regarding an incident that happened involving the Inquiry Committee. Mr Phindela was in Stellenbosch attending a scheduled workshop with senior managers and the union officials. At the workshop, he informed Mr Phindela and Mr Xaso about Mr Bongo who offered him a bribe in exchange for his assistance to delay or collapse the Inquiry Committee. The incident was later reported to the Acting Secretary to Parliament, Ms Tyawa. He submitted an affidavit on 26 October 2017, 16 days after the alleged commission of corruption on 10 October 2017.

Cross-examination

[20] Mr Vanara admitted that he never reported the incident to the South African Police Service (SAPS). He acknowledged that he was aware of the Act in general but not the specific provisions in terms of which a person with the knowledge of corruption or who has reasonable suspicion thereof must report same to SAPS (section 34(2) of the Act).[9] He only reported it to Mr Phindela, Mr Xaso and Ms Tyawa.

- [21] When Mr Vanara was asked to explain how Mr Bongo knew about the domestic dispute and criminal charge (which was subsequently withdrawn) of assaulting his wife in about June 2017, Mr Vanara denied disclosing his personal affairs to anyone or knowing Mr Bongo before 04 October 2017. He maintained that he was not aware that Mr Bongo was an Advocate. He denied that Mr Bongo met up with him on 10 October 2017 in order to have a legal discussion between two colleagues regarding the effects of a parallel inquiry into Eskom.
- [22] When questioned by the Bench, Mr Vanara confirmed that when Mr Bongo made the gratification offer to him, there was no blank cheque offered or a fixed amount that was proposed. Mr Bongo or anyone else on his behalf never tried to make any arrangements for payments or obtaining Mr Vanara's bank details. After this incident, Mr Bongo never called Mr Vanara again or met up with him. There was no contact between Mr Vanara and Mr Bongo after 10 October 2017.
- [23] The difficulty with Mr Vanara's evidence is that having a discussion about delaying or collapsing a parliamentary process is not unlawful in terms of the Act. The Act is very clear that only when an offer of gratification is made in exchange for a proscribed act, i.e., the delay or collapse of the Inquiry Committee, in favour of Mr Vanara or any other person, only then it becomes a crime.
- [24] With Mr Vanara admitting that he simply did not have the power to stop the commencement of the Inquiry committee; it then becomes difficult to accept a senseless and futile act of bribing someone to act beyond the scope of their power, as the truth. Upon being questioned by the Bench in respect of bank details being obtained, Mr Vanara confirmed that he was never approached for his bank details by Mr Bongo or anyone else on his behalf. There was no offer of a specific amount or arrangements to get the money to Mr Vanara. Furthermore, there were no follow-up meetings between Mr Vanara and Mr Bongo.
- [25] As we shall see below, Mr Vanara did not discuss this very important incident with Mr Mocumi. Mr Vanara's decision to withhold such an important incident from Mr Mocumi constitutes a huge anomaly as he worked with Mr Mocumi closely, travelled regularly with him and shared everything with him to do with the Eskom Inquiry, besides the incident of 10 October 2017.
- [26] Mr Vanara is yet to file a criminal complaint. His evidence was only presented to Parliament through administrative officials and for politicians to deal with. He did not report the commission of corruption to SAPS as required in terms of section 34(1) of the Act. His conduct is not consistent with that of a lawyer with knowledge of criminal law.

- [27] The conclusion is inescapable: if Mr Vanara believed that Mr Bongo is guilty of an offence of corruption in terms of the Act, he (Mr Vanara) would have reported same to the Hawks/SAPS as required by section 34(1) of the Act. Why would he, Mr Vanara, choose to commit an offence under section 34(2) of the Act by not reporting the crime to Hawks/SAPS. Thus, his failure to report the incident of 10 October 2017 to the Hawks/SAPS simply does not make sense.

Mr Disang Mocumi's evidence

- [28] Mr Mocumi is currently the Secretary for the Portfolio Committee on Public Enterprises. He was the Secretary for the Inquiry Committee at the time of the incident. On 04 October 2017, when Mr Mocumi and Mr Vanara landed in Johannesburg, Mr Vanara received a phone call on their way to the hotel. Mr Mocumi did not know who the caller was at the time and could not hear what the caller said. Mr Mocumi heard Mr Vanara confirm that he is in Durban and that he would meet with the Acting Chairperson of Eskom. After the call, Mr Vanara asked whether Mr Mocumi knew Mr Bongo and that Mr Bongo had a particular interest in the Inquiry Committee. Mr Mocumi told Mr Vanara that he knew Mr Bongo as a Member of Parliament.
- [29] When it was put to Mr Mocumi that he said to Mr Vanara in the presence of Elise Miller "who does Mr Bongo think he is. He is a small boy and we will deal with him", he said that he did not recall making that comment. When questioned about his knowledge around the incident of 10 October 2017, Mr Mocumi admitted that he never knew about the incident as Mr Vanara never informed him about it. His evidence was clearly that Mr Vanara did not tell him about the incident of 10 October 2017 involving Mr Bongo.

Mr Masibulele Xaso's testimony:

- [30] Mr Xaso is employed in Parliament as the Secretary to the National Assembly since 01 April 2013. He was approached by Mr Phindela at the management and union workshop at Stellenbosch on 10 October 2017. Mr Phindela indicated that Mr Vanara called in order to meet with them regarding an incident involving the Inquiry Committee that occurred earlier that day. Mr Xaso, Mr Phindela and Mr Vanara met in Stellenbosch at the Protea Hotel between 15:00 and 16:00 on the same day. Mr Vanara told them that he had received several calls from Mr Bongo and that Mr Bongo seemed to have known about the Inquiry Committee, the witnesses and meetings. Mr Vanara said Mr Bongo told him that he was concerned about incriminating evidence coming to light and that members of the Eskom Board would be arrested. Mr Vanara said that when they met in Mr Vanara's office, Mr Bongo told Mr Vanara to fall sick and cause the Inquiry Committee to collapse. Mr Bongo told Mr Vanara to name the price, which Mr Vanara viewed as an attempt to bribe him. Mr Vanara rejected Mr Bongo's offer and asked Mr Bongo to leave his office.
- [31] Under cross-examination, Mr Xaso admitted that he knew he was obligated in terms of the Act, to report the commission of corruption but that he and Mr Phindela agreed to report it to the appropriate Parliamentary authority, i.e., the Acting Secretary to Parliament, Ms

Tyawa. When questioned about his failure to report the crime to the police he maintained that he reported it to Parliament instead. He admitted that he only made an affidavit in September 2018 for the Ethics Committee and submitted another statement in 2020 for purposes of the criminal trial.

- [32] Moreover, Mr Xaso said Mr Vanara did not say Mr Bongo knew about schedules or meetings with possible interviews with witnesses. Mr Xaso relayed that all Mr Vanara told him is that Mr Bongo told Mr Vanara to make himself unavailable and to name the price. Mr Xaso admitted that he knew Mr Bongo was an Advocate but that he could not confirm if the other Members of Parliament knew Mr Bongo as an Advocate. He confirmed that Mr Bongo did not have the power to make the Inquiry Committee collapse.

Mr Modibedi Phindela's testimony

- [33] Mr Phindela is an admitted Advocate who holds a B.Juris, LLB and an LLM Degree. He is the Secretary to the National Council of Provinces since 2007. On 10 October 2017 when he was in Stellenbosch, Mr Vanara called him and wanted to see him regarding a matter in which he was the evidence leader. Mr Vanara came to see Mr Phindela at Stellenbosch later the same day. Mr Phindela and Mr Xaso were together when Mr Vanara met with Mr Phindela. Mr Vanara told them that he was "approached by Advocate Bongo and offered a bribe". They then proceeded to report the incident to Ms Tyawa.
- [34] Mr Phindela admitted that he was aware that there was an obligation to report corruption to the police. The defence questioned Mr Phindela why he failed to report the incident to the police. Mr Phindela said he had reported the matter to Ms Tyawa.
- [35] Mr Phindela conceded in cross-examination that Mr Bongo was known as Advocate Bongo at Parliament. He said everyone knew that Mr Bongo was an Advocate. Mr Phindela never informed Mr Vanara that Mr Bongo was an Advocate. Mr Phindela admitted that he only made a statement of the incident on 23 May 2018, some 5 months after the incident, after the Police approached him to make a statement. Mr Phindela said "All he told me is that he was approached and offered a bribe. That is all he said to me and Ms Tyawa". This contradicts Mr Vanara's evidence in chief referred to above.

Penelope Tyawa's testimony

- [36] Ms Tyawa was the Acting Secretary to Parliament at the time. Mr Phindela, Mr Xaso and Mr Vanara approached her regarding the incident of 10 October 2017. She relayed that Mr Vanara said that "he was approached by Honourable Mr Bongo to collapse the inquiry". She then told Mr Vanara to reduce the incident to writing so that she could submit it to the Executive authority. On 26 October 2017 Mr Vanara submitted the statement. Ms Tyawa confirmed that she was aware of the reporting duty in terms of section 34 of the Act but that Parliamentarians were governed by the Financial Management of Parliament Act 10 of 2009 and their own whistle blowing policy.

- [37] During re-examination, Ms Tyawa confirmed that she only learnt that Mr Bongo was an Advocate recently. She stated that at Parliament everyone is addressed as “Honourable Member” and not by their titles such as Doctor or Advocate. In relaying to the court the exact words used by Mr Vanara she stated “Honourable Mr Bongo offered me a bribe to collapse the inquiry”. Ms Tyawa was questioned by the Bench regarding what was reported to her by Advocate Vanara in her own words, Mr Vanara (“Mr Bongo offered me a bribe to collapse the Inquiry”). This however was not part of her evidence-in-chief. She was unable to explain why she omitted to mention the word “bribe” in her evidence-in-chief.

Vincent Mokhoema’s testimony

- [38] Lieutenant Colonel Mokhoema (Mokhoema) is in the employ of SAPS since 2007 and the investigating officer in this matter. Mr John Steenhuisen submitted an affidavit alleging that Mr Vanara was bribed by Mr Bongo. Mr Steenhuisen’s affidavit lacked essential information and thus, Lieutenant Colonel Mokhoema obtained statements from Mr Vanara, Mr Bongo and other witness statements. When Mr Mokhoema obtained the statement from Mr Vanara, Mr Vanara relayed to him that when he was appointed as evidence leader of the Inquiry Committee, he received numerous calls from Mr Bongo and they eventually met in his office on 10 October 2017. Mr Vanara explained to him that Mr Bongo said that he was sent from Eskom in order to acquire the assistance of Mr Vanara by falling ill or taking sick leave in exchange for money. Mr Vanara refused to render his assistance and reported the incident to the parliamentary authority. Mr Mokhoema, having knowledge that failure to report a commission of corruption is an offence, questioned Mr Vanara regarding his failure to report it to the police. Mr Mokhoema accepted Mr Vanara’s explanation that he had reported it to Parliament.

When he interviewed Mr Bongo, a prepared affidavit was submitted to him by Mr Bongo marked Exhibit “F”. Mr Bongo stated in his affidavit that the scheduled meeting that had taken place between himself and Mr Vanara was a legal discussion centred on the possible dead-lock on the parallel establishment of the State Capture Inquiry by the Parliament as well as the Executive Head. Mr Mokhoema could refute Mr Bongo’s version made under oath.

Evaluation of the State case

- [39] Mr Vanara is a single witness to the incident that gave rise to the charges levelled against Mr Bongo. The other State witnesses were not present when the meeting between Mr Vanara and Mr Bongo took place. They can only attest to what Mr Vanara relayed to them regarding the meeting between himself and Mr Bongo.
- [40] Mr Vanara maintained throughout his testimony that he did not know Mr Bongo as an Advocate. Mr Xaso admitted that he knew Mr Bongo to be an Advocate but that he could not confirm whether other Members of Parliament knew Mr Bongo as an Advocate. Ms Tyawa testified that she never knew Mr Bongo as an Advocate until very recently. However, Mr Phindela testified that everyone knew Mr Bongo as an Advocate and that is how he was often addressed at Parliament. He confirmed that there was no need for him to tell Mr Vanara that

Mr Bongo was an Advocate. This flies in the face of Mr Vanara's testimony that he did not know Mr Bongo was an Advocate and that Mr Phindela informed him that Mr Bongo was an Advocate after 10 October 2017.

[41] Mr Xaso testified that Mr Vanara told him that Mr Bongo told Mr Vanara to "name his price". Further to that, Mr Phindela said: "All he told me is that he was approached and offered a bribe. That is all he said to me and Ms Tyawa". Ms Tyawa maintained throughout examination-in-chief, cross-examination and re-examination "[T]hat Mr Vanara said that he was approached by Honourable Mr Bongo to collapse the inquiry". However, it was only after the Bench touched on this issue again, that she made mention of "bribe", a pivotal point which she left out in her evidence-in-chief. Ms Tyawa was unable to explain satisfactorily why "bribe" was not mentioned at all in her evidence and why her own evidence contradicted that of Mr Phindela in material respects, notwithstanding that Ms Tyawa, Mr Xaso and Mr Phindela were together when Mr Vanara reported the incident of 10 October 2017.

[42] Mr Vanara's testimony is contradicted by the testimony of the other witnesses and places his credibility as a single witness in question.

[43] Furthermore, it must be noted that the affidavit by Mr Bongo, handed up as Exhibit "F", Mr Bongo avers the following at pg. 16-17:

"[I]t was around February 2017 or thereabout when I began to cordially interact personally with the complainant on a collegial basis. As we both [are] individuals from [the] Advocacy profession we effortlessly began to interact on issues of mutual interest in particular legal issues that may have a bearing in the execution of our duties in Parliament... At the centre of this meeting were the

issues

around the possible legal dead-lock on the parallel establishment of State Capture [I]nquiry by both Parliament and the Executive Head."

[44] This statement was made by Mr Bongo for purposes of the enquiry before the Ethics Committee which found no misconduct on the part of Mr Bongo. This is, with respect, a previous consistent statement. It is consistent with Mr Bongo's version relating with the purpose of the lawyer to lawyer discussions that he had with Mr Vanara regarding the parallel processes of Inquiry.

[45] It is not without significance, in my view, that Lieutenant-Colonel Mokhoema did not investigate the accused defence, namely that the purpose of contacting Mr Vanara was to engage him as a lawyer about the parallel processes referred to above. Lieutenant-Colonel Mokhoema also confirmed that Mr Bongo was not involved in further activities relating to the complaint by Mr Vanara after 10 October

2017. He confirmed that he is aware that section 34 of the Act imposes a duty upon someone with knowledge of corruption, or reasonable suspicious thereof, to report same to the Hawks/SAPS. The conclusion is inescapable that the investigating officer did not believe that Mr Bongo had committed any crime.
- [46] The investigating officer referred the court to an affidavit deposed to by Mr John Steenhuisen, now a leader of the DA in Parliament. According to the investigating officer Mr Steenhuisen said “Vanara said he was bribed”. This is factually incorrect. Indeed no such evidence was led before me in court to that effect. Mr Hellens SC quite rightly argued that such incorrect information could only have come from Mr Vanara. This is yet another version of what allegedly transpired between Mr Vanara and Mr Bongo on 10 October 2017.
- [47] Ms Shihaam Lagkar’s office was situated next to Mr Vanara’s office. It was put to Mr Vanara in cross-examination that she would say she saw Mr Bongo on many occasions in front of Mr Vanara’s office. She was on the list of State witnesses and accordingly the court expected her to be called. She was however, not called as a witness. The court should draw an adverse inference that a witness, who was available but not called, was not going to support the State’s case.[10]

Conclusion

- [48] Whether or not to grant the application in terms of section 174 of the Criminal Procedure Act is a discretion to be exercised judicially.
- [49] Having regard to the fact that I have already found that there is insufficient evidence upon which a reasonable court, acting carefully, might convict, the only possible reason for refusing the application at this stage can be the hope that the accused will implicate himself during his evidence. To do so will be a manifest misdirection.[11]
- [50] This case falls within the ambit of the following dictum of Nugent, JA in Lubaxa, supra at 707h – 708b:
- “Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before a prosecution is initiated (Beckenstrater v Rottcher and Theunissen 1955*
- (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.”
- [51] The State’s evidence in this case is far below this threshold referred to above.

[52] It is my judgment that “Mr Vanara’s evidence is not credible in some material respects. He is a single witness. Therefore his evidence must be clear and satisfactory in all material respects. The evidence of other state witnesses clearly does not corroborate that of Mr Vanara in some material respects. There are also material contradictions between Mr Xaso, Mr Phindela and Ms Tyawa regarding what Mr Vanara reported to them on 10 October 2017.

[53] The section 174 application cannot be refused in the hope that the accused person will incriminate himself when he gives evidence, thereby closing material defects in the state’s case.

[54] In the circumstances I make the following order:

54.1) The application in terms of section 174 of the Criminal Procedure Act is granted.

54.2) The accused, Advocate Bongani Bongo, is found not guilty and therefore discharged.

HLOPHE, JP

Legal representatives:

The State: Adv T Du Toit-Smith

Adv D Combrin

The Accused: Adv M Hellens SC

Instructed by JC De Jager Attorneys

Matter heard on:

15 February, 16 February, 19 February, 22 February, 24 February and 26 February 2021.

[1] Of the Criminal Procedure Act, 51 of 1977. The 212B notice is marked exhibit “B1”.

[2] S v Lubaxa 2001(2) SACR 703 (SCA).

[3] S v Dewani 2014 (unreported, WCC case no CC15/2014, 8 December 2014; 2014 JDR 2660 (WCC)) at para 8.

[4] S v Dewani 2014 (unreported, WCC case no CC15/2014, 8 December 2014; 2014 JDR 2660 (WCC)) at para 13.

[5] S v Mpetha & Others 1983(4) SA 262.

[6] 2011

(2) SACR 437 (GSJ).

[7] S v Agliotti 2011 (2) SACR 437 (GSJ) at 456 in fine to 457b

- [8] S v Dewani 2014 (unreported, WCC case no CC15/2014, 8 December 2014; 2014 JDR 2660 (WCC)) at para 15. See also S v Lubaxa , supra at para 8 above of this judgment.
- [9] Section 34 (1) – (2) of the Act provides the following: “34.
- (1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed- (a) an offence under Part 1, 2,3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or (b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official. (2) Subject to the provisions of section 37(2), any person who fails to comply with subsection (1), is guilty of an offence.”
- [9] Section 34 (1) – (2) of the Act provides the following:
- “34.
- (1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-
- (a) an offence under Part 1, 2,3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or
- (b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.
- (2) Subject to the provisions of section 37(2), any person who fails to comply with subsection (1), is guilty of an offence.”
- [10] S v Texeira 1980 930 SA
- [11] S v Lubaxa (supra)

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