

PROSECUTORIAL POWER AND AUTHORITY: THE NEED TO CURB
THE ABUSE OF THE POWER AND AUTHORITY TO ABANDON
PROSECUTION IN SWAZILAND.

BY

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DEDICATION

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DECLARATION

I, Simangele Mbatha, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements of any other degree or qualification at any other University.

I further declare that this dissertation reflects the law as at the date of signature hereof.

Signed and dated at Pietermaritzburg on the 20th day of January 2019

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ABSTRACT

Section 6 of the Swaziland Criminal Procedure and Evidence Act 67 of 1938 makes provision for the stopping of a prosecution. The wording of the section is structured in such a manner as to afford the prosecution too wide a discretion without setting in place checks and balances to foster accountability from the Director of Public Prosecutions department on the use of such power and authority, and as such, opens a door to the abuse of the power and the maladministration of justice. Not only do provisions of section 6 of the Act provide for more than one interpretation, but it is further argued that this section falls short of the spirit and purport of the Constitution of Swaziland, 2005, insofar as it negates the right to equal protection of the law as enshrined under section 20(1), particularly by failing to afford victims of crime any consultative audience before the decision to stop a prosecution is made, thus rendering the section ambiguous and unconstitutional. By embarking on a comparative study of the provisions as are found in South African statutes on the stopping of a prosecution, it is hoped that lessons will be drawn from the rich criminal jurisprudence and possibly incorporated to develop Swaziland law.

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CHAPTER 1

INTRODUCTION

1.1 PURPOSE OF THE STUDY

‘...stopping of prosecution by a prosecutor without the necessary authority...may very conceivably be done in a blatant disregard of instructions or for various other reasons, e.g. because he has a secret interest in the outcome of the accused by some means or other.’¹

The above statement, alone, per the observations by His Lordship Pickard ACJ², suggests the presence of some element of the maladministration of power and authority by prosecutors in the execution of their prosecutorial functions with regards to the stopping of a prosecution, and even possibly, corruption in the manner in which such power and authority is used in criminal proceedings.

Swaziland courts are incessantly bombarded and encumbered with the stopping of criminal trials by the prosecution using the authority afforded to them under section 6 of the Criminal Procedure and Evidence Act³ (hereinafter referred to as the CP&E Act). At times, it is the questionable circumstances under which such stopping of a prosecution is effected, especially where it appears that the prosecutor has adequate evidence to continue with prosecuting a case but instead opts not to. Albeit there being no rule of law tacitly stating that all provable cases brought to the attention of the prosecuting authority must be prosecuted,⁴ the stopping of a prosecution in such instances still remains a cause for concern.

Section 6 of the CP&E Act, has been used in criminal proceeding as the sole establishing authority upon which the power to stop prosecution is premised, since its inception in 1938. This changed after the adoption of the Constitution of the Kingdom of Swaziland, 2005 (hereinafter referred to as the Constitution) which, at section 162(4)(c),⁵ provides that the

¹ *Attorney-General v Additional Magistrate, Middledrift, and Others* [1987] 4 ALL SA 233 (Ck) at 237.

² *Attorney-General* (note 1 above).

³ Criminal Procedure and Evidence Act 67 of 1938 (AS AMENDED). This is a Swaziland statute which, at section 6, provides that, ‘The Attorney-General may, at any time before conviction, stop any prosecution commenced by him or by any other person, but, in the event of the accused having already pleaded to any charge, he shall be entitled to a verdict of acquittal in respect of such charge.’

⁴ *Freedom under Law v National Director of Public Prosecutions and Others* [2013] 4 All SA 657 (GNP) at 685.

⁵ The Constitution, 2005 section 162(4)(c) which provides as follows: ‘The Director shall have power in any case in which the Director considers it proper to do so, to- (c) discontinue, at any stage before judgement is delivered, any criminal proceedings instituted or undertaken by the Director or any other person or authority.’

Director, in any case where he deems it proper, shall discontinue prosecution before judgment is delivered. Under section 162(6)(a),⁶ the Constitution further provides that in so doing, the Director shall have regard to public interest, the interest of the administration of justice and the need to prevent abuse of the legal process.

These provisions are crafted such as to reflect the spirit and purport of the Constitution in so far as protecting the rights of the accused, the complainant, the interests of the public and those of the administration of justice are concerned. This is the paramount purpose for which any law pertaining to criminal proceedings is promulgated. The gatekeepers to accessing and enjoying the protection afforded by the law through the criminal justice system are prosecutors who are regarded as its most powerful officials.⁷

It is therefore essential that legislative provisions affording and governing the use of power and authority by prosecutors align with the spirit and purport of this constitutional provision. Section 6 of the CP&E Act falls short of the purposes and aims intended by the Constitution which, for instance, at section 20(1)⁸ enshrine equality of all and the right to equal protection for all under the law.

The coming into force of the Constitution introduced constitutional provisions which foster further development of the statutory provisions which preceded the Constitution such as section 6 of the CP&E Act. However, to-date this section has not been developed to reflect, as well as adopt the spirit of the Constitution, nor has it been amended to align it to provisions such as section 162(6)(a).⁹

The Constitution further purports to review laws for the promotion of good governance, the rule of law, respect for institutions and the progressive development of Swazi society.¹⁰ Paragraphs 6 and 7 of the Preamble place emphasis on the promotion of fundamental rights

⁶ The Constitution, 2005 section 162(6)(a) provides as follows: 'In the exercise of the power conferred under this Chapter, the Director shall – (a) have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process.'

⁷ M Schonteich 'Strengthening Prosecutorial Accountability in South Africa' 2014 *Institute For Security Studies* 1.

⁸ The Constitution, 2005 section 20(1) which provides as follows; 'All persons are equal before and under the law in all spheres of political, economic, social and cultural life in every other respect and shall enjoy equal protection of the law.'

⁹ The Constitution, 2005 section 162(6)(a) (note 6 above).

¹⁰ The Constitution, 2005 see paragraph 4 of the preamble which provides that, 'Whereas it has become necessary to review the various constitutional documents, decrees, laws, customs and practices so as to promote good governance, the rule of law, respect for our institutions and the progressive development of the Swazi society.'

and freedoms of all, binding on all organs and agencies of government.¹¹ It is in respect of the observance and alignment to these founding statutory principles that the prosecution must exercise its power and authority as provided for under section 6 of the CP&E Act. These provisions however do not afford adequate guiding principles upon which the above stated aims of the constitutional provisions can be realised, thus rendering it open to abuse and unconstitutional.

The Swaziland courts seem to blindly apply the provisions of section 6 of the CP&E Act for both the stopping a prosecution, which is rightly provided for by the section, as well as for the withdrawal of charges, albeit this procedure is not explicitly provided for under the section. It is in the wording of this section that there exists an opening of opportunities for abuse of the provisions to trample on the rights of complainants to equal protection under the law per the provisions of section 20(1) of the Constitution. The partial literal interpretation of section 6 of the CP&E Act by the courts affords leverage to the prosecution to exercise unfettered discretionary power to stop prosecutions and withdraw charges. This exercise of power in itself comes without any checks and balances in the form of policy directives. This effectively renders it difficult to curb the abuse of prosecutorial power and authority to invoke section 6 of the CP&E Act. Furthermore, the power conferred under the Act through section 6 and through the Constitution does not place any obligation on the prosecution to give the court reasons for abandoning prosecution in whatsoever form, be it a stopping of prosecution or the withdrawal of charges.

Courts are epitomized as the sole interpreters of the law to give effect to the provisions of the Constitution¹², but it would seem that there exists some reluctance on the part of the courts to enforce and protect the fundamental rights and basic freedoms enshrined in the Constitution.¹³ The other challenge could be attributed to a lack of vibrancy in constitutional litigation to challenge the courts to make much needed determination on the constitutionality of our current

¹¹ The Constitution, 2005 at paragraph 6 of the Preamble which provides that '*Whereas* it is necessary to protect and promote the fundamental rights and freedoms of ALL in our Kingdom in terms of a constitution which binds the Legislature, the Executive, the Judiciary and the other Organs and Agencies of the Government.' At paragraph 7 it is provided that '*Whereas* all branches of government are the Guardians of the Constitution, it is necessary that the Courts be the ultimate Interpreters of the Constitution.'

¹² The Constitution, 2005 at paragraph 7 of the Preamble (note 11 above).

¹³ A Dube & S Nhlabatsi 'The King can do no wrong: The Impact of *The Law Society of Swaziland v Simelane NO & Others* on constitutionalism' (2016) 16 *African Human Rights Law Journal* 270.

laws (such as section 6 of the CP&E Act) with the anticipation of aligning them to the relevant provisions of the Constitution.¹⁴

Where a constitution is operative, it is mandatory that governments, in the exercise of their power, must derive such power from the constitution and limit the exercise of same to the extent provided for by the constitution.¹⁵ The whole idea of constitutionalism is that governmental power shall be bound by rules which prescribe the procedure according to which legislative and executive acts must be performed, and at the same time delimiting their permissible content. Only then does constitutionalism become a reality in that these rules curb arbitrariness of discretion and at the same time extend to the wielder of such power and authority some degree of liberty in the face of set zones upon which authority may not trespass.¹⁶

This places the constitution in a position of supremacy where the rules and principles of the constitution are binding on all branches of the state and have priority over any other rules made by the government, the legislature or the courts.¹⁷ Any law or conduct not in accordance with the constitution, be it for procedural or substantive reasons, will not have the force of law.

The 'rule of law' demands that all laws must be fair and just and must apply to all people equally.¹⁸ Ricardo states that any universal definition of the rule of law must conform to four principles:¹⁹ (1) The principle that power may not be exercised arbitrarily, advocating for prospective, accessible and clear laws; and (2) The principle of the supremacy and independence of the law in respect of which the law applies to all, including the sovereign; (3) The principle that the law must apply to all equally and as such, offering equal protection without discrimination; (4) The principle for respect of universal human rights as laid down in the instruments and conventions accepted by the international community as a whole. The third principle implies that constitutional principles such as those enshrined under section 20(1) of the Swaziland Constitution addressing equal protection of the law, should flow as the product

¹⁴ Ibid 269.

¹⁵ I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 8.

¹⁶ S A De Smith *The New Commonwealth and its Constitution* (1964) 106.

¹⁷ Ibid.

¹⁸ K English & A Stapleton *The Human Rights Handbook* (1997) 14.

¹⁹ R Gasalbo-Bono 'The significance of the rule of law and its implications for the European Union and the United States' (2010) 72:229 *University of Pittsburgh Law Review* 231 available at <http://lawreview.law.pitt.edu/ojs/index.php/lawreview/article/download/159/159>, accessed on 01 May 2019.

of the ordinary remedies of the law of general application as provided by the judiciary and not necessarily as a result of the enforcement of the Bill of Rights.

The current position is that section 6 of the CP&E does not conform to the demands of the rule of law insofar as it omits to consider equal benefit for victims of crime and places the accused at a vantage point of benefit. With the persistent use of this section of the CP&E Act in its current state of unconstitutionality, the gap of susceptibility to abuse of power during criminal proceedings widens even further. The courts must venture into interpretative advocacy for the development of the section which poses a major threat to the fundamental rights of victims of crime who are robbed of the opportunity to attain recourse through due process in instances where the offender could be successfully prosecuted but for section 6 of the CP&E Act which is, most of the time abused, within the criminal process in Swaziland.

In the interpretation of statutory provisions, courts have devised rules to assist with such interpretation. These are premised on varying approaches which need a full understanding and comprehension of how they each apply in interpretation. There exists a possibility to allot a rule the wrong interpretation, which in turn results in atrocious outcomes. The court, in the case of *Ngwenyama v Mayelane and Another*²⁰ stated that the primary rule in the construction of statutory provisions is to ascertain the intention of the legislature by giving words of the provision under consideration the ordinary grammatical meaning as dictated by their context unless doing so would result in an absurdity the legislature never intended or contemplated. Further that whilst words must be allotted their ordinary meaning, a contextual and purposive reading of the provision in question is important. A brief discussion of the literal and key rule of interpretation will be discuss in Chapter 3.

This dissertation critically analyses the wide discretionary power and authority afforded to the prosecution in Swaziland to stop prosecution without putting in place clearly defined guidelines to monitor the use of this vast unfettered power. The view taken in this dissertation is that such a wide discretionary power is a recipe for abuse. The provisions of section 6 of the CP&E Act as currently used, do little, if anything, to foster expansion or development of the guidelines provided for in the Constitution in respect of how prosecutorial power and discretion ought to be exercised.

²⁰ *Ngwenyama v Mayelane and Another* [2012] 3 All SA 408 (SCA) 410.

In order to expatiate the discussion in this dissertation with the hope of drawing up possible solutions to remedy the inevitable dangers envisaged as discussed in the preceding paragraphs, this study seeks to find possible solutions from the well-developed South African jurisprudence in this area of criminal procedure. In doing so, attention must be afforded to the relevant statutory provisions in respect of both South African and Swaziland legislation. This will enable the identification of loopholes in respect of the Swazi provisions, which foster the possibility of the abuse of the power and authority to stop prosecution.

The study is divided into four chapters; the first, being an introductory chapter, which also includes a brief background of the legal system in Swaziland, its Constitution and the applicable statutes in which prosecutorial power to stop prosecution is premised. Chapter two details the relevant legislative provisions from both Swaziland and the Republic of South Africa dealing with the stopping of a prosecution. This chapter will also address those provisions which purport to foster the constitutional development of the provisions of section 6 of the CP&E Act. The aim is to pinpoint the areas where there is a need for development of the section, and where such development is needed to bring it into conformity with the constitutional provisions particularly of section 20(1) of the constitution of Swaziland which enshrines the right to equal protection of the law for all. It is expected that there are lessons to be drawn from the much more developed section 6 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the CPA) of the Republic of South Africa.

The third chapter will cover a detailed comparative study between Swaziland and South Africa to show what strides have been made, if any, to foster development in this area of the law by the Republic of South Africa. From the study of a plethora of scholarly literature and case law, it will be shown that, if any positive development has been achieved by the Republic of South Africa, Swaziland stands to derive much needed benefit from the work thus done and covered. Drawing from the discussions undertaken in the preceding chapters, and lessons learnt, the final chapter will cover the conclusion and suggest recommendations which stand to benefit and foster needed development of the criminal jurisprudence of Swaziland.

1.2 BACKGROUND

As earlier alluded to, the CP&E Act came into effect in 1938 and precedes the Constitution of Swaziland, 2005 which came into effect in the year 2006. There exists a gap of 67 years

between the two pieces of legislation, this gap worthy of mention especially in relation to a statute (the CP&E Act) which has not been notably amended in that long a period.

The CP&E Act founds and directs procedure in criminal proceedings and as such, it is a fair expectation that if any developments towards conformity to the Constitution were to be effected, this Act would have to be afforded priority. This has not been the case, rather, other developments have taken centre stage such as the promulgation of the Sexual Offences and Domestic Violence Act, 2018 and the Children Protection and Welfare Act, 2012. These pieces of legislation take into consideration and incorporate the provisions of the Constitution, particularly sections 20(1)²¹ and 29²² respectively. Of relevant note is the fact that all these pieces of legislation rely on the proper application of the provisions in the CP&E Act which itself has not been developed or amended to meet constitutional requirements. The Swaziland courts still place reliance on and operate according to the 1938 CP&E Act which is the core statute used to institute, withdraw and stop a prosecution.

Upon gaining independence from being a British protectorate in 1968, Swaziland adopted and operated the 1968 Constitution which was repealed by His Majesty King Sobhuza11 by way of a Proclamation in 1973.²³ The Kingdom of Swaziland had between 1973 and 2005 operated under this draconian and repressive Constitution²⁴ called the King's Proclamation.²⁵ This proclamation proscribed the operation of the Bill of Rights, in that among other things, it asserted its own supremacy over all other laws and granted the king all legislative, judicial and executive powers which paved the way for him to make the proclamation and others in the years to come, effectively making Swaziland a "pariah" state in the community of progressive Southern African countries.²⁶ The Proclamation, in saving some sections of the abrogated 1968 Constitution, also saved section 91 whose provisions established and set out the duties of the Office of Attorney-General.²⁷ All matters, criminal and civil, were prosecuted and litigated, on

²¹ The Constitution of Swaziland, 2005 section 20(1) (note 8 above).

²² The Constitution of Swaziland, 2005 Section 29 covering the rights of the child; inclusive and not limited to; the right to proper care by parents and other lawful authorities, right to equal status be it a child is born in or out of wedlock, the right to the same measure of special care, assistance and maintenance necessary for its development from natural parents or those responsible for the child by law and to receive special protection against exposure to physical and moral hazards within and outside the family.

²³ The Kings Proclamation to the Nation, dated 12 April, 1973.

²⁴ S M LaNgwenya 'Recent legal developments - Swaziland' (2005) 2 *University of Botswana Law Journal* 167.

²⁵ The King's Proclamation to the Nation (note 23 above).

²⁶ Ibid.

²⁷ Decree No. 5 of the King's Proclamation to the Nation, 1973 which provides that, 'The Attorney General shall again have the power and duties vested on him in terms of Chapter V11 section 91(1),(2),(3),(3),(4),(5),(6),(7) and (8) of the repealed constitution...shall again apply to the Office of the Attorney General.'

behalf of the state, by the office of the Attorney General until 1973 where, by way of the King's Decree,²⁸ the office of the Director of Public Prosecutions was established.

Already in place and operative was the CP&E Act which still made reference to the 'Attorney General' as having the power to stop prosecution²⁹ albeit the fact that, by Order 17 of 1973,³⁰ such power had been transferred to the office of the Director of Public Prosecutions.³¹ This is a clear indication that even the slightest of changes which needed to be effected to bring the Act into conformity with core legislation were left untouched.

In the year 2005, the Parliament of Swaziland passed notable legislation which reflected a move towards a much needed democratic era and a marked possibility of the resumption of the rule of law - the Constitution,³² which at paragraph 4 of the Preamble speaks to the promotion of, amongst other things, the rule of law.

According to Milton Handler, what enables any constitution to cope with new problems arising at different times under ever-changing conditions and circumstances is the elasticity which its preamble contemplates.³³

Section 162(1), (2) and (3)³⁴ of the Constitution, also reinforces the establishment of the office of the Director of Public Prosecutions (DPP), which is a public office occupied by an individual

²⁸ Director of Public Prosecutions Order 17 of 1973, which order enacted by the King's-Order-In-Council, provided for the office of the Director of Public Prosecutions whose duties where to prosecute criminal matters at the instance of the state. This essentially took the prosecution of criminal from the hands of the office of the Attorney General.

²⁹ Section 6 of the Criminal Procedure and Evidence Act (note 3 above). Worthy of note as regards the practical operations of the offices of Attorney-General and that of the Director of Public Prosecutions in Swaziland, the former is seized with litigation in civil proceedings on behalf of the state whilst the latter is seized with only prosecution in criminal proceedings.

³⁰ Director of Public Prosecutions Order (note 28 above).

³¹ Director of Public Prosecutions Order (note 27 above).

³² The Constitution of Swaziland, 2005.

³³ M Handler 'A reconsideration of the relevance and materiality of the preamble in constitutional interpretation' (1990) 12 Cardoza Law Review 117 available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2568&context=journal_articles, accessed 01 May 2019.

³⁴ Which provides that there shall be a Director of Public Prosecutions whose office shall be a public office and who shall be appointed by the King on the advice of the Judicial Service Commission. Such person shall not qualify to be appointed Director unless that person qualifies for appointment as a Judge of the superior courts.

appointed by the King³⁵ on advice by the Judicial Service Commission (JSC),³⁶ the appointee being an individual who qualifies³⁷ for appointment as a judge of the superior courts.³⁸

Section 162(4),³⁹ in setting out the functions of the office of the DPP, is worded similarly to section 91(4) of the 1968 Constitution,⁴⁰ save for the latter referring to the Attorney General and not the DPP.

Incorporated in the Constitution of 2005, is Chapter III encompassing the Bill of Rights; which sets out the rights of accused persons, the victims of crime and those affected by the commission of crime. Section 14(1)(a), also discussed in the chapters to follow, proclaiming the rights to ‘respect for life, right to fair hearing, equality before the law and equal protection of the law;...’ is discussed together with section 20(1) which provides that ‘All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.’

³⁵ The King at the time of such appointment, currently it being His Majesty King Mswati111, the reigning monarchy of the kingdom of Swaziland.

³⁶ The Commission is established in terms of section 159 of the Constitution of Swaziland, such commission comprising the Chief Justice, two legal practitioners, chairman of the Civil Service Commission (a commission entrusted with the employment of all civil servants in Swaziland), and two members appointed by the King. The duties of the JSC are enshrined in section 160(1)(a-f) of the Constitution of Swaziland, which duties include: Advising the King on his powers to appoint and exercise disciplinary control over persons appointed, advise the King on the appointment, discipline and removal of the DPP, review and recommend pertaining matters touching on the discipline, appointment and removal of Judges and other judicial officers, receive and process complaints about the judiciary, advise the government and the Minister of Justice about other administrative and general issues relating to justice and perform any other functions as prescribed by the Constitution.

³⁷ To qualify to be appointed a judge of the superior courts, one must meet the following requirements; as judge of the High Court, in terms of section 154(1)(b) of the Constitution, one must have practiced as a legal practitioner for not less than 10 years in Swaziland, any Commonwealth country or Ireland, or must have practiced in any place as a judge of a court with unlimited jurisdiction for such period of 10 years, or as a barrister, legal practitioner or advocate in either of the above mentioned places. Section 154(1)(a) covers appointment as judge of the supreme court, one must have practiced as Judge of the High Court for not less than 7 years, or as legal practitioner, barrister or advocate for not less than 15 years.

³⁸ The Supreme Court of Swaziland and the High Court of Swaziland.

³⁹ The Constitution (note 5 above).

⁴⁰ The Constitution of Swaziland, 1968 (as abrogated), provides as does section 162(4) of the Constitution, 2005 (note 5 above).

CHAPTER 2

2 RELEVANT SWAZILAND AND SOUTH AFRICAN PROVISIONS

2.1 SWAZILAND STATUTORY PROVISIONS

The bulk of power and authority in criminal proceedings has been shown to vest predominantly in prosecutors. According to James Vorenberg:⁴¹

‘The fate of most of those accused of crime is determined by prosecutors, but typically this determination takes place out of public view - in the hallways of the court house, in the prosecutors' offices, or on the telephone. There is a broad and rather casual acceptance of the fact that prosecutors often exercise greater control over the administration of criminal justice than do other officials.’

In support of such a contention, one must consider the empowering statutory provisions upon which such wide prosecutorial discretion, power and authority to stop prosecution is premised in Swaziland.

Swaziland operates a dual legal system comprising the Roman-Dutch common law which is modified by statutes (under which the Constitutional Courts operate) and customary law which is operative in structures known as Swazi Courts. The latter courts predominantly interpret and apply Swazi law and custom.⁴² Swazi National Courts, governed by the 1950 Swazi National Courts Act and comprising Swazi Courts, Swazi Courts of Appeal, Higher Swazi Court of Appeal and the Judicial Commissioner have jurisdiction to adjudicate petty criminal offences and minor civil disputes governed by customary law, a body of unwritten customary rules and practices.⁴³

Swaziland, in applying the common law, a set of unwritten law or law from non-statutory sources, derives such basis from the provision of Section 252⁴⁴ of the Constitution which

⁴¹ J Vorenberg ‘Restraint of prosecutorial power’ (1981) 94 *Harvard Law Review* available at <http://www.jstor.org/stable/1340665>, accessed 16 March 2018.

⁴² B Dube & A Magagula ‘The law and legal research in Swaziland’ 2007, available at <http://www.nyulawglobal.org/globalex/Swaziland.html>, accessed on 20 December 2018.

⁴³ A Dube ‘Assessment study on Delayed Justice Delivery’ July 2010 46 available at <https://www.icj.org/cijlcountryprofiles/swaziland/swaziland-introduction/swaziland-court-structure/>, accessed 01 December 2018.

⁴⁴ Which provides at section 252(1) that; ‘Subject to the provisions of the Constitution or any other written law, the principles and rules that formed, immediately before 6th September, 1968 (Independence Day), the principles and the rules of the Roman-Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.’

cements the application of the Roman-Dutch law as was in place since 22nd February 1907.⁴⁵ When Swaziland seized to be a British protectorate and gained her independence in 1968, the country was left to operate a dual legal system and inherited the CP&E Act, 1938.⁴⁶

The CP&E Act is a statute aimed at regulating procedure and evidence in criminal proceedings, and it further makes provision for other matters incidental thereto.⁴⁷ The CP&E Act is divided into twenty-one parts demarcated in roman numerals from 'Part I' to 'Part XXI'. Without stipulating what each specific 'Part' of the division contains, only those parts relevant for this discussion will be dealt with as follows: 'Part 1' entails the short title and application, as well as the interpretation of the Act. This is the part where the Act is identified and interpretation of the meaning of key words and names used in the entirety of the Act is rendered. This is done under sections 1 and 2 respectively. Section 1 of the CP&E Act stipulates that this Act may be cited as the Criminal Procedure and Evidence Act, 1938 and shall apply to all criminal proceedings instituted after the 1st January, 1939.⁴⁸

'Part 11' under the title 'Prosecution at the public instance' covers sections 3 to 9. This part deals with the power conferred on the prosecution in relation to conducting criminal proceedings. More importantly, is section 6 of the Act in respect of which this discussion is centred. Other sections of value to this discussion are found in 'Part 11' which covers sections 10 to section 19.

It is against the backdrop of the provisions of the CP&E Act that criminal procedure is followed by Swaziland courts. Outlining one such important procedure, crucial in determining whether or not a criminal matter will reach finality of being holistically decided by the court through

⁴⁵ B Dube 'UPDATE: The law and legal research in Swaziland' 2016, available at <http://www.nyulawglobal.org/globalex/Swaziland.html>, accessed on 01 December 2018. For further reference also see paragraph 5 of the introductory section which highlights the source of Swaziland's legal system as deriving from Swaziland's first contact with the British around 1840 to solicit assistance in dealing with the Zulus, during which period the first Europeans came to settle in Swaziland. To represent the Swazi, British and Transvaal, a provisional government was established in 1890; from 1894 to 1899, the Transvaal undertaking the protection and administration of Swaziland until same passed onto the British governor of the Transvaal after the South African (Boer) of 1899 to 1902. In 1903 and Order in council established relations between Swaziland and the British, at the same time providing the basic on which the British would administrate for the next 60 years.

⁴⁶ A B Dube 'Assessment Study on Delayed Justice Delivery' (note 43 above).

⁴⁷ Part 1 of the Criminal Procedure and Evidence Act No. 67 of 1938.

⁴⁸ See Part 1, section 1 of the Act which sets out to give the short title and application of the Act and provides that 'This Act may be cited as the Criminal Procedure and Evidence Act, 1938, and shall apply to all criminal proceedings instituted after the 1st January, 1938, in respect of any offence in any part of Swaziland whenever such offence was committed.'

the assessment of evidence or not in criminal proceedings, is Section 6 of the Act⁴⁹ which provides that;

‘The Attorney-General may, at any time before conviction, stop any prosecution commenced by him or by any other person; but, in the event of the accused having already pleaded to any charge, he shall be entitled to a verdict of acquittal in respect of such charge.’

This section of the CP&E Act first and foremost affords the Attorney-General the power to make decisions using discretionary power. Dependent on the actions and context within which discretion is used by the holder of such power, discretion may mean or lead to a generous dose of tyranny or beneficence, justice or injustice and reasonableness or unreasonableness⁵⁰. Loosely translated, discretion is the power or right to act or decide according to ones’ own judgment or choice.⁵¹ According to Anna Pratt and Lorne Sossin, in the face of discretion afforded by statute, the most focus tends to be directed at the governing law and its provision whilst the actual effects of the discretion afforded are ignored.⁵² The authors further contend that,

‘Where discretion is constructed as a problem (usually expressed in terms of "arbitrariness"), solutions are most frequently sought through the development and application of even more legal rules to constrain, shape, and guide the use of discretion. This view also reflects the conceit that discretion can be eliminated and that legal rules, when not framed in discretionary terms, are somehow self-executing.’⁵³

The above statement could not have been stated any better with regards to Section 6 of the CP&E Act. The provisions of this section open too wide a door for discretionary power whilst at the same time there being no legal rules to constrain, shape and guide the use of this discretionary power. Apart from directing, when, in respect of criminal proceedings section 6 of the CP&E Act may be invoked, it states nothing further in terms of guiding the prosecution how to use this authority for which so much leverage is afforded.

Section 6 of the CP&E Act, as it stands, is not partitioned into subsections but is rather one paragraph which, albeit it not catering for this procedure, is also used by prosecutors in Swaziland to withdraw charges. The courts continue to allow section 6 to be invoked in its

⁴⁹ The Criminal Procedure and Evidence Act (note 3 above).

⁵⁰ A Pratt & L Sossin ‘A brief introduction of the puzzle of discretion’ (2009) 24(3) *CJLS* 302.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

present state and this, it is submitted, no longer serves the purpose it ought to as it does not ascribe to the constitutional provisions advocating for equal protection by the law especially in respect of victims of crime.

Not only does the power to stop prosecution in terms of section 6 extend in respect of matters instituted by the office of the Attorney-General at the public instance, same also extends in respect of matters prosecuted by virtue of the authority conferred under section 10 of the Act. Section 10 provides for prosecution by private individuals who possess substantial and peculiar interest in issues of the trial⁵⁴ referred to as private parties⁵⁵. The authority to take up such prosecution as a private party per section 10, further extends to the classes of individuals stipulated under section 11(1) as follows;

‘The right of prosecution under section 10 as private parties shall also be possessed by- (a) a husband in respect of an offence committed against his wife; (b) the legal guardian or curator of a minor or lunatic in respect of an offence committed against his ward; and (c) the wife or child or, if there is no wife or child, any next of kin, of any deceased person in respect of any offence by which the death of such person is alleged to have been caused.’

The CP&E Act⁵⁶ further infers that the private party, desirous to prosecute, must have in their possession, a certificate signed by the Attorney-General that he has seen the statements or affidavits on which such charge is based and declines to prosecute at the public instance for him to access any court process for summoning any person to answer any charge.⁵⁷

Section 13 of the CP&E Act directs the private party desirous of taking up prosecution to produce a certificate from the Attorney-General showing that the latter declines to prosecute before any process of court may be issued.⁵⁸ Having had regard to sections 10, 11 and 13 of

⁵⁴ The Criminal Procedure and Evidence Act No. 67 of 1938, section 10 provides that, ‘If The Attorney-General declines to prosecute for an alleged offence, any private party who can show some substantial and peculiar interest in the issue of the trial, arising out of some injury which he individually has suffered by the commission of such offence, may prosecute the person alleged to have committed it in any court.’

⁵⁵ Ibid.

⁵⁶ The Criminal Procedure and Evidence Act No.67 of 1938 (AS AMEMDED).

⁵⁷ Section 13(1) which provides that, ‘No private party may obtain the process of any court for summoning any person to answer any charge, unless he produces to the officer authorised by law to issue such process a certificate signed by the Attorney-General that he has seen the statements or affidavits on which such charge is based and declines to prosecute at the public instance. See also sub-section 2 which mandates the Attorney-General to issue such certificate to the private party intending to undertake such prosecution.

⁵⁸ Ibid.

the CP&E Act, section 17⁵⁹ again permits the Attorney –General to take the matter out of the hands of the private party for purposes of prosecution at the public instance if he so deems appropriate by applying by motion to the court seized with hearing such a matter, and this provision further stipulates that ‘... such court shall make an order in terms of such motion.’⁶⁰ This exerts a mandatory obligation on the court to grant such an order in terms of the motion before it.

In essence, by invoking section 17, the prosecution is allowed to take the matter out of the hands of the classes of individuals stated in sections 10, 11 and 13 and to deal with such a particular matter as it deems fit, this inclusive of invoking section 6 to stop prosecution. By virtue of this unfettered use of power and authority, the possibility of the abuse of same is exacerbated particularly where stopping of a prosecution is concerned.

2.2 THE REPUBLIC OF SOUTH AFRICA STATUTORY PROVISIONS

The rule of law is said to have played a huge part in the imposition of a legal order by the colonialists as well as laying a foundation for the formulation of an independent legal order post colonialism in South Africa.⁶¹ Formal interpretation of the rule of law and equality is argued to have cemented and exacerbated oppression and discrimination during the colonial rule whilst post colonialism litigation was used as a tool to attempt to correct past colonial oppression.⁶² Legal writers such as Beat Lenel contend that South African law may not be boxed as classical Roman, Roman-Dutch Law, English common Law or even purely traditional South African Law, but that it is rather a merge of all four to a specific South African law.⁶³ The Common law, which is Roman-Dutch law is the major source of law.⁶⁴

⁵⁹ Which provides that: ‘The Attorney-General or the local public prosecutor may apply by motion to any court before which the prosecution is pending to stop all further proceedings in a prosecution at the instance of a private party, in order that the prosecution for the offence may be instituted or continued at the public instance, and such court shall make an order in terms of such motion.’

⁶⁰ Section 17 of the Criminal Procedure and Evidence Act (note 58 above).

⁶¹ S Bachmann & T Frost *Colonialism, justice and the rule of law: a Southern African and Australian Narrative* (2012) 45 Vol 2: 307.

⁶² Ibid.

⁶³ B Lenel ‘The History of South African Law and its Roman-Dutch Roots’ (2002), available at <http://www.lenel.ch/docs/history-of-sa-law-en.pdf>, accessed on 02 December 2018.

⁶⁴ Ibid.

South Africa started experiencing a serious influx of settlers in 1658 pursuant to the establishment of a settlement in the Cape by Jan Van Riebeeck in 1652.⁶⁵

Around 1806, the British, upon taking up authority of the colony, formalized the systems of administration wherein around the 17th century governance of the colony had changed a few hands between the Dutch, French and the British, finally ending with the sovereignty of Britain being cemented with a peace agreement in 1814.⁶⁶

Around 1948 apartheid was introduced in South Africa and was legislated by parliamentary Acts which were openly contradictory to the English principles of legality and the Dutch principles of equality, fairness and justice.⁶⁷ When South Africa became a Republic in 1961, with this change came a constitution which did not enshrine the bill of rights and it was left to Judges to decide over the application of unjust legislation.⁶⁸

In 1806 and 1828 the criminal law underwent reform in accordance with English law although still based on Roman-Dutch roots⁶⁹, and dating as far back as that time South African criminal law jurisprudence development has not stopped as can be seen from the over 70 instances of amendments listed in the Criminal Procedure Act 51, 1977(hereinafter referred to as the CPA).

The CPA is an Act which regulates procedures and related matters in criminal proceedings. It governs how criminal cases are handles in courts of law. One such procedure being that covered under section 6⁷⁰ which encompasses the stopping of a prosecution which provides as follows:

‘An attorney-general or any person conducting a prosecution at the instance of the State or anybody or person conducting a prosecution under section 8, may-

(a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;

(b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge:

⁶⁵ W C Boll *A Comparative analysis of Criminal Justice Processes in South Africa and the United States* (unpublished Doctoral Thesis, University of South Africa, 2002).

⁶⁶ Ibid 81.

⁶⁷ B Lenel ‘The history of South African Law and its Roman-Dutch Roots’ (note 62 above) 6.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Which provides for the withdrawal of charges at section 6(a), and the abandoning of prosecutions under section 6(b); the latter executed with the tacit consent of the Attorney General. Also see section 20(5) of the National Prosecution Authority Act No: 32 of 1998 which further provides that such consent shall be granted by the National Director in writing.

Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto.’

Section 6 of the CPA has been further developed through the Correctional Services and Supervision Matters Amendment Act 122 of 1991 to segment the section further into subsection (1)(a)(b) and (c) and incorporate a subsection (2).⁷¹

Section 8(3) of the CPA provides that the Attorney-General may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.⁷² This has the connotation that the Attorney-General, having given a private individual the go ahead to prosecute in any matter, may decide to take the matter away from under the hand of the private individual and proceed to deal with such matter as he deems fit. The flexibility with which this authority is exercised affords room for abuse of prosecutorial power whilst fostering uncertainty in respect of criminal proceedings.

⁷¹ As provided for by section 36 of the Correctional Services and Supervision Matters Amendment Act 122 of 1991, section 6 of the Criminal Procedure Act 51 of 1977 is segmented into subsections (1) and (2) of which subsection (1) incorporates (a)(b) as detailed in the body of the text, and (c) which provides that ‘at a time before judgment, whether or not an accused has already pleaded to a charge, reconsider the case and upon receipt of a written admission made by the accused in respect of the charge brought against him or a lesser charge, suspend the court proceedings and place such person, with his concurrence; under correctional supervision on such conditions and for such period as may be 30 agreed upon: Provided that--- (i) where a probation officer or a correctional official is readily available in the court's area of jurisdiction, the powers under this paragraph may only be exercised after a report of such a probation officer or correctional official has been submitted for consideration to the prosecutor concerned; (ii) the powers under this paragraph may only be exercised after consultation with the Commissioner and the police official charged with the investigation of the case and with due regard to the circumstances of the offence, the accused and the interests of the community; (iii) where a prosecution has been instituted under section 8, the suspension of the court proceedings shall be authorized beforehand by the attorney-general; (iv) the provisions of section 106(4) shall not be applicable where such an accused has already pleaded to the charge providing that ‘Section 6 of the Criminal Procedure is hereby amended by the addition of the following paragraph and subsection, the existing section becoming subsection (1)...’ Further, the provisions of subsection (2) state as follows: ‘If the court proceedings which have been suspended under subsection (1)(c) are proceeded with later- (a) and the trial has already commenced, the plea which has already been recorded shall stand and the proceedings shall- (i) if the court is similarly constituted, be resumed from where they were suspended; or (ii) if the court is differently constituted, be proceeded with de novo; (b) the written admission referred to in subsection (1)(c) may not be used against such an accused during the prosecution.’

⁷² Section 8(3) of the CPA provides that ‘An attorney-general may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the attorney-general, and that the attorney-general may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.’

The operations of the office of the National Director of Public Prosecutions (NDPP) are established by an Act of Parliament⁷³, which Act also addresses and regulates matters which are connected to the establishment of the single National Prosecution Authority (NPA)⁷⁴. Through the NPAA, the legislature of South Africa purposed to simplify the cooperation between different government departments within the Criminal Justice System.⁷⁵

In terms of section 179⁷⁶ of the Constitution of the Republic of South Africa, the NPA is headed by the NDPP⁷⁷. The Director of Public Prosecutions (DPP) and prosecutors, as determined by an Act of Parliament, execute prosecutorial functions in different jurisdictions⁷⁸.

Section 179(2) of the Constitution provides that, ‘The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.’ Section 179(5)(d) goes on to elaborately state that the NDPP may review a decision to prosecute or not prosecute, after consulting the relevant DPP, and after taking representation within a period specified by the NDPP, from the accused person, the complainant and any other person or party whom the National Director considers to be relevant.

The above statutory provisions are further supplemented by the provisions of section 20(5) of the NPAA⁷⁹ which provides that,

‘Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the National Director, or by a person designated by the National Director.’

⁷³ The National Prosecution Authority Act No: 32 of 1998, (hereinafter referred to as the NPAA).

⁷⁴ Established in terms of section 179

⁷⁵ M Montesh *Police Science* (unpublished Doctorate thesis, University of South Africa, 2007) 127.

⁷⁶ The Constitution of the Republic of South Africa, 1996 at section 179(1) states that there is a single National Prosecution Authority in the Republic structured in terms of an Act of Parliament.

⁷⁷ The Constitution of the Republic of South Africa 1996, section 179(1)(a) establishes the office of the National Director of Public Prosecutions who is the head of the prosecution authority and appointed by the President as head of the executive, and (b), establishes the office of the Director of Public Prosecutions and prosecutors.

⁷⁸ The Constitution of the Republic of South Africa, 1996 at section 179(3)(b) provides that national legislation must ensure that the Directors of Public Prosecutions are responsible for prosecutions in specified jurisdictions, subject to subsection (5).

⁷⁹ Act No: 32 Of 1998 (note 73 above).

This provision tacitly defines the procedure to be adopted by the prosecution in invoking section 20(1)(c) of the NPA⁸⁰. Stopping of a prosecution must be authorized by the Attorney-General or another authorized person⁸¹, inferring that a lot more scrutiny is exercised by another superior authority beyond just the prosecuting counsel acting on his own accord to exercise his powers as conferred under the section.

To an extent, the discretionary power and the authority to exercise such discretion must adhere to certain guidelines as set out in National Prosecution Policy⁸² which are set out in accordance to legislated provisions⁸³ in South African law.

The case of *Dawood v Minister of Home Affairs*⁸⁴ is instructive on the question of the exercise of discretion where the Constitutional Court stated that there was a need for guidance where broad discretion was exercised so as to foster the advancement of the spirit, purport and objectives of the Bill of Rights.

⁸⁰ Which section provides as follows: '20 (1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to- (c) discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.'

⁸¹ The National Prosecution Authority Act 32 OF 1998, section 20(5) provides that 'Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the National Director, or by a person designated by the National Director.'

⁸² The National Policy sets out the way in which the Prosecution Authority and individual prosecutors should exercise discretion. It guides prosecutors in the way they perform their functions, exercise their power and carry out their duties, thus making the making the prosecution process more fair, transparent, consistent and predictable. On stopping of a prosecution, Policy 5(a) provides as follows: 'Criminal proceedings may sometimes be stopped after a plea has already been entered. This would normally only occur when it becomes clear during the course of the trial that it would be impossible for the state to prove its case or where exceptional circumstances have arisen which make the continuation of the prosecution undesirable. If a prosecution is stopped, an accused will be acquitted and may not be charged again on the same set of facts. A prosecutor may therefore not stop a prosecution, unless the Director of Public Prosecutions or his or her delegate has consented thereto. Such decision should therefore be made with circumspection.'

⁸³ The Constitution of South Africa, 1996 at section 179(5) and (b) provides that the National Director of Public Prosecutions must issue policy directives which must be observed in the prosecution process.

⁸⁴ 2000 (3) SA 936 (CC) 54.

CHAPTER 3

3 COMPARATIVE ANALYSIS OF SWAZILAND AND SOUTH AFRICAN STATUTORY PROVISION: THE DIFFERENCE IN INTERPRETATION OF A STOPPING OF A PROSECUTION AND WITHDRAWING A CHARGE.

3.1 SECTION 6 OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT 67 OF 1938 AND OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

In seeking to establish what changes ought to be instituted to the Swaziland Act, recourse must be sought in comparison to what South Africa has done so far to effect changes and improve statutory provisions governing the power to stop a prosecution.

Both section 6 of the CPA and section 6 of the CP&E Act provide for the stopping of a prosecution. However, in the case of South Africa, development of this section is still continuing and the most recent being its segmentation into two. The Correctional Services and Supervision Matters Act⁸⁵, at section 36, provides for this purported development.⁸⁶

Section 6 of the CPA further differentiates the subsections dealing with the procedure to withdraw charges and that for stopping a prosecution⁸⁷. This is not the case with the Swaziland Act which deals with a provision only addressed the stopping of a prosecution. Even though the wording of this section of the CP&E Act tacitly deals with stopping of a prosecution, it is also invoked for the withdrawal of charges in Swaziland.

Section 6 of the CP&E Act⁸⁸, acknowledging the changes discussed above, is crafted similarly to the then provisions of section 9 of Ordinance 40 of 1828 of Britain which provides that,

“the Attorney – General has the power, at any time before conviction, of stopping all prosecution commenced by him or by the superintendent of police or by the clerks of the peace at the public instance,

⁸⁵ Act 121 of 1991.

⁸⁶ The Correctional Services and Supervision Matters Act 121 of 1991 at section 36 provides for the sectioning of section 6 of the Criminal Procedure Act 1977 into subsection (1)(a)(b) and (c), and subsection (2)(a)(i) and (ii) and (b). It further states that the existing section will become subsection (1).

⁸⁷ In view of the amendments effected by section 36 of the Correctional Services and Supervision Matters Act to the Criminal Procedure Act, for withdrawing charges the effective section would be subsection (1)(a) and for stopping a prosecution would be subsection (1)(b).

⁸⁸ The Criminal Procedure and Evidence Act 67 of 1938.

but in the event of the defendant having been previously arraigned upon any charge, he shall be entitled to a verdict of acquittal in respect of such charge.”⁸⁹

Save for the wording relating to such prosecution having been commenced by the superintendent of police or clerks of the peace, the wording is of the same import. Since the inception of the CP&E Act into the criminal justice system of Swaziland in 1938, the only notable change made to section 6 only goes as far as removing the wording ‘...the superintendent of police or by the clerks of the peace at the public instance...’ and replacing it with the words ‘...any other person...’

In effecting changes in the wording of section 9 of Ordinance 40⁹⁰, the provisions of section 8 of the Criminal Procedure Act 56 of 1955⁹¹ also reflect that the wording ‘superintendent of police or by the clerks of the peace’ have been expunged and reference is only made to the Attorney-General or any other person designated by him as being the people that have the power to exercise the authority to withdraw charges or stop a prosecution.

It suffices to theoretically infer that Swaziland courts still use section 6 of the CP&E Act to withdraw charges and stop prosecution, especially because development of this Act has not been holistically embarked on since its inception. This inference is further supported by the statement made by the court in the case of *Kerr v Rex* to the effect that withdrawal of an indictment amounts to a stopping of a prosecution wherein the court stated as follow:

‘There is no one point of minor importance which perhaps I should have alluded to earlier in my judgment, and that is whether the withdrawal of the indictment amounts to a “stopping of the prosecution” within the meaning of sec. 9. To stop anything is to arrest or impede its progress, or discontinue it. To stop an indictment is the same as to withdraw it. There is no peculiar virtue in the use of the term stopping a prosecution. Any words or the acts of the Attorney-General, if he had prosecuted in person, for instance, intimating to the court that he declines to proceed further with the case against the accused, or that he withdraws the indictment, is just as much significant of his intention or decision of stopping the prosecution as if he had used the precise word stop” itself. If this be so where the

⁸⁹ *Kerr v Rex* (1907) 21 EDC 324 at 331.

⁹⁰ Section 9 of Ordinance 40 of 1828 of Britain as cited in the case of *Kerr v Rex* (note 89 above).

⁹¹ A South African statute providing for the procedure in criminal proceedings in the Republic at the time. In respect of stopping of prosecution, Section 8 read as follows, “(1) The attorney – general, or with his consent, any person delegated under sec. 6 or designated under sec. 7, may, at any time before conviction, stop any prosecution commenced at the public instance within the area of jurisdiction of the attorney – general. (2) An accused who has pleaded to a charge in respect whereof the prosecution has so been stopped, shall be entitled to a verdict of acquittal in respect of that charge.”

Attorney-General prosecutes in person, then the words “stopping the prosecution” must receive the same meaning where the Solicitor – General prosecutes and withdraws the indictment.’⁹²

It stands to reason therefore to infer that Swaziland courts still align themselves to arguments similar to such as the one advanced by the court in the preceding paragraph. The wording of section 6 of the CP&E Act, particularly where it provides that ‘...but in the event of the accused having already pleaded to any charge...’ gives the impression that stopping of prosecution may be effected even where a plea has not been entered in respect of the accused person. The structuring of this wording of the provision is misleading and when applied, goes against the development in interpretation of what withdrawal of charges and stopping of a prosecution actually are as developed by South African legal authorities.

The interchangeable use of section 6 of the CP&E Act for stopping a prosecution as well as effecting the withdrawal of charges is predominantly rife within the magistrates’ courts of the Kingdom of Swaziland. Because of the failure to develop section 6 of this Act, this continues to widen the gap of catching up to jurisdictions such as South Africa in the interpretation and application of the provisions with sound interpretation. This further affords the opportunity for abuse of power and authority by the prosecution, especially given the authority as seen under section 17 of the CP&E Act according to which, even were the Attorney-General may have refused to institute criminal proceedings and afforded private parties to do so, this section gives him the power to assume authority, take and deal with any matter as he deems fit.

A reflection to the provisions of section 6 of the CPA shows a marked difference between withdrawal of charges and stopping of a prosecution. Contrary to the argument of the court in the *Kerr* case⁹³, South African courts have gone to lengths to develop, demarcate and pronounce on the differences between withdrawal of charges and stopping of a prosecution. In the case of *S v Gouws*⁹⁴, the court citing the case of *Attorney-General v Additional Magistrate, Middledrift and Others*⁹⁵, stated as follows:

"In my view this distinction [between the accused person who had pleaded not guilty and his co-accused persons, who had not pleaded at all] is a justifiable one ... and that, to that extent, the magistrate erred in entering a judgment of 'not guilty and discharged'. Nor can it be argued that s 6(b) applied to them since

⁹² *Kerr v Rex* (note 89 above) at 338 – 339.

⁹³ *Kerr* case (note 89 above).

⁹⁴ [2008] ZAGPHC 42 at para 16.

⁹⁵ 1987(4) SA 914 (CGD).

that section deals with procedure 'after plea' only. Accordingly, no room exists for a finding that the prosecutor's action in 'abandoning the prosecution' can be construed as a 'stopping' of the prosecution as envisaged by that section or that it required consent from the Attorney-General. Clearly it amounted to no more than a withdrawal of the charges prior to plea with retention by the State of the right to charge them afresh."

Clearly the provisions of section 6 of the CPA are self-explanatory as seen in the above statement by the court. Stopping of a prosecution in terms of section 6(b) is a procedure after the accused has tendered a plea and withdrawal of a charge per section 6(a), a procedure before a plea is tendered. This separation of the procedures as envisaged in sections 6 of the CPA affords clarity to the court as to the intentions of the prosecutor. The CP&E Act does not make this demarcation in its provision.

Tenets of the interpretation of statutes demand that in rendering an interpretation, consideration must be given to the intention of the legislature, and further, that by applying the literal rule to establish such intention, reliance is best placed in the ordinary meaning of the words used in the statute.⁹⁶ Where such ordinary and literal meaning results in an absurdity, repugnancy or inconsistency with the rest of the instrument, then modification of the words is permissible insofar as it only addresses the absurdity or inconsistency. It is further stated by the court in this case that in respect of a statutory provision, there may be two likely interpretations that amount to an ambiguity. It is submitted that in respect of section 6 of the CP&E Act, this is the case.

According to Snyman, it is a tenet of the principle of legality that the rules of criminal law must be clear and precise. Further that this promotes the behaviour of individuals to be in conformity to the rule set out in the law.⁹⁷

Development in respect of the entire CPA Act has been rapid, particularly with regards to the period marking the constitutional dispensation. The CPA Act alone computes and lists over 70 amendments which have been effected in respect of various sections of the Act.⁹⁸

⁹⁶ *Venter v Rex* 1907 TS 910 at 914 - 915.

⁹⁷ CR Snyman *Criminal Law* 4 ed (2002) 41.

⁹⁸ The Criminal Procedure Act 55 of 1977.

Section 6 of the CPA⁹⁹ has been developed further by section 36 of the Correctional Services and Supervision Matters Amendment Act¹⁰⁰ to place an obligation for monitoring by way of checks and balances with respect to the use of the power to stop or to suspend a prosecution during criminal proceedings. This obligation lies squarely on the shoulders of the Attorney-General¹⁰¹, and for a suspension of proceedings, consultation with the Commissioner and police official in charge of investigating a particular matter is mandated.¹⁰² This development effectively takes away the power of the prosecutor to act alone in making decisions pertaining to the suspension or even the stopping of a prosecution outside of being monitored, as such, limiting the abuse of prosecutorial power. The provision mandating the monitoring of a stopping of a prosecution is captured in section 6(b) where it is provided that,

‘...the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto.’

This provision which tacitly demands that the Director of Public Prosecutions or the Attorney-General authorise the stopping of a prosecution, does not exist under section 6 of the Swaziland Act, neither is it provided for in the Constitution of Swaziland¹⁰³.

⁹⁹ Ibid (note 98 above).

¹⁰⁰ Act 122 of 1991 which provides that ‘section 6 of the Criminal Procedure Act is hereby amended by the addition of the following paragraph and subsection, the existing section becoming section (1): “(c) at any time before judgment, whether or not an accused has already pleaded to a charge, reconsider the case and upon receipt of a written admission made by the accused in respect of a charge brought against him or a lesser charge, suspend the court proceedings and place such person, with his concurrence, under correctional supervision on such conditions and for such period as may be agreed upon: Provided that- (i) where a probation officer or correctional officer is readily available in the court’s area of jurisdiction, the powers under this paragraph may only be exercised after a report of such a probation officer or correctional officer has been submitted for consideration to the prosecutor concerned; (ii) the powers under this paragraph may only be exercised after consultation with the Commissioner and the police official charged with the investigation of the case and with due regard to the circumstances of the offence, the accused and the interests of the community; (iii) where a prosecution has been instituted under section 8, the suspension of the court proceedings shall be authorised beforehand by the attorney-general; (iv) the provisions of section 106(4) shall not be applicable where such an accused has already pleaded to the charge. (2) If the court proceedings which have been suspended under subsection (1)(c) are proceeded with later- (a) and the trial has already commenced, the plea which has already been recorded shall stand and the proceedings shall- (i) if the court is similarly constituted, be resumed from where they were suspended; or (ii) if the court is differently constituted, be proceeded with *de novo*; (b) the written admission referred to in subsection (1)(c) may not be used against the such an accused during the prosecution.”

¹⁰¹ Section 6(1)(c)(iii) of the CPA as provided for under section 36 of the Correctional Services and Supervision Amendment Act 122 of 1991.

¹⁰² Section 6(1)(c)(ii) (note 100 above).

¹⁰³ The Constitution of Swaziland, 2005.

3.2 CONSTITUTIONAL PROVISIONS ADDRESSING THE USE OF POWER AND STOPPING OF PROSECUTION IN CRIMINAL PROCEEDINGS – SWAZILAND AND SOUTH AFRICA

It has been stated in decided cases that before reliance may be placed on constitutional provisions, litigants must first rely on enacted legislation and that where such legislation falls short of the purport and spirit of the constitution, it is incumbent on a litigant to challenge such provisions on constitutional grounds.¹⁰⁴

The Constitution of Swaziland, via section 162(6)(a) advocates for and fosters the need for the development of statutory provisions dealing with prosecutorial power to amongst other procedures, stop a prosecution. It provides as follows:

‘In the exercise of the power conferred under this Chapter, the Director shall –

- (a) have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process; and...

Section 6 of the CP&E Act evidently does not meet the requirements set out in the Constitution to prevent the abuse of power and authority, as well as the abuse of the legal process in the use of prosecutorial power.

As regards the South African position, in terms of section 179(5)¹⁰⁵ of the Constitution of South Africa, the National Director of Public Prosecutions must determine prosecution policy and issue policy directives which must be observed in the prosecution process. These policy directives serve as guidelines for the use of power and authority by the prosecution. The policy directives are already in place and in use as may be observed from the case of *Freedom under Law v National Director of Prosecutions and Others*¹⁰⁶ where the court stated as follows:

¹⁰⁴ *NAPTOSA and others v Minister of Education Western Cape and Others* 2001(2) SA 112 (CC) at 30, also see *South African Defence Union v Minister of Defence and Others* 2007(5) SA 400 (CC) at 51.

¹⁰⁵ Section 179(5)(b) of the Constitution of South Africa which provides as follows: ‘The National Director of Public Prosecutions- (b) must issue policy directives which must be observed in the prosecution process; (c) may intervene in the prosecution process when policy directives are not complied with; and (d) may review a decision to prosecute or not to prosecute, after consulting with the relevant Director of Public Prosecutions and after taking representation within the period specified by the National Director of Public Prosecutions, from the following: (i) The accused person. (ii) The complainant. (iii) Any other person or party whom the National Director considers to be relevant.’

¹⁰⁶ [2013] 4 All SA 657 (GNP) at para 92.

‘In terms of the prosecution policy and directives issued in terms of the NPA Act, there is a duty to pursue a prosecution where there is a reasonable prospect of success, and regard should always be had to the nature and seriousness of the offence and the interests of the broader community.’

At paragraph 22 of the answering affidavit filed by the Acting National Director of Public Prosecution in the *Freedom under Law* case,¹⁰⁷ it is stated that the Acting National Director may, in terms of section 22(2)(b)¹⁰⁸ of the NPA Act, intervene in a prosecution process in which policy directives have not been adhered to. In terms of section 22(2)(c)¹⁰⁹ of the NPA Act the Director may further review a decision to prosecute or not pursuant to consultations with the relevant Director and taking representations of the accused person, the complainant or any other party considered by the National Director to be relevant.

The notable development of section 6 of the CPA in this regard is that it is divided into 3 main subsections, subsection (1) squarely addresses the withdrawal of charges, subsection (2) deals with the stopping of a prosecution and subsection (3) deals with the suspension of a prosecution.

This development signifies the fact that law is not static but evolves and as such, constant development is a demand any legal system cannot do without. Much as biased judges may distort the law away from efficiency, fostering legal evolution and diversity of judicial views improves the quality of the law and this distinguishing feature brings newness into dispute resolution and increases the precision of legal rules.¹¹⁰

The above development of section 6 of the South African Act emanates from constant arguments and discussions rendered by courts and legal scholars on the subject such as in the case of *National Director of Public Prosecution and Others v Freedom under Law*.¹¹¹ In this case the court, in rejecting the contention by the NDPP that a withdrawal of a charge falls under section 6(a) and not under section 6(b), and that decisions instituted under this section are only

¹⁰⁷ *Freedom under Law v National Director of Prosecutions and Others* [2013] 4 All SA 657 (GNP) at 88.

¹⁰⁸ Which provides as follows: ‘(2) In accordance with section 179 of the *Constitution*, the National Director– (b) may intervene in any prosecution process when policy directives are not complied with; and...’

¹⁰⁹ Which provides as follows: ‘(2) In accordance with section 179 of the *Constitution*, the National Director– (c) may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations, within the period specified by the National Director, of the accused person, the complainant and any other person or party whom the National Director considers to be relevant.’

¹¹⁰ N Gennaioli ‘The Evolution of Common Law’ (2007) available at https://scholar.harvard.edu/files/shleifer/files/evolution_jpe_final.pdf, accessed on 13 December 2018.

¹¹¹ [2014] 4 All SA 147 (SCA).

provisional and therefore not subject to review, the court stated that a decision to withdraw a criminal charge in terms of section 6(a) is final. Further, the prosecution can only be recommended by a different, original decision to reinstitute the proceedings. The court finally set aside the withdrawal of the criminal charges which automatically inferred a reinstatement of same.

A recent development is that the courts have determined that the authority and power to stop a prosecution or withdraw charges is subject to review by the courts, but that such power to review be sparingly exercised.¹¹² The South African courts extended this explanation to the principle of legality which is now well-established in this jurisdiction as an alternative pathway to judicial review where PAJA¹¹³ finds no application. This was enunciated in the dictum by Ngcobo J in the case of *Affordable Medicine Trust and Others v Minister of Health of RSA and Others*¹¹⁴ where the court stated as follows:

“The exercise of public power must therefore comply with the Constitution, which is supreme law, and the doctrine of legality, which is part of the law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.”

The Republic of South Africa has displayed innovation and judicial advocacy in developing her criminal jurisprudence which warrants the need for Swaziland to draw lessons and follow suit.

3.3 A COMPARATIVE ANALYSIS OF SECTION 6 OF THE SOUTH AFRICAN CRIMINAL CODE WITH THE SWAZILAND CODE

As alluded to in the preceding chapter and paragraphs, section 6 of the Criminal Procedure and Evidence Act¹¹⁵ as well as the Criminal Procedure Act¹¹⁶, are pieces of legislation upon which

¹¹² *Regina v Director of Public Prosecutions, Ex parte Manning* [2001] QB 330 at paragraph 23.

¹¹³ Promotion of Administrative Justice Act 3 of 2000; an Act giving effect to the right administrative action that is lawful, reasonable and procedurally fair and the right to written reasons for administrative actions as contemplated by section 33 of the Constitution of the Republic of South Africa, 1996 which guarantee everybody's rights to administrative action which is lawful, reasonable and procedural; right to be given reasons where one is adversely affected by an administrative action; and that national legislation must be enacted to give effect to these rights, providing for a review of administrative action by the court or an independent tribunal where applicable, imposing a duty on the state to give effect to the rights as stated above and to promote efficient administration.

¹¹⁴ 2006 (3) SA 247 (CC) 28.

¹¹⁵ *Ibid.*

¹¹⁶ Criminal Procedure Act 51 of 1977.

prosecutorial power to stop prosecution is expressed in the case of both Swaziland and the Republic of South Africa. The section is more clearly defined in the South African statute, where section 6 is divided into two subsections which denote a clear line of divide between the withdrawal of charges, stopping of a prosecution and suspension of same. The South African statute clearly defines that a charge may be withdrawn before a plea is entered by an accused, and that a stopping of a prosecution may be instituted after the entering of a plea.

Not only is this demarcation of the procedure to withdraw, suspend or stop prosecution important, it also clearly denotes the major difference which exists between the procedures, which in respect of the Swaziland statute are not defined. It is as if these procedures do not exist at all in practice in Swaziland, which is not true, especially in respect of the withdrawal of charges and stopping a prosecution both of which are in practice instituted under the provisions of section 6 of the Act.

The section simply provides that,

‘The Attorney-General may, at any time before conviction, stop any prosecution commenced by him or by any other person; but, in the event of the accused having already pleaded to any charge, he shall be entitled to a verdict of acquittal in respect if such charge.’

Herein lies the lacuna which exposes this section to abuse and maladministration of the power to stop prosecution. It is not enough that a section of the criminal procedure act wielding so vast a discretionary power should remain undeveloped for over 80 years since its inception in the face of evolving fundamental legal principles in the area as discussed in the case of development observed in this area of the criminal law with South Africa.

Section 6 of the criminal code in respect of both countries affords wide discretionary power on the prosecution, wherein the use of such power, particularly that of stopping a prosecution, is an encroachment on the powers of the court.¹¹⁷ Not only is this the concern, also unsettling is the question of whether all prosecutors seized with such authority possess the relevant aptitude to wield same, this observation was made by the court in the case of *Attorney-General v Additional Magistrate, Middledrift and Others*¹¹⁸ where the court stated that,

¹¹⁷ A Kruger ‘Hiemstra’s Criminal Procedure: Power to withdraw charge or stop prosecution’ (May 2018) available at <https://www.mylexisnexis.co.za/Index.aspx>, accessed on 18 December 2018.

¹¹⁸ [1987] 4 SA 233 (Ck) 237.

‘...the premise of the learned Judge President that stopping of a prosecution by a prosecutor without the necessary consent would be due to floundering through inaptitude and inexperience is not necessarily correct. It may very conceivably be done in a blatant disregard of instructions or for various other reasons, eg because he has a secret interest in the outcome of the matter or has been coerced into assisting the accused by some means or other.’

Couched in the above extract is an inference of the possibility of a blatant abuse of power and the possibility of corruption in the exercise of this power. The continued development of criminal jurisprudence in South Africa has diminished the possibility of abuse of power by the prosecution. Checks and balances are in place such as the development of section 6 of the CPA which, through this section, the legislature has managed to effect a separation of procedure in terms of stopping prosecution and withdrawal of charges.

In developing this section, the wording reflects that the rule of law, principles of legality, relevant constitutional provisions and statutory interpretation have been given regard by the South African legislature.

These checks and balances are introduced and can be developed from the provisions themselves, such as the mandatory demand that stopping of prosecution must be authorised by the Attorney-General.¹¹⁹ This is not the case with the Swaziland Act which is silent in this regard.

To further illustrate, section 13¹²⁰ of the Act seems to bear the connotation that the Attorney General would have had occasion to peruse and appraise him/herself of the contents of all the statements or affidavits on which any charge is based. Having done so, he would have declined to institute prosecution at the public instance for one reason or the other. Having authenticated his decision by issuing a certificate to that effect, section 17¹²¹ of the Act permits the Attorney-General to, again, take the matter out of the hands of the private party for purposes of

¹¹⁹ Section 6(1)(b) of the Criminal Procedure Act 51 of 1977.

¹²⁰ Criminal Procedure and Evidence Act 67 of 1938 provides that, ‘(1) No private party may obtain the process of any court for summoning any person to answer any charge, unless he produces to the officer authorised by law to issue such process a certificate signed by the Attorney-General that he has seen the statements or affidavits on which such charge is based and declines to prosecute at the public instance. (2) In every case which the Attorney-General declines to prosecute he shall grant such certificate at the request of the party intending to prosecute.’

¹²¹ Criminal Procedure and Evidence Act 67 of 1938 provides that, ‘The Attorney-General or the local public prosecutor may apply by motion to any court before which the prosecution is pending to stop all further proceedings in a prosecution at the instance of a private party, in order that the prosecution for the offence may be instituted or continued at the public instance, and such court shall make an order in terms of such motion.’

prosecution at the public instance. This, he does by applying by motion to the court seized with hearing such a matter, and this provision further stipulates that ‘... such court shall make an order in terms of such motion.’ This exerts a mandatory obligation on the court to grant such an order in terms of the motion before it, bringing this discussion full circle to the problems envisaged in respect of the amount of power afforded the prosecution under section 6 in respect of which one may ask the question; ‘Does the provision of this section do enough to prevent and mitigate possible abuse of the power and authority to stop prosecution?’

It is submitted that section 6 does not only not do enough to guard against possible abuse of the power to stop prosecution, it further does not adequately provide clear guidelines how this discretionary power, as it extends to the prosecution, must be invoked, neither does it provide boundaries to which it extends so as to avoid the likelihood of it being abused.

The Swaziland statute does not make specific provision for the withdrawal of charges; which has led to the practice of the prosecution using the same piece of legislation designed for stopping prosecution to withdraw charges, and the courts have not picked up on this misdemeanour nor have they accordingly addressed it to foster change, correction and development.

The range of power afforded the prosecution by the Swaziland statute is cause for concern. Evidently, there is a need for development of the provisions as South Africa has done, this reflected in the much more developed approach of the relevant provisions and arguments advanced by legal scholars in addressing stopping of a prosecution.

3.4 INTERPRETATION OF STATUTORY PROVISIONS ADDRESSING STOPPING OF A PROSECUTION IN THE CONTEXT OF SWAZILAND AND SOUTH AFRICA

The doctrine of separation of powers demands that Parliament enact laws and the judiciary interprets same.¹²² In passing laws, parliament proposes to remedy what is perceived to be a defect or lacuna in the existing law, both the written law enacted by statutes or the unwritten common law expounded by judges in decided cases.¹²³ In interpreting the law, the judiciary is limited to ascertaining from the wording approved by Parliament as expressing its intention,

¹²² *Duport Steels Ltd and others v Sirs and Others* [1980] 1 All ER 529 at 542-543.

¹²³ *Ibid* 542.

establishing what that intention was and giving effect to that intention.¹²⁴ The court further stated that in the case of statutory wording being plain and unambiguous, judges ought not invent fanciful ambiguities for failure to give effect to the plain meaning even where they feel that if the statute be applied as is, it will result in inexpedient, unjust or even immoral result. Of utmost importance is Parliament's opinion as to the intent of the statutory provision.¹²⁵

Parliament may enact a statute aimed at remedying a defect in the existing law, which upon application and actual operation may result in injurious consequences not anticipated at the time the statute was passed.¹²⁶

Such is the case with section 6 of the CP&E Act. In enacting this section, Parliament did not anticipate another use of this section of the Act save for such use as is may be deduced from the provisions within the ordinary cause of criminal proceedings and as is captured in the plain and, according to Parliament, unambiguous wording of the statutory provision. The wording of the Act is to the effect that section 6 may be invoked to stop a prosecution, and in the event the accused had already tendered a plea, he or she is entitled to a verdict of acquittal in respect of that charge. Further, it states that any prosecution may be stopped at any stage of criminal proceedings before the court convicts an accused person.

At the time of enactment of this section of the Act, one may infer from the wording of the provision that Parliament had not anticipated the development of criminal jurisprudence in so far as the interpretation of a stopping of prosecution and a withdrawal of charges is concerned. It is further submitted that it had not been anticipated by the legislature that invoking the provisions of this Act would result in the infringement of fundamental rights of others with a vested interest in the outcome of a case such as the complainants or victims of criminal activity.

Such a consideration of these rights of others affected by criminal activity shows as being in the mind of the legislature in the wake of the constitutional dispensation where at Chapter 3 of the Constitution, the protection and promotion of fundamental rights is enshrined.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid 543.

Section 20(1) of the Constitution¹²⁷ seeks to account for and take into consideration the rights of all by providing for enjoyment of equal protection under the law. This section of the Constitution is further supported by the provisions of section 162(6)(b) which seek to provide what considerations ought to be taken into account in the exercise of prosecutorial power and authority. It is provided that regard must be given to the public interest, interests of the administration of justice and the need to prevent abuse of legal process.

Section 163 of the Constitution of Swaziland, 2005, further establishes the Commission of Human Rights and Public Administration¹²⁸ whose functions include but are not limited to the investigation of complaints relating to human rights violations¹²⁹, taking appropriate action to foster the remedying and correction of these violations by causing a reporting of complaints to the relevant superiors of the offending party¹³⁰, as well as a referral of matters to the Director of Public Prosecutions or the Attorney-General for action to be instituted accordingly.¹³¹

¹²⁷ Section 20(1) of the Constitution of Swaziland which provides as follows: 'All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.'

¹²⁸ The Constitution of Swaziland, 2005 and at section 163(1) which provides as follows: 'There shall be established within a year of the first meeting of Parliament after the commencement of this Constitution, a Commission on Human Rights and Public Administration in this Chapter referred to as "the Commission".'

¹²⁹ The Constitution of Swaziland, 2005 section 164(1) providing that, 'The Commission shall perform the following functions – (b) investigate complaints of injustice, corruption, abuse of power in office and unfair treatment of any person by a public officer in the exercise of official duties.'

¹³⁰ The Constitution of Swaziland, 2005 section 164(1)(d)(iii) which provides that the Commission shall take appropriate for the remedying, correction or reversal of instances specified in paragraphs (a),(b) and (c) through such means as are fair, proper and effective, including- (iii) causing the complaint and the findings of the Commission on that complaint to be reported to the superior of an offending person or institution.

¹³¹ The Constitution of Swaziland, 2005 at section 164(1)(d)(iv) referring matters to the Director of Public Prosecutions or the Attorney-General for appropriate action to secure the termination of the offending action or conduct, or the abandonment or alteration of the offending procedures.

CHAPTER 4

4 CONCLUSION & RECOMMENDATIONS

4.1 CONCLUSION

Prosecutorial power and authority are important tools needed by the prosecution to effectively execute its mandate in criminal proceedings. However, also of utmost importance is the need to curb the abuse of power in the exercise of prosecutorial discretion, particularly in the abandoning of prosecution. Much as the independence of the prosecution is essential in protecting the prosecutorial function from interference by ensuring that the prosecutorial mandate is undertaken without fear, favour or prejudice¹³², accountability in light of such discretionary power as afforded the prosecution is still a necessity and need not interfere with independence of the prosecution authority.¹³³

The prosecution must also be held accountable to the public they serve, and this accountability is made possible through the setting in place of checks and balances in the form of policy directives and clear unambiguous rules of procedure to govern the exercise of power and authority by those seized with such power and holding public office. It further serves as a reminder that the custodians of this power remain responsible to the citizenry for their actions and decisions.¹³⁴ Accountability is tied to the rule of law in a democratic society and works as a necessary tool to foster confidence in the government and the justice system, and for our purposes, to ensure that the government and systems that are in place do not become self-serving but are seen to be of service to the general will of the public.¹³⁵

According to Martin Schontiech, accountability encompasses a public right to access information about government activities and to enable the public to petition government and seek redress by way of an impartial administrative and judicial mechanism.¹³⁶

Having established that discretionary power is also subject to scrutiny and accountability, it is of utmost importance that statutory provisions be reflective of this notion, and that in the

¹³² M Schontiech 'Strengthening Prosecutorial Accountability in South Africa' (note 7 above) 2.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

manner in which these provisions are crafted, they must clearly encompass and reflect the intention of the legislature.

It is submitted that it serves justice to have a statutory provision which is wordy rather than one that has few words so as to result in an ambiguous interpretation. In crafting a piece of legislation, parliament has a clear intent and such legislation is aimed at addressing a particular mischief. This must be crystal clear in the wording of any provision subjected to the literal meaning allotted to the words as used.

Section 6 of the CP&E Act does not provide a clear and single interpretation of the intentions of the legislature, and as such is ambiguous. In providing that, ‘...but, in the event of an accused having already pleaded to any charge, he shall be entitled to a verdict of acquittal...’ the section creates the impression that stopping of a prosecution in terms of the CP&E Act can be instituted both before and after a plea has been entered by an accused. This is not the case as stopping of a prosecution renders the matter final in that the accused person may never stand prosecution for the same matter again given the same merits and set of facts. Where a plea has not yet been entered, the correct procedure to pursue is a withdrawal of charges. In this instance, charges may be reinstated at a later stage.

While the CP&E Act has failed dismally, section 6 of the CPA has made a clear distinction between the two procedures, withdrawal of charges and stopping of a prosecution. Not only is this section properly segmented, the two procedures are clearly stated as well as the steps to be taken to institute these very different procedures.

Section 6 of the CP&E Act is indicative of a major loophole insofar as the protection of fundamental rights and freedoms afforded under the Constitution of Swaziland are concerned. In its ambiguity, the section falls short of the spirit of the Constitution insofar as the provisions of section 20(1) of the Constitution are concerned by not affording all equal protection of the law.

The criminal justice process by its very nature is all inclusive and involves the complainant against whom the offence has been committed, the accused person who is the offender, victims affected by the commission of crime whosoever they may be, society whose interests are of paramount importance in criminal proceedings and, amongst other factors, the need for society

to have confidence in the criminal justice system. As a system, it is the fabric that holds society together and its proper functioning serves to maintain that hold and stability.

In dispensing its functions, the criminal justice system is subject to none other than the constitution, which when properly applied, cements and makes the notion of the rule of law a reality. The constitution is the supreme law of the land and any other law which does not advance the spirit and purport of the constitution is a bad law and is thus unconstitutional. It takes a solid justice system through the independent functions of the judiciary to reaffirm the constitution as the supreme law. Failure to so do by the courts renders constitutional provisions ineffective. According to Angelo Dube, where there is no rule of law is a rule by law.¹³⁷

The dawn of the constitutional era in Swaziland presented much anticipated hope for a positive democratic change for all spheres of civil society, government and especially the judiciary which for the longest period had operated without reference to the notion of constitutionalism. As the sole interpreters of the law, one would imagine this period as having been extremely trying and unworkable.¹³⁸

Albeit the constitutional dispensation and 13 years into this era, Swaziland is still lacking in constitutional jurisprudence, which lack has shown itself in decided cases¹³⁹ which presented an opportunity for the judiciary of Swaziland to dive into the deep and begin to unravel long standing misconception relating to the rule of law and its application in Swaziland. However, to the detriment of much anticipated development, the courts have failed to take a stand to vehemently enforce and protect the fundamental rights and basic freedoms enshrined in chapter 111 of the Constitution.¹⁴⁰

The reluctance by the superior courts to take such a stand could be said to be one of the causes which have seen national legislation wallowing in inundated provisions such as section 6 of the CP&E Act which is the sole statute providing for the instituting of criminal proceeding in Swaziland. Since the inception of the CP&E Act in 1938, section 6 has not been amended in

¹³⁷ A Dube 'The King can do no wrong: The Impact of The Law Society of Swaziland v Simelane NO & Others on constitutionalism' (note 13 above) 269.

¹³⁸ Ibid. Of special note is the fact that the period 1973 to 2005 was epitomized by what Mr. Dube refers to as 'endless royal excesses', wherein, he further states, any conduct that was inconsistent with the King's Proclamation was rendered null and void, the King's immunity largely accepted in the absence of a constitution. The Judiciary had established the King's Proclamation as a *grundnorm*.

¹³⁹ See *Sithole NO & Others v The Prime Minister of the Kingdom of Swaziland and Others* [2008] SZSC 22, *Commissioner of Police & Another v Maseko* [2011] SZSC 15.

¹⁴⁰ Ibid 270.

spite of Constitutional provisions advocating for such change, improvement and much needed development. The constitution of Swaziland provides for the review of various constitutional documents, decrees, laws, customs and practices for the promotion of good governance, the rule of law, respect for institutions and the development of the Swazi society.¹⁴¹

Section 6 of the CP&E Act allows the wielding of unfettered discretionary power and authority to prosecutors to stop prosecution. This use of discretionary power is invoked amidst the absence of tangible policy directives, set rules or guidelines. It is submitted that this is a sure recipe for abuse of power and authority, particularly because the Swaziland statute does not have the provision as well developed as the South African provisions of section 6 of the CPA.

Section 6 of the CPA, provides that in stopping a prosecution, consent must be given by the Attorney-General, the absence of whose consent renders such stopping a nullity. This is in line with the provisions of section 179(5)(d) of the Constitution of South, which provides that the Attorney-General is empowered to review the decision to prosecute or not to. In the exercise of such review authority in terms of section 179(5)(d), the Attorney-General is enjoined to take consultation with the accused, complainant and other relevant parties which in itself adheres to the provisions of section 9(1)¹⁴² of the Constitution.

It is not only the amendment of section 6 of the CPA as earlier stated which renders it constitutional, same is supported by other developments that South Africa has undertaken to improve criminal jurisprudence such as the plethora of case law, some of which were mentioned in preceding chapters,¹⁴³ on stopping of prosecution and withdrawal of charges. South African courts continue to labour relentlessly to interpret national legislation in conformity to constitutional provisions. This is a very important trait which is lacking in respect of Swaziland courts.

This could be aligned to the lack of active involvement of civic groups in calling the government to accountability, especially the prosecution. It could well be on account of, per the argument by Angelo Dube, lack of Swazi-centric constitutional jurisprudence, lack of the

¹⁴¹ The Constitution of Swaziland, 2005 see paragraph 4 of the Preamble.

¹⁴² The Constitution of South Africa 1996, section 9(1) which provides as follows: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

¹⁴³ *Attorney-General v Additional Magistrate* case (note 1 above), also see *S v Soli* [2000] JOL 717 (Ck) at 4-5, *S v Joji and Another* [1977] 4 All SA 652 (Tks) at 654-655 and *S v Van Niekerk* [1985] 4 All SA 354 (BG) at 355-356.

culture of strategic litigation or a rigid curriculum in the academy that does not afford its products innovative thinking.¹⁴⁴

As alluded to earlier, with the passage of time and the coming into force of the constitutions both in Swaziland as well as in South Africa, statutory provisions needed to be aligned with the constitutional provisions, particularly those pertaining to extending certain fundamental rights to the people. Given the paramount importance of the CP&E Act in criminal proceedings as an Act cementing criminal procedure, there had been hope of a speedy amendment of national legislation to align it with the constitution.¹⁴⁵ 13 years into the constitutional dispensation of the Kingdom of Swaziland, section 6 of the CP&E Act has still not been amended albeit many problems touching on its unconstitutionality and ambiguity. Since its inception in 1938, it still operates as it did then despite the improvements of provisions of section 6 of the CPA in neighbouring jurisdictions such as South Africa whose legal authorities are of persuasive value to the courts in Swaziland.

Major developments have been undertaken by South Africa to amend section 6 of the CPA to align it with the constitutional provisions. This has taken the form of a division of the section into subsections which in their wording, clearly denote the marked differences between stopping a prosecution and the withdrawal of charges. The most recent development is that effected in terms of section 36 of the Correctional Services and Supervision Amendment Matters Act 121 of 1991 which pronounces the Act as having subsections 1 and 2, which were not in existence before.

Section 6 of the CPA clearly states that charges are withdrawn before an accused pleads to a charge and stopping of prosecution is a procedure used after a plea has been entered into in respect of a charge. In respect of a stopping in terms of section 6(b) of the CPA, consent for a stopping of a prosecution is given under the hand of the Attorney-General.

The responsibility to review the use of power and authority to invoke section 6 of the CPA by the prosecution is further protected in terms of section 179(5)(d) of the Constitution which places an obligation on the Attorney-General to consult with certain parties to criminal proceedings in reaching a decision as regards the stopping of a prosecution. The individuals to

¹⁴⁴ A Dube 'The King can do no wrong: The impact of *The Law Society of Swaziland v Simelane NO and Others* on constitutionalism' (note 13 above) 269-270.

¹⁴⁵ *Ibid* (note 136 above) 269.

be consulted include, most importantly, the complainant who in terms of the Swaziland statute is not given any regard.

Section 162 of the Constitution of Swaziland seeks to steer consideration of amendments in the direction of the formulation and amendment of national laws towards holistically incorporating those relevant provisions found under the Bill of Rights without necessarily tacitly stating what those improvements and amendments ought to be. This stance, it is submitted, affords leverage to the legislature to exercise a creative and innovative streak in the development of laws in conformity with statutory provisions. Much as this may be the case, and true to the words of Angelo Dube, the judiciary appears to be ‘treading on egg shells’ insofar as venturing into criminal jurisprudence advocacy in their interpretation of statutory provisions to give effect to fundamental rights and freedoms. The legal fraternity is lacking in innovative thinking and in the employ of strategic litigation, and there is a lack of public interest litigation by civil society. The prosecution also appears to be flying blind with no rules and policies to guide its operations and curb abuse of discretionary power and authority.¹⁴⁶ What hope is there for development and improvement one may ask?

A glimmer of hope may be found yet, in drawing lessons from the South African jurisdiction. Swaziland expects much more from the legal fraternity to spearhead this radical change, but there again, there seems to be a lack of innovative thinking.¹⁴⁷ The death knell to constitutional jurisprudence is dealt by the seeming lack of independence of the judiciary of Swaziland which appears to be ‘treading on eggshells’ so to speak, coupled with the reluctance to enforce and protect fundamental rights and basic freedoms enshrined in chapter III of the Constitution.¹⁴⁸

The status quo is a dire one when even the established Commission on Human Rights and Public Administration appears to be failing in its mandate as set out under section 164¹⁴⁹ of the Constitution of Swaziland, 2005. According to the UNDP report on the strategic plan of the Commission¹⁵⁰ which was established in 2009, there appears to not have been any matters

¹⁴⁶ A Dube ‘The King can do no wrong: The impact of *The Law Society of Swaziland v Simelane NO and Others* on constitutionalism’ (note 13 above) 269.

¹⁴⁷ Ibid 269.

¹⁴⁸ Ibid 270.

¹⁴⁹ The Constitution of Swaziland, 2005 section 164 (note 126 – 129 above).

¹⁵⁰ Swaziland Commission on Human Rights and Public Administration/Integrity *Strategic Plan* (2013-2017) 4.

undertaken and finalised to date as a result of the Commission having had any hand in accomplishing such an anticipated success.

The irony is that it is the same section 6 of the CP&E Act and CPA respectively that is used to stop prosecution in both Swaziland and South Africa. The difference however is in the crafting of the statutory provision, which in the case of the CPA reflects development which translates and reflects itself in the application thereof.

Both jurisdictions, Swaziland and South Africa operate with constitutions which are regarded as the supreme law, boasting a rich Bill of Rights in each though there exists a vast and marked difference in respect of the nature and form of the rights protected as well as the extent to which certain public functions are regulated.¹⁵¹

It is a rule of law principle that all are subject to the law, and that the law applies equally to all. The rule of law is cemented by the constitution in respect of which all laws must be in alignment. Those statutory provisions thought to be devoid of conformity to the constitution must be challenged before a court of law on constitutional grounds, which court will pronounce on their constitutionality or lack thereof.¹⁵²

4.2 RECOMMENDATIONS

The study has already concluded that section 6 of the CP&E Act is both ambiguous and unconstitutional. There is a need to amend the provisions of the section to elevate it to the standard of statutory interpretation which other jurisdictions more advanced in criminal jurisprudence such as South Africa, have attained, in their interpretation of a statute of similar import and function in their section 6 of the CPA to that of Swaziland.

The ambiguity can be addressed by drawing lessons from the South African statute¹⁵³ wherein the section is divided into two subsections, one dealing with the withdrawal of charges alone, and another dealing specifically with the stopping of a prosecution.¹⁵⁴

The Constitution of South Africa, 1996 at section 179 establishes the National Prosecution Authority and declares it at subsection 2 as having the power to institute criminal proceedings.

¹⁵¹ Ibid.

¹⁵² *NAPTOSA* case (note 103 above) at 30.

¹⁵³ The Criminal Procedure Act 51 of 1977.

¹⁵⁴ The Criminal Procedure Act 51 of 1977 section 6(a) and (b) respectively (note 69 above).

At subsection 5 the Constitution further mandates the National Director of Public Prosecutions to issue policy directives which are to be adhered to in the prosecution process. The Director is further charged with intervening in the criminal process where such policy directives are not followed. Having done all of the above, the Director is granted review authority over decisions made by the prosecution about whether to prosecute or not. In such review decisions, he is enjoined to consult with all parties affected by the commission of any particular offence and those people who he deems relevant to the matter. The provisions of the Constitution are self-explanatory, clear and straight to the point on what is expected of each party in fulfilment of the mandate of the prosecution authority. Similar clarity is found in section 6 of the CPA.

Section 162 of the Constitution of Swaziland, 2005 equally establishes the office of the Director of Public Prosecutions and empowers him to institute criminal proceedings, as well as discontinue same. At subsection 5 it is provided that in the exercise of the prosecutorial mandate, the Director of Public Prosecutions must have regard for certain interests pertaining to public interests, administration of justice and prevention of the abuse of legal process. This does not holistically address the use of power and authority by the prosecution. There needs to be undertaken the development of an independent and dedicated Act aimed at addressing the operations of the office of the DPP just as there is the National Prosecution Authority Act 32 of 1998 in the case of South Africa. This would easily allow for there to be a detailed outlining of the functions, as well as the procedures in terms of which such functions would be carried out.

Similarly, Swaziland has to consider establishing the office of the National Director of Public Prosecutions to oversee and monitor the operations of the Department of Public Prosecutions. Further, there is a need to establish at least two posts for the office of the Director of Public Prosecutions. Currently there is one Director of Public Prosecutions who, as it were, may be likened to the National Director of Public Prosecutions of South Africa. The Director in Swaziland currently single-handedly carries out the functions of this office of monitoring the operations in respect of all the four regions in Swaziland. For a single individual to monitor all these jurisdictions is not feasible and this is evident from the lack of much needed establishment of formal policy directives to assist in the monitoring of the use of power and authority by the prosecution in Swaziland.

There is an abject lack of positive developments in the delivery of the prosecutorial mandate due to the lack of proper monitoring. The government of Swaziland must establish an

independent and dedicated entity charged with reviewing the operations of the office of the DPP. The more accountability called for from this office, the better hope for proper and mandatory service delivery.

The judiciary must adopt a higher level of adjudication. Independence is the key to growth and freedom to venture into more innovative and radical interpretations of statutory provisions. This will assist in spearheading and re-establishing confidence in and the dignity of the judiciary, whilst displaying to all other core departments of the Swaziland government and the nation at large, the significance of the proper delivery of justice. The current position with the institution is reflective of an ailing judicial system. There is no innovation by the judiciary in terms of interpretation of statutory provision, neither is judgment writing informative and reflective of growing standards of criminal jurisprudence development. Were this to be done, it would foster development and bring awareness and change. The Constitution has been in circulation since 2006 and it can no longer be said that Swaziland is still navigating and finding her feet around it. There must be a willingness from the bench to flex its judicial muscle and venture into introducing and addressing constitutionality in their judgements. By so doing, this will begin to develop the criminal jurisprudence. If South Africa has been able to accomplish this major development of section 6 of the CPA, so can Swaziland.

The lack of constitutional thinking in judgment writing by the superior court of Swaziland has allowed the lingering of unconstitutional provisions such as section 6 of the CP&E Act. The Constitution does not make provision for the establishment of a constitutional court, yet there is a Human Rights Commission which is staffed but dormant as there have not been any advocacy for human rights litigation emanating from the Commission since its inception in 2009.

It is important to understand that the prosecutor's authority to decline to prosecute is a powerful one and open to widely unchecked abuse.¹⁵⁵ Checks and balances are not needed just for the departments within the justice system alone, but these are essential for all government institutions. The effect such checks and balances would have would be positive if they would start with the institutions charged with the delivery of justice. A healthy justice system denotes a healthy nation. According to Joseph Lawless, prosecutorial misconduct has reached epidemic

¹⁵⁵ M Schonteich 'Strengthening Prosecutorial Accountability in South Africa' (note 7 above) 11.

proportions and, like a disease, cuts across geographic and socio-economic boundaries to infect the criminal justice system.¹⁵⁶

¹⁵⁶ JF Lawless 'Prosecutorial Conduct: Law, Procedure, Forms' 4 ed (2018) para 1.01.

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