

IN THE COURT OF APPEAL OF LESOTHO

C.OF A.(CRI) of 1988

In the matter between:-

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EDWARD HAE PHOOFOLO

Appellant

and

REX

Respondent

JUDGMENT

MAHOMED J.A.

The Appellant was charged in the High Court on 17 counts of contravening the Exchange Control Regulations of 1975, ("the Regulations") and one count of contravening the Central Bank of Lesotho Act of 1978 ("the Act"). Several of these counts were, however, in the alternative, and the Appellant was eventually found guilty on Counts 2, 4, 6, 8, 10, 12, 13, 15 and 18 of the Indictment.

The allegation made on Count 18 was that whilst the Appellant was an officer or employee of the Central Bank of Lesotho (hereinafter referred to as "the Bank") he accepted certain gifts or advantages, the acceptance of which would

/result or. . . .

result or give the appearance of resulting in the diminishment of the Appellant's impartial devotion to his duties under the Act. The remaining counts on which the Appellant was found guilty all constituted contraventions of the Regulations.

THE FACTS

The following facts emerged during the trial:

1. At all relevant times during the period covered by the Indictment, the Appellant was the first Deputy Governor and a Director of the Central Bank.
2. On various dates during the period 1982 to 1987, the Appellant introduced within the Kingdom of Lesotho various amounts of foreign exchange, and on each such occasion when he did so, he filled in a Form E declaring how he had come to acquire the right to the foreign exchange concerned.
3. Subsequently on the 4th September 1987, the Appellant made a further statement to Mr. Charles Van Staden pertaining to the same transactions.

/4. There was. . . .

4. There was a conflict between the original declarations made on the relevant Form E and the subsequent explanation given by the Appellant to Mr. Van Staden in respect of each transaction. This was the basis of the conviction of the Appellant on Counts 2, 4, 6, 8, 10 and 12 in terms of Regulation 22 of the Regulations which made it an offence for any person to make any incorrect statement in any declaration made for the purposes of the Regulations (read with Regulation 19 (2), which provides that if a person makes a statement pursuant to an order in terms of Regulation 19 (1) which is in conflict with any other statement previously made by him, he shall be deemed to have made an incorrect statement in terms of Regulation 22).

5. In respect of Counts 13 and 15, in his statement to Mr. Van Staden, the Appellant also admitted that he had various monies to his credit in certain bank accounts in the United Kingdom. It was common cause that he did not within the period provided for in Regulation 7, declare that he had become entitled to procure the assignment of these credits, and the trial Court held that this constituted a contravention of Regulation 7 (2) (read with Regulations 7 (9), 7 (11), 7 (12) and 7 (13)).

6. In respect of Count 18, the Appellant also admitted in his statement to Mr. Van Staden, that he had received a payment of some £9 000 from Mr. Knights of Bradbury Wilkinson PLC. The undisputed evidence was that Mr. Knights was the sales representative of Bradbury Wilkinson

/PLC, which. . . .

PLC, which had entered into a substantial contract with the Central Bank for the printing of Lesotho currency notes. The trial Court held that the receipt of this money, in the circumstances, amounted to the acceptance of a gift or an advantage which would result or give the appearance of resulting in a diminishment of the Appellant's impartial devotion to his duties under the Act.

The Relevant Regulations and Statutory Provisions.

The relevant provisions are contained in Regulations 7, 8, 19, and 22 of the Exchange Regulations and Section 19 (3) and Section 19 (4) of the Act. These are as follows:-

- "7. (1) Every person resident in Lesotho who becomes entitled to sell or to procure the sale of any foreign currency, shall, within thirty days after becoming so entitled, make or cause to be made a declaration in writing of such foreign currency to the Ministry or to an authorised dealer.
- (2) Every person resident in Lesotho who becomes entitled to assign or procure the assignment of any right to receive outside the Rand Monetary Area any credit or any balance at a bank, or payment of any amount in a foreign currency shall, within thirty days after becoming so entitled, make or cause to be made, a declaration in writing of such right to the Ministry or to an authorised dealer.
- (3) Any person who has, in terms of sub-regulation (1) or (2), made a declaration in writing to the Ministry or to an authorised dealer, shall be deemed to have offered such foreign currency, or such right, as the case may be, for sale to

/the Ministry. . . .

the Ministry or to such authorised dealer and the Ministry or such authorised dealer may purchase such foreign currency or such right....

- (9) For the purpose of this regulation any person who has at any time since the commencement of these regulations been in Lesotho shall be deemed, until the contrary is proved, to have been and still to be resident in Lesotho, provided that the Ministry may make such rules for temporary residents as it deems fit.
- (11) If in any criminal proceedings against any person for a contravention of sub-regulation (1) of this regulation there is produced to the Court any document of which such person is proved or has admitted himself to be the author and which contains a statement by such person from which it may reasonably be inferred that any foreign currency is held by him or in his name or on his behalf, it shall be presumed, until the contrary is proved, that such person is entitled to sell or to procure the sale of the foreign currency in question.
- (12) If in any criminal proceedings against any person for a contravention of sub-regulation (2) of this regulation there is produced to the Court any document of which such person is proved or has admitted himself to be the author and which contains a statement by such person from which it may reasonably be inferred that any amount is standing to his credit outside the Rand Monetary Area or that he has any balance at a bank outside the Rand Monetary Area, it shall be presumed, until the contrary is proved, that such person is entitled to assign or to procure the assignment of such a right as is referred to in the said sub-regulation (2).

/ (13) If in. . . .

- (13) If in any criminal proceedings against any person for a contravention of sub-regulation (1) or (2) of this regulation, it is proved that such person is entitled to sell or to procure the sale of or to assign or to procure the assignment of any foreign currency, it shall be presumed, until the contrary is proved, that a declaration in writing has not been made to the Ministry or to an authorised dealer within the period required by sub-regulation (1) or (2), as the case may be.
8. (1) Every person resident in Lesotho who is, or becomes, entitled to sell or to procure the sale of any foreign asset, shall within thirty days after becoming so entitled, make or cause to be made, a declaration in writing in the form prescribed by the Ministry of such foreign asset to the Ministry or to an authorised dealer. Such declaration shall state when and how such foreign asset was acquired, where it is held and whether and to what extent it is held in cover for or in respect of any foreign liability.
19. (1) The Ministry, or any person authorised by the Ministry, may order any person to furnish any information at such person's disposal which the Ministry or such authorised person deems necessary for the purposes of these regulations and any person generally or specifically appointed by the Ministry for the purposes may enter the residential or business premises of a person so ordered and may inspect any books or documents belonging to, or under the control of such person.
- (2) If any person makes any statement on any information furnished in compliance with such an order which is in conflict with any other statement previously made

/by him. . . .

by him in giving information required in connection with the subject matter of such order he shall be deemed to have made an incorrect statement in terms of regulation 22 and may, on an indictment, summons or charge alleging that he made the two conflicting statements, be convicted of making an incorrect statement in contravention of the said regulation 22 upon proof of the two statements in question and without proof as to which of the said statements was incorrect, unless he proves that when he made each statement he believed it to be true.

22. Every person who contravenes or fails to comply with the provisions of any of these regulations, or contravenes or fails to comply with the terms of any notice or order or direction issued or any permission or exemption granted under these regulations, or who obstructs any person in the execution of any power or function assigned to him by or under these regulations, or who makes any incorrect statement in any declaration made or return rendered for the purposes of these regulations (unless he proves that he did not know and could not by the exercise of a reasonable degree of care have ascertained, that the statement was incorrect) or refuses or neglects to furnish any information which he is required to furnish under these regulations, shall be guilty of an offence and liable upon conviction to a fine not exceeding ten thousand rand or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment; provided that where he is convicted of an offence against any of these regulations in relation to any security, foreign currency, gold, bank-note, cheque, postal order, bill, note debt, payment or goods the fine which may be imposed on him shall be a fine not

/exceeding ten

exceeding ten thousand rand or a sum equal to the value of the security, foreign currency, gold, bank-note, postal order, bill, note, debt, payment or goods, whichever shall be greater". (Presumably there should be a comma between the words "note debt")".

Section 19 (3) and (4) of the Central Bank of Lesotho Act 1978 read as follows:-

- "(3) No director, officer or employee of the Bank shall accept any gift or advantage for himself or, on his behalf, for any person with whom he may have family, business, or financial connections if the acceptance thereof would result, or give the appearance of resulting, in a diminishment of his impartial devotion to his duties under this Act.
- (4) Any person who contravenes this section shall be guilty of an offence and liable on conviction to a fine of M5,000 and to three years' imprisonment."

The Relevance and the Admissibility of the Statements made by the Appellant to Mr. Van Staden.

The statement made by the Appellant to Mr. Van Staden was a crucial part of the case made on behalf of the Crown. Appreciating this, Mr. Mall, who appeared for the Appellant, attacked the authorisation of Mr. Van Staden's appointment in terms of Regulation 19 (1). In the course of an able argument, Mr. Mall, contended that this appointment was ultra vires.

The terms of Mr. Van Staden's appointment in terms of Regulation 19 (1) by the Minister of Finance are as follows:-

/.....

"TO WHOM IT MAY CONCERN

I, the undersigned, E.R.Sekhonyana, in my capacity as Minister of Finance and under powers vested in me by Regulation 19 (1) of the Exchange Control Regulations, 1975, hereby appoint Charles Robert Van Staden who is employed in the Exchange Control Department of the South African Reserve Bank, to exercise on behalf of the Minister of Finance the powers conferred on him by Exchange Control Regulations 1975.

Signature of E.R.Sekhonyana
E.R.Sekhonyana
Minister of Finance."

The first submission made by Mr. Mall was that Mr. Van Staden's authorisation was ultra vires because the authority which the Minister of Finance purported to confer on him was not limited to what could be authorised in terms of Regulation 19 (1) but extended to all the powers which the Minister of Finance could himself exercise in terms of the Exchange Control Regulations.

The second and alternative submission made was that the purported authorisation of Mr. Van Staden constituted a "delegation" of the Minister's powers and that where such "delegation" took place, the Interpretation Act contemplated notice of such "delegation" to be published in the Gazette, unless the contrary intention appeared in the relevant legislation. (It was common cause that Mr. Van Staden's appointment was in fact never gazetted in the instant case).

/ In my. . . .

In my view, the judgment of this Court in the case of Phoofolo v. The Minister of Finance and the Attorney-General (C.of A. (CIV) 25/1987) is inconsistent with both these submissions.

1. On page 13 of the unreported judgment in the case of Phoofolo (supra), Schutz P. held that whilst the authority of Mr. Van Staden had been "inaptly worded", properly interpreted, it meant that the Minister was conferring on Mr. Van Staden only those of the powers of the Minister which were contained in Regulation 19 (1) and no others. The learned judge drew attention to the phrase - "...and under powers vested in me by Regulation 19 (1)..." and then concluded as follows:

"This phrase indicates that the Minister was directing himself only to those powers and serves sufficiently to limit the powers actually conferred. The phrase is there and must be given a meaning".

This conclusion is clearly fatal to Mr.Mall's first submission.

2. On page 12 of the judgment in the case of Phoofolo (supra), Schutz P. also dealt with judicial and dictionary meanings of the word "delegation", and on page 13 he expressly held that the authority conferred on Mr. Van Staden by the Minister of Finance, did not

/constitute a . . .

constitute a "delegation" of the Minister's powers with the result that Section 35 and 36 of the Interpretation Act had no application. This conclusion is equally fatal to Mr. Mall's second submission.

Faced with these difficulties, Mr. Mall was driven to contend that the judgment of this Court in Phoofolo's case was wrong and ought not to be followed. In support of this contention he strongly contended that, even if the authority conferred upon Mr. Van Staden by the Minister of Finance was to be limited to the exercise of the powers which the Minister himself had in terms of Regulation 19 (1), this would, (on the terms set out in the written authority), include also the power to appoint other persons to perform the very powers which the Minister had entrusted to Mr. Van Staden. Counsel contended that this could never have been contemplated either by the enabling Act or by Regulation 19 (1) and that this difficulty had never been considered by this Court in Phoofolo's case.

During the course of argument, Mr. Mall conceded that the foundation for his argument rested on the last three lines of the written authority of Mr. Van Staden, (which I have previously quoted), to the effect that Mr. Van Staden was -

"to exercise on behalf of the Minister of Finance the powers conferred on him by Exchange Control Regulations 1975".

/ If these. . . .

If these last lines had not been added, there would be nothing objectionable in simply making an appointment in terms of Regulation 19 (1). The question which therefore arises is whether these words could be severed from the remainder of the document leaving intact a simple appointment in terms of Regulation 19 (1).

Since the question of "severability" was raised for the first time by the Bench during the course of oral argument, Counsel were given the opportunity of making further written submissions. Pursuant thereto, helpful written submissions were received from both Counsel.

The classical case on the test of "severability" is the decision in Johannesburg City Council v. Chesterfield House (Pty) Ltd, 1952 (3) SA 809 in which it was stated that:

"Where it is possible to separate the good from the bad in a statute and the good is not dependent on the bad, then that part of the statute which is good must be given effect to, provided that what remains carries out the main object of the statute.

Where, however, the task of separating the bad from the good is of such complication that it is impracticable to do so, the whole statute must be declared ultra vires."

(At page 822 D-F).

The written authority of Mr. Van Staden contains two parts. In the first

/part the. . . .

part the Minister of Finance, acting in terms of Regulation 19 (1), makes an appointment of Mr. Van Staden and identifies him as a person who is employed in the Exchange Control Department of the South African Reserve Bank. In the second part contained in the last three lines of the written authority, the Minister goes on to say that Mr. Van Staden was to exercise on behalf of the Minister of Finance the powers conferred on him by the Exchange Control Regulations of 1975.

Notionally, these are two separate matters. In my view, they are conceptually and notionally severable. (Baines Motors v. Piek, 1955 (1) SA 534; S.v. Prefabricated Housing Corporation (Pty) Ltd & Another, 1974 (1) SA 535 (A); S.v. Ockers & Another, 1974 (2) SA 523; S.v. O'Malley & Another, 1976 (1) SA 469).

If the excision of the second part of the written authority left undefined what the purpose of Mr. Van Staden's appointment would be, there might be some merit in resisting the notional severance because there might be some doubt as to whether, in its truncated form, the authority would give effect to the intention of the Minister or enable the main object of the appointment to be carried out. (S. v. Prefabricated Housing Corporation (Pty) Ltd & Another (*supra*); Johannesburg City Council v. Chesterfield House (Pty) Ltd (*supra*); Markowitz & Sons Trust Co. (Pty) Ltd v. Bassous, 1966 (2) PH (A) 65 (C)).

/ Mr. Mdhluli, who. . . .

Mr. Mdhluli, who appeared for the Crown, contended, however, that the written authority makes it perfectly plain that the appointment was being made in terms of Regulation 19 (1) and that the powers of a person so appointed could be determined in terms of the Regulation itself. The appointment could only be made for the purposes of authorising the person appointed to order any person, to furnish any information which the appointee deems necessary for the purposes of the Regulations and which is at the disposal of such person. In my view, Mr. Mdhluli is correct in these contentions and the words in the last three lines of the written authority conferred upon by Mr. Van Staden, relied upon by Mr. Mall, are and should be severed from the remainder.

In his supplementary argument on "severability", Counsel also drew attention to the fact that his argument did not involve a challenge to the validity of a Regulation or a Government Notice; the attack, he said, was on a "private document" recording certain powers.

Whilst the doctrine of juridical severability has very often been applied in the field of subordinate legislation, its operation is not confined to that field. It has with the same logic and effect been applied in the field of contract (the case of Markowitz & Sons (supra) in the adjudication of administrative Acts (S.v. Ockers (supra); S.v. Kleingeld, 1975 (3) SA 779 (C);) and in the construction of administrative documents such as permits (Transair (Pty) Ltd v. National Transport Commission, 1977 (3)

/SA 784. . . .

SA 784 (A) at p. 795 F-H). The document sought to be attacked in the instant case is a letter of appointment for public purposes and I can see no reason why the doctrine of severability should not be applied to its contents.

The Consequences of Admitting the Statements made by the Appellant to Mr. Van Staden.

- (a) With respect to Counts 2, 4, 6, 8, 10 and 12, there was a clear conflict between the relevant declarations made by the Appellant in respect of these Counts as to the source of the funds introduced by him and the corresponding explanation subsequently given in respect of each of these matters in the statement which the Appellant made to Mr. Van Staden. The conviction of the Appellant in terms of Regulation 22 read with Regulation 19 (2), therefore, became unavoidable. Mr. Mall did, at one stage, faintly suggest that there could be no conviction in terms of these Regulations unless both the statements relied upon were made pursuant to an order under Regulation 19 (1). He could suggest no basis for this submission which he wisely and correctly abandoned during the course of argument.
- (b) No argument was addressed to us in respect of the convictions on Counts 13 and 15. In my view, the Appellant was correctly convicted on these counts by the trial judge.

/(c) With respect. . . .

(c) With respect to Count 18, the statement made by the Appellant to Mr. Van Staden clearly established that the Appellant had, indeed, received substantial sums of money from Mr. Knights who was working for Bradbury Wilkinson PLC. It was contended on behalf of the Appellant that this evidence did not -

"exclude the possibility that the money so received was as a result of a purely personal relationship between the Appellant and Mr. Knights and that the company had nothing to do with it."

It is not disputed that Mr. Knights was the sales representative of Bradbury Wilkinson PLC and the Appellant gives no explanation whatever as to why Mr. Knights should be giving to him such substantial sums of money. At the very least, the acceptance of such monies by the Appellant would give the appearance of resulting in the diminishment of the Appellant's impartial devotion to his duties under the Act. This is sufficient for a contravention in terms of ~~Regulation~~ ^{Section} 19 (3) and in my view, therefore, the Appellant was correctly convicted on Count 18.

JWH.A.

Sentence

No appeal was lodged against the sentence imposed by the trial Court.

/ Conclusion . . .

Conclusion

In the result, I would order that the appeal be dismissed.



I.MAHOMED
JUDGE OF APPEAL

I agree



for J.J.TRENGROVE
JUDGE OF APPEAL

I agree



L.W.H.ACKERMANN
JUDGE OF APPEAL

Delivered at MASERU this 23rd day of January, 1990.