C of A (CIV) No. 15/2005

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

JüRGEN FATH	First Appellant
IMPREGILO SPA	Second Appellant

and

THE MINISTER OF JUSTICE OF THE KINGDOM OF LESOTHO	First Respondent
THE CROWN (herein represented by THE DIRECTOR OF PUBLIC PROSECUTIONS)	Second Respondent

CORAM:
Grosskopf, JA
Plewman, JA
Gauntlett, JA

JUDGMENT

27 March, 11 April 2006

Prosecution of a company – arrest of a director or servant in terms of s. 33 of the Criminal Procedure and Evidence Act, 1981 – thereafter citation of director or servant in terms of s. 338 (2) – jurisdiction of High Court as a consequence – use of civil proceedings to challenge jurisdiction of criminal court.

GAUNTLETT, JA:

Introduction

[1] This appeal concerns a challenge to the jurisdiction of the High Court of Lesotho to try the second appellant on charges of bribery. The second appellant is

an Italian-registered corporation, the first appellant a German national employed for a period in Lesotho by Hochtief Aktiengesellschaft ('Hochtief''), a member of a joint venture with the second appellant and Concor Holdings (Pty) (Ltd). The joint venture ("the consortium") was engaged in the building of the Mohale Dam and related construction and engineering works.

[2] This challenge was initiated in March 2005 in the form of civil proceedings – by notice of motion, with supporting affidavits and extensive documentary annexures – while the criminal trial of the second appellant, with the first appellant formally cited as its representative, was pending. The criminal trial did not in the circumstances commence. It has since been further postponed, to await the outcome of this appeal.

[3] The challenge arose from certain events which took place at the consortium's offices at the Mohale Dam, and then in Maseru, on 23 July 2004. The first appellant was nearing the end of his sojourn in Lesotho. Since 1999 he had been seconded by Hochtief to the consortium, rising to the position of its chief accountant. On the morning in question the first appellant (he deposed) was finalizing his arrangements to leave Lesotho permanently. He was told two officials wished to see him at the Mohale Dam offices of the consortium. He went there; he was met by a police

officer and a member of Lesotho's anti-corruption unit. He was shown a warrant of arrest, told that a charge of bribery had been laid against him, and that he was required to appear in the Magistrate's Court in Maseru at 2.00 p.m. that day.

[4] The first appellant asserted in his founding affidavit that he was "**under the impression**" that he was actually under arrest, and an accused on a charge of bribery. The "**suggestion**", as he put it, was that he had personally committed the crime. His initial description is both vague and cursory. Mr. Mohau Mokhachane of the Lesotho Directorate on Corruption and Economic Offences however in an opposing affidavit gave this detailed account:

> "**We waited a few minutes. Eventually Mr. Fath arrived. We exchanged introductions and we explained the purpose of our visit.**
>
> **In particular Mr. Fath was told that we had a warrant for his arrest (which I showed to him). He did not request a copy thereof. We explained to him that he had nothing to worry about and that his attendance in Court was just a formality. We explained to him that it was in fact the second applicant that the Crown was wanting to prosecute and that he would merely have to appear as its representative. We explained to him that he would be immediately released on bail and therefore he did not have to be concerned.**
>
> **Mr. Fath could not understand how he could stand in for Impregilo. He kept on repeating that he was an employee of Hochtief, not Impregilo. We explained to him that all this would be explained to him at Court when we got there. He accepted**

> **this and was then very co-operative. He asked to be allowed to collect some cash to pay bail which we advised would be fixed in a small amount and also to arrange for a lawyer. He attended to these things and advised that he had R2,000.00 in cash. We also asked him to bring his passport which he collected. He was told that his passport would be necessary for bail condition purposes. Thereafter we left. Mr. Fath did not even bring an overnight bag with him. He was advised this would not be necessary.**
>
> **Mr. Fath was accordingly reassured throughout that he had nothing to be worried about. Nor was he actually arrested. This was because his arrest was unnecessary because after we explained the purpose of our visit he undertook to co-operate fully."**

[5] This account elicited a vigorous denial in reply. Its thrust is that the first time the first appellant heard his presence at the court was sought in a representative capacity was on arrival in court. He believed that he was under arrest, and that he had to appear at court in his personal capacity.

[6] The common cause facts are that the first appellant then proceeded to court. He had in the meanwhile engaged legal representation. His rights were explained to him at the commencement of proceedings. The charges were read, and explained. These were charges of bribery of the then Chief Executive of the Lesotho Highlands Development Authority by the second appellant. The first appellant said he understood them. His counsel then applied for bail, disavowing any relationship between the first and second appellants (and recording that Hochtief

was not properly before court). With the agreement of the Crown, bail was then duly granted to the first appellant (without the surrender of his passport), on certain conditions not now material.

Subsequent procedural matters

[7] The procedural steps which followed are, for the reasons I shall give, of limited importance. (Unfortunately the parties viewed matters differently, and directed substantial parts of the papers and written argument at them). In essence, what then happened was this. The matter was remanded at that first appearance on 23 July 2004 until 26 October 2004. On 9 September 2004 the first appellant ceased to be engaged by the consortium. Prior to the hearing on 26 October 2004, attorneys in South Africa received the charge sheet and thereupon made arrangements to represent the second appellant, and to receive the indictment once finalized. They reserved the second appellant's rights to challenge it. The appearance on 26 October 2004 duly took place; the finalized indictment, signed by the DPP, followed a week later and was transmitted to the second appellant's attorneys. Separate legal representation was arranged for the first appellant. The application giving rise to this appeal was launched in March 2005.

[8] The trial was due to commence on 18 April 2005. On that date, the second appellant was represented by senior and junior counsel (who at the outset recorded that their appearance was not in any way to be construed as an acceptance of the court's jurisdiction). They sought and obtained a postponement of the trial by consent to October 2005, to enable the application to be dealt with. The parties evidently contemplated that any ruling in the application would be made with reasonable expedition, so as to achieve this. So too, it must be inferred, did the learned judge a quo (Nomngcongo J), or he would not have made the order.

Unfortunately that expectation was not realized. The ruling only ensued some six months later, on 17 October 2005. Why it took that long is not explained in the judgment. An appeal to this court was noted three weeks later.

The issues

[9] The declaratory relief the appellants sought from the High Court is essentially directed at two matters: the invalidity of the first appellant's arrest on 23 July 2004; and the invalidity of the subsequent citation of him by the Crown, in terms of s. 338(2) of the Criminal Procedure and Evidence Act, 1981 ("the Code") as the representative of the second appellant for the purposes of the trial of the latter. I deal with each in turn. A third issue which arises is whether what the appellants did in this matter was procedurally competent. It entails not using specific statutory remedies provided by the Code to attack (before the criminal trial commenced, but as part of the criminal proceedings) the indictment or the court's jurisdiction, but instituting collateral civil proceedings. For reasons to be explained, this is dealt with last. Finally there is an issue of costs.

The arrest issue

(i) The "stratagem of deceit"

[10] The attack on the arrest was advanced before us by counsel for the appellants on two main bases. The first is that the facts (so it was argued) established "**an improper stratagem to procure the presence of the first appellant before the Magistrate**". Warming to the task, the heads of argument suggested a scheme to trick the first appellant, so as to procure his citation as the representative (for the purposes of s.338 (2) of the Code) of the second appellant. The Crown (represented by the DPP who in turn, it seems, had engaged two

members of the Bar in South Africa to assist him) "**deliberately resorted to a stratagem of deceit … tainted by illegality from beginning to end**".

[11] There are several reasons why this attack is insupportable. The first, and most obvious, is that it was advanced for the first time in a replying affidavit. There is no evident excuse for this, and indeed none was offered in oral argument. The application was not an urgent one. Between July 2004 and March 2005, when the application was launched, the appellants had had a full opportunity to investigate factual and legal grounds to attack the arrest and the subsequent citation of the first appellant as the representative of the second appellant. The relevant allegations are serious ones, imputing dishonesty to the DPP and his representatives. They should have been in the founding papers, so that they could be properly answered. The need to do so is trite; this Court, like other appeal courts, has said so time without number.

[12] After having strongly advanced in his opening argument the contention that the arrest was indeed, on facts we could find, vitiated by deceit, the appellants' counsel ultimately conceded in his reply that the argument was not open to him, for the reasons I have indicated. The concession was correctly made. The argument – asserting, as I have said, forensic deceit – should not responsibly have been

advanced before either the High Court or us at all. This should have been clear on any careful reading of the papers.

[13] Related reasoning yields the same conclusion. The argument showed no regard for the first principles applicable to disputes of fact in opposed motion proceedings. It was the appellants who had chosen to proceed by way of notice of motion, thereby initiating a collateral challenge to the pending criminal trial. They were confronted with detailed opposing affidavits regarding the arrest. No attempt was made in oral argument to suggest that the denials and explanations advanced by the respondents in this regard could be characterized as not genuine, such that they could be rejected on the papers alone. Nor was any application made before the court below to cross-examine the deponents. The invitation in argument that we should nonetheless uphold the appellants' version by resort to the probabilities was appropriately faint (cf Administrator, Transvaal v Theletsane 1991 (2) SA 192 (A) at 196 I – J). In these circumstances, for this reason too there was no proper basis to persist with the attack. Again, that much should have been clear from the outset.

[14] Before I leave the facts relating to the arrest, one last aspect requires mention. Counsel for the respondents argued before us that the affidavits – approached on the principle laid down in Plascon-Evans Paints (Pty) Ltd v Van

Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) - did not in fact establish an arrest. Rather, he said, what happened was that the first appellant, although shown the warrant, of his own accord appeared at court, effectively treating it as a summons. There having been no arrest, the first issue in its entirety falls away. I do not agree. The warrant of arrest (although, for reasons not explained, was not procured and thereafter produced in evidence by either side) was plainly (all the deponents agreed) just that. The first appellant submitted to it. He attended court in response. And most tellingly, he applied for bail. He would not have needed bail if he was at liberty. If the Crown or the court had seriously considered that he had not been the subject of an arrest, there would have been no bail application. The matter must accordingly be approached on the basis that the first appellant was indeed arrested on 23 July 2004.

(ii) No arrests for corporate offences

[15] I turn now to the basis of attack on the arrest on which counsel for the appellants ultimately relied. It is a legal argument which I shall summarize before examining. It amounts to this. There is a gap, a casus omissus, in the law of Lesotho. Arrests may only be effected under the Code of individuals suspected of offences personally committed. The first appellant was not suspected of having committed an offence himself. He could not be arrested under the Code, as a

servant or director of a corporate body suspected of having committed an offence, to secure the presence before court of the corporate body.

The argument, counsel for the appellants acknowledged, draws all its strength from the literal wording of s. 33(1) of the Code. It reads:

> "**Any judicial officer may issue a warrant for the arrest of any person or for the further detention of a person arrested without a warrant on a written application subscribed by the Director of Public Prosecutions or by the public prosecutor or any commissioned officer of the police setting forth the offence alleged to have been committed and that, from information taken upon oath, there are reasonable grounds of suspicion against the person, or upon the information to the like effect of any person made on oath before the judicial officer issuing the warrant".**
> (Emphasis supplied).

Counsel for the appellants stressed the words I have underlined. In this case, he said, there could never have been a suspicion that the first appellant had himself committed an offence. Therefore, for the purposes of s.33, there could be no "reasonable grounds of suspicion against the person", being the first appellant.

[16] The difficulty with this approach is that it ignores context. "**In law**" remarked Lord Steyn in R v Secretary of State for the Home Department, ex parte Daly [2001] 3 All ER 433 (HC) at 447a, **"context is all"**. "**And so it is**" the South African Supreme Court of Appeal has added "**when it comes to construing the language**

used in documents, whether the document be a statute, or a contract, or, as in this case, a patent specification" (Aktiebolaget Hässle v Triomed (Pty) Ltd 2003 (1) SA 155 (SCA) at 157G). In University of Cape Town v Cape Bar Council 1986 (4) SA 903 (A), it was aptly noted that the words of a statute

> "**clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and if only when that is done that one can arrive at the true intention of the legislature"** (at 914D-E).

[17] The context is a statute which has moved beyond criminal culpability restricted to personal acts of natural persons. That has been done in a much later chapter in the Code than the provisions dealing with arrests, headed "General and Supplementary". Thus s. 338 (5) creates a form of vicarious liability for directors or servants (on stipulated conditions) for offences for which corporate bodies are liable to be prosecuted. And s.338 (1) and (2) contemplate the prosecution of corporate bodies which, as artificial persons, cannot themselves commit unlawful human conduct. Hence a corporate body may today, by this extension of the common law, be held accountable in criminal as well as civil law in circumstances in which sound legal policy and developed principle dictate it should be.

[18] S. 338(2) of the Code (which appears to be closely modelled on s. 332(2) of South Africa's Criminal Procedure Act, 51 of 1977) reads:

> **"In any criminal proceedings referred to in sub-section (1), a director or servant of a corporate body shall be cited as a representative of that corporate body, as the offender and thereupon, the person so cited may, as such a representative, be dealt with as if he were the person accused of having committed the offence in question;**
>
> **Provided that –**
>
> **(a) if that person pleads guilty, the plea shall not be valid unless the corporate body authorized him to plead guilty;**
>
> **(b) if at any stage of the proceedings that person ceases to be a director or servant of that corporate body or absconds or is unable to attend, the court in question may, at the request of the prosecutor, from time to time substitute for that person any other person who is a director or servant of that corporate body at the time of the substitution, and thereupon the proceedings shall continue as if no substitution had taken place.**
>
> **(c) If the person representing the corporate body is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the body corporate (*sic*) and may be recorded by attachment and sale of property of the corporate body.**
>
> **(d) the citation of the director or servant of a corporate body to represent that corporate body in any criminal proceedings against it, shall not exempt that director servant from prosecution for that offence under sub-section 5."**

[19] Once a person is so cited as the representative of a company, a number of consequences flow. Several of these, it will be immediately seen, have

significant repercussions for the individual cited. He or she is personally liable and obliged to respect and comply with the judicial process concerned, and to appear and remain present in court throughout the trial. He or she is liable to arrest in terms of warrants obtained under sections 121(3) and 173(2) of the Code, and may personally be convicted and sentenced for contraventions of the latter provisions. As the cumulative effect of the South African equivalent of s.338(2) was summarized by Goldstone J in Ex parte Prokureur-Generaal, Transvaal 1984 (2) SA 283 (T) at 287G (my translation):

> "**In other words, so far as the procedure is concerned, in contrast with the offence or contravention itself, the representative himself [as sulks] may be treated as if he is the accused".**

[20] This is the legal position once an individual is so cited in terms of s. 382(2), the appellants concede. But, they say the position is very different before then. This may be asymmetrical in the statute, but (they argue) it is what s.33 says. S.33 on its literal wording makes no provision to bring before court, by way of arrest, an individual not suspected of himself or herself having committed an offence.

[21] The essential question is whether that is the right way to construe s.33, in the context of a Code which contemplates prosecuting corporate bodies through representatives – and in the process, to the extent necessary and within the limits of

the law, trammeling the rights of the representative, in the ways explained by Goldstone J in Ex parte Prokureur-General Transvaal, supra.

[22] The Code, and what appear to be its antecedents, provide various means for obtaining the presence of an accused at court. Arrest is only one. It offers however generally the most immediate and effective means: control is asserted over the person of the arrestee (by touching, or where necessary, subduing the subject, or by some means of confining). Or the arrestee simply submits to custody. It is of course (instances of abuse aside) no basis to attack the validity of an arrest that another potentially effective way of procuring attendance at court existed (Tsose v Minister of Justice 1951 (3) SA 10 (A) at 17; Minister van Polisie v Kraatz 1951 (3) SA 10 (A) at 17)).

[23] The residual legal attack here is different. It is, as I have noted, that the arrest of the first appellant was simply not available as a matter of law to the Crown as a means of securing his presence at court to represent the second appellant, because he was not accused of committing any offence himself. Counsel for the appellants were invited to indicate how, in the circumstances of this matter, proceedings could then have been effectively initiated against the second appellant. The answer was: by summons. But a consideration of the provisions in the Code

with regard to the use of a summons to procure attendance at court (s.120, read with ss. 118 and 92 of the Code) indicates two immediate difficulties for the appellants' argument.

[24] The first is that the literal language of those provisions, too, does not allow for it: here, too, the "person" to be summonsed on a literal construction is the perpetrator. So the resort to these provisions serves only to underscore the weakness of the literalism propounded: if the argument is consistent, the summons route for exactly the same reason is unavailable, too. The contended gap becomes a procedural black hole, and there is no remedy – in the sense of a procedural mechanism to secure attendance – at all. At a level of the most basic policy, the law is strongly resistant to that conclusion. This point was made forcefully by Centlivres CJ in the leading decision in Minister of the Interior v Harris 1952 (4) SA 769 (A) at 780 H – 781 A: to accord a statutory right but then to deny it a means of carrying it out

> "…**would be to reduce the [provisions in question] to nothing … [The lawmaker] could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. Ubi jus, ibi remedium".**

[25] The second difficulty is that the summons route is by its nature in any event ill-equipped to deal with any case in which urgent steps need to be taken, or where it is anticipated that evasive action to thwart service of the summons may ensue. In contrast, a warrant may be procured directly by a police officer from any judicial officer. The police officer may take it directly to the intended arrestee and enforce it – physically if he must. A summons (in terms of s.120) however requires first a determination by the public prosecutor to prosecute; then a lodging with the clerk of the court concerned of a requisite statement; thereafter the issue and delivery by the

clerk of that court to the messenger of the court; and finally its service by the messenger. The opportunities for flight or evasion in this lengthier process are obvious. When pressed to suggest why the legislature should have wished to conceive of a scheme which would permit this, counsel for the appellants could suggest no answer – other than a statutory tenderness for the individual concerned. But that is hardly consistent with the position which (pace Ex parte Prokureur-General van Transvaal, supra) applies immediately citation takes place in terms of s. 338 (2), when (as I have described) personal rights of the individual representative of the corporate body may be quite significantly infringed in the course of the trial taking place.

[26] The argument took final resort in asserting the need to adhere to the plain and literal words used in s.33, emphasized in paragraph [15] above (… "**suspicion against the person…**"). But it seems to me the answer is this. Once the Code makes it plain, as s.332 later does, that artificial persons can commit crimes, that they are to be prosecuted for them, and that this is to happen through a natural person as a representative, the intention in s.33 must be that the "suspicion against the person" in s.33 is a suspicion against that representative in that surrogate capacity. In that sense it is indeed "against the person", even if it is not personal.

[27] In the very authority on which counsel for the appellants sought to rely in this regard as the locus classicus in South Africa for the so-called golden rule of interpretation (Venter v R 1907 TS 910), Innes CJ said this (at 914-5):

> "**When to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature".**

If my analysis entails a departure from the literal wording of s.33, it is because the context demands it and because without it the efficacy of the Code would be materially thwarted in its application to corporate bodies (cf Ex parte Minister of Justice: In re R v Jacobson and Levy 1931 TPD 45).

[28] The residual attack on the lawfulness of the arrest of the first appellant must accordingly fail.

Second issue : the citation in terms of s.338 (2)

[29] The appellants also argued that no valid citation of the first appellant as the representative of the second appellant had been effected. This was not, it may be noted, on the basis that the first appellant was never directly employed by the second appellant, because at all material times he was an employee of Hochtief,

"engaged" – as the papers put it – until 9 September 2004 on the work of the consortium of which the second appellant was a member. That stance by the appellants is consistent with the fact that "director" in s.338 (2), it has been held, is to be given a wide meaning, including all who assist in the control or administration of the corporation, even if they do not occupy formal positions (R v Mall 1959 (4) SA 607 (N) at 609 H – 611D, dealing with the South African equivalent of s.338 (11); S v Marks 1965 (3) SA834 (W) at 841D – 843D. See too Hiemstra Suid-Afrikaanse Strafprosesreg (6 de uit. 2002 by Johann Kriegler) 915; Du Toit et al Commentary on the Criminal Procedure Act (1999 rev.) 33-7). If "director" is to be widely interpreted, so too, it may be expected, should "servant".

The argument was rather that "cited" in s.338 (2) means, and only means, summons. Thus (as I understood the submission) even if the argument based on the literal meaning of s.33 fails, a proper interpretation of s.338 (2) leads to the same result: the first appellant had to be summonsed, not arrested, for a valid citation of the second appellant to take place.

[30] The argument in my view fails at every level. To cite in its present context means to identify or describe. The language of the section moreover plainly contemplates a prosecution which has commenced, with the corporate body (through its representative) already before court. Working from that premise, the work of the provision relates to how the offender is to be described and dealt with during the prosecution.

[31] The suggestion that the judgment in Ex parte Prokureur-General, Transvaal

supra supports the argument also bears no scrutiny. Counsel for the appellants could point to no passage which does. In truth, the present issue was not even raised in that matter. The same applies to the further authorities to which diffuse reference was made (IGI Insurance Co Ltd v Madasa 1995(1) SA 144 (TkA) at 146D – 147C; Himelsein v Super Rich CC 1998(1) SA 929 (W) at 931E – G; Hiemstra op cit 912; Harms Civil Procedure in the Supreme Court B-28).

[32] Nor does the resort to the Afrikaans text of the comparable South African provision assist where “gedaag” (more naturally rendered as summonsed in English) is used for “cite”. There is no basis to infer that the Lesotho lawgiver had any recourse to that text in enacting the Code; as counsel for the appellants in fact were elsewhere at pains to emphasize, s.338 (2) appears to have been inspired by the English text of the South African equivalent.

[33] These matters aside, the argument ultimately folds in on itself. If s.33 does not bear the literal meaning for which the appellants contend, so that the presence of representative before court can be secured – in appropriate circumstances – by arrest as well as summons, s.338 (2) could hardly have intended thereafter to exclude the former. So viewed, the second argument is not self-standing, but in truth wholly dependent on the answer to be given to the first. And that, as has been

indicated, must be in the negative.

Third issue: the challenge by collateral civil proceedings

[34] When the appellants gave notice that they wished to challenge the High Court's jurisdiction by way of motion proceedings, the Crown (as I have noted) agreed to the postponement of the criminal trial. But it argued before the court a quo that the procedure should not be countenanced, at least in the circumstances of this matter. That argument was rejected by Nomngcongo J, in terms the appellants have sought to support before this court.

[35] The learned judge referred to a number of decisions, in some of which such a procedure has been allowed by the court to pass with little comment, while in others, he noted, it has been censured. The former generally comprise instances where no objection was raised by the other party, and where a court of appeal found itself (as we do) with something of a fait accompli. It is an unattractive option in a matter where there are issues which have been fully argued, and which should beneficially receive a final ruling, simply to set aside the whole proceedings for a procedural defect. This is particularly so in the context of a criminal trial relating to alleged events of some years ago. For those reasons, I deal with this issue last, and I do not adopt that course. But in dealing with it, I have to say that I consider the learned judge a quo was with respect wrong; this is not an instance where collateral motion proceedings should have been tolerated. To the extent that the learned judge exercised a discretion in doing so, that discretion was vitiated.

[36] The reasons for this conclusion are, in short, these. The departure point is that the Code (as it commonly is known) is aptly named: save where other statutes may make explicit separate provision, it is Lesotho's encompassing regulation of criminal trials. It does not contemplate an elective opt-out when a criminal litigant considers that beneficial. The Code provides, in particular, quite specifically for preliminary challenges in relation to indictments, jurisdiction and the like. It is not as if the appellants in this matter were faced with a situation which only resort to the

inherent jurisdiction of the High Court could remedy. Nor were they invoking the specialist provisions of the Constitutional Litigation Rules (GG XLV of 14 December 2000, Legal Notice 194 of 2000).

[37] Counsel for the appellants called in aid two leading South African authorities (to which the court a quo itself makes no reference). A close reading however of both shows that they support a quite different conclusion. Thus Rumpff CJ in Nduli v Minister of Justice 1978 (1) SA 893 (A) noted that, while the parties had agreed that a challenge to the jurisdiction of the criminal be brought by civil proceedings "**the proper and certainly the more efficacious procedure"** would have been to use the specific provisions of the South African Code (at 905B). It was with clear reluctance that the court acceded to this course (at 905 F-G). Similarly in S v Ebrahim 1991 (2) SA 553 (A) the court found itself confronted with just such an agreement by the parties, to which it was constrained to accede (at 567C). That is not the case here. In Lesotho, moreover, this Court has disapproved of the general practice, in Sole v GH Penzhorn and others C of A (CIV) 21/00 and again, emphatically, in Sole v Cullinan C of A (CIV) 29/02.

[38] That is not to say that circumstances may not arise in which a challenge to the competence of a criminal court to hear a matter may permissibly be made

outside the ambit of the Code. That resort must however be rigorously justified. As a minimum the resort would have to be shown to be necessary, because the Code offers no appropriate mechanism for the challenge or because some other compelling consideration warrants it.

[39] Resort to the declaratory powers of the High Court at common law in inessential circumstances has, it may be noted, obvious complicating consequences. The court, ruling in indictments and jurisdiction in the context of the Code, does so within a particular framework for appeals (and appealability). Declarators on the other hand are discretionary. Different tests may arise for appealability. There is also the prospect of greater delay. Nothing prevented the appellants here from seeking the determination of the preliminary issues by the trial judge in the criminal matter at an initial hearing, before (as happened) a lengthy period was procured for the trial itself and ultimately wasted.

[40] In these circumstances, there was no proper basis for the court a quo to have permitted the procedural course it did. It did not apply the correct principles in this regard.

Costs

[41] Finally there is the question of costs. The respondents sought a costs order

in the event of the appeal being dismissed.

[42] Counsel did so on the basis that, in the first place, the issues raised by the application could have been ventilated without resort to the production of three sets of affidavits, and in the second place, that ultimately unsustainable allegations of a serious kind were made by the appellants against the Crown and its professional representatives.

[43] Nothing further need be said in relation to the first aspect. As regards the second matter, I have already said that there was no responsible basis for it. Much of the papers, and of both written and oral argument was taken up with the contention of a stratagem of deceit before the necessary concession was made, a few minutes before the end of the argument.

[44] For these reasons I consider it appropriate that the appellants should pay the costs of the appeal, jointly and severally. Although the respondents were represented in oral argument by only one of the two counsel engaged by them, the heads of argument were prepared by both senior and junior counsel.

[45] Counsel for the appellants (who throughout have been represented by two counsel) did not suggest that any costs order we might make should not extend to the costs of two counsel, where these have been incurred.

[46] There is no cross-appeal by the respondents against the order by the court a quo that each party pay its own costs in that court.

The Order

> The appeal is accordingly dismissed with costs, such costs to be paid by the first and second respondents jointly and severally, the one paying the other to be absolved, and including the costs of two counsel where these have been incurred.

_____
J J Gauntlett
JUDGE OF APPEAL

I agree:

_____
F H Grosskopf
JUDGE OF APPEAL

I agree:

_____
C Plewman
JUDGE OF APPEAL

Counsel for the appellants: G. Farber SC and DF Dörfling
Counsel for the respondents: HHT Woker

(the heads of argument being prepared by GH Penzhorn SC and HHT Woker)