IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) No. 15/06

In the matter between:

MILLENIUM TRAVEL & TOURS FIRST APPELLANT
JAYAKRISHNAN APPUTATTAN NAIR SECOND APPELLANT
MAMOLISE MARY KAMOHI THIRD APPELLANT

and

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

Held in Maseru on 2nd April 2007

CORAM:
Steyn, P
Ramodibedi, JA
Grosskopf, JA
Smalberger, JA
Melunsky, JA

SUMMARY

The appellants were indicted in a summary trial in the High Court on numerous counts of fraud and bribery. They raised two points *in limine*. The first related to the alleged improper exercise by the respondent of his discretion in terms of section 144 of the Criminal Procedure and Evidence Act 1981 ("the Act"); the second alleged that the appointment by the respondent of outside counsel to conduct the proceedings, in terms of section 6(2) of the Act, was in conflict with the provisions of section 99 of the Constitution. The court *a quo* dismissed both points *in limine*. Held that the dismissal of the first point *in limine* was not subject to appeal at this stage. Held further that the dismissal of the second point *in limine*, involving as it did the interpretation of a constitutional provision in respect of which there had been a final decision, was appealable in terms of section 129(1)(a) of the Constitution. Appeal considered. Held that the provisions of section 6(2) of the Act are not inconsistent with section 99 of the Constitution. Appeal accordingly dismissed.

JUDGMENT

SMALBERGER, JA

1. The three appellants stand indicted in a summary trial in the High Court on 258 counts of fraud and four counts of bribery. In respect of the latter counts they face alternative charges of contravening section 22 (2) of the Prevention of Corruption and Economic Offences Act 5 of 1999. The indictment comprises 64 pages, relates to events spanning a number of years and involves amounts totaling more than two million maloti.

2. After several postponements the trial was scheduled to proceed before Mofolo J. In terms of section 6 (2) of the Criminal Procedure and Evidence Act 9 of 1981 ("the Act") the respondent had retained outside counsel to prosecute at the trial. Before the commencement of the hearing the appellants, through their counsel, raised two points *in limine*. In broad outline they were:

> 1. That the respondent failed to exercise, alternatively did not properly exercise, his discretion under section 144 of the

Act when directing that a summary trial be held.

2. That the appointment of outside counsel was improper and unconstitutional in that section 6 (2) of the Act is in conflict with section 99 of the Constitution of Lesotho.

3. On 18 August 2006 Mofolo J handed down a comprehensive written ruling in which he dismissed the points taken *in limine*.

The appellants subsequently noted an appeal against his ruling. The Grounds of Appeal read as follows:

> "1. The Court erred in finding that the point was argued that section 144 of the CP and E Act (Act 1981) finds no application: what was argued is the fact that the Crown did not establish a factual basis to invoke the provisions of section 144(1)(b) 'in the public interest'.
>
> 2. The Court erred in finding that because of the provisions of section 144(1) (b) 'in the public interest' a summary trial in the High Court, was justified, without the holding of a preparatory examination.
>
> 3. The Court erred, in holding as it did, that the Director of Public Prosecutions, was in law permitted to delegate his prosecutorial power, to officers other than those subordinate to him as contemplated by section 99 of the Constitution of

> Lesotho.
>
> 4. The learned Judge *a quo* erred, and/or misdirected himself in holding as he did, dismissing the contention that section 45 of Act No 5 of 1999 was invalid without first hearing and/or inviting argument thereon. The learned Judge ought to have invited both parties to address him on the validity or otherwise of the said section if he was to make a decision thereon."

4. The first two grounds of appeal relate to the first point *in limine*; the third ground relates to the second point *in limine*; and the fourth ground arises from what it is claimed was held by Mofolo J during the course of his judgment. It is not clear that he made such a ruling. In any event it is strictly speaking extraneous to the points raised *in limine* – and being no more than a ruling, not final in effect and therefore open to reconsideration.

5. In terms of section 129 (1) (a) of the Constitution an appeal shall lie as of right to the Court of Appeal from decisions of the High Court in respect of, *inter alia*, "final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution." The second point *in limine* (and therefore the third

ground of appeal) raises a constitutional issue – the proper interpretation of section 99(2) and (3) of the Constitution and whether section 6(2) of the Act is in conflict with those provisions. The ruling by Mofolo J in respect of the second point *in limine* has the attributes of a final decision (cf S v Western Areas Ltd And Others 2005 (5) SA 214 (SCA) at 224 (para 20)). It is therefore appealable in terms of section 129(1) (a) of the Constitution. Mr. Dickson, for the respondent, conceded this.

6. By contrast, the first point *in limine* does not in my view raise a constitutional issue or involve an interpretation of the Constitution (nor do the grounds of appeal associated therewith, or the fourth ground of appeal). The appellants are of course bound by their grounds of appeal. See in this regard Rule 4 (5) of the Court of Appeal Rules, 2006 published as Supplement No.2 to Gazette No.55 of 17 November, 2006 which provides as follows:

> "The appellant shall not argue or rely on grounds not set forth in the notice of appeal unless the Court grants him leave to do so. The Court, in deciding the appeal, may do so on any grounds whether or

not set forth in the notice of appeal and whether or not relied upon by any party."

7. In any event the exercise by the DDP of his discretion under section 144 of the Act to order a summary trial cannot *per se* constitute an infringement of the appellants' right to a fair trial. A preparatory examination is not an essential pre-requisite for a fair trial; equally a summary trial cannot *per se* be labeled as unfair. The requirements essential for a fair trial enshrined in section 12 of the Constitution, including the right to be informed with sufficient particularity of the charge; the right to be given adequate time and facilities to prepare a defence; the right to a fair hearing within a reasonable time by an independent and impartial court; the right to legal representation; and the right to challenge and adduce evidence, are all rights that have to be respected and catered for in a summary trial. The question of whether or not there will be a fair trial, in the absence of any allegation of pre-trial irregularities, is not a matter which can be determined in advance of the actual proceedings; nor can the question of whether there has been a fair

trial normally be answered until after the conclusion of the trial proceedings. Everything will depend upon the circumstances of the particular case (cf Shabalala and Others v Attorney-General, Transvaal, and Another 1996(1) SA 725 (CC) at 743-4 (paragraphs 37 and 38)).

8. I proceed to consider whether this Court has jurisdiction to entertain an appeal against the dismissal of the first point *in limine.* Before doing so it should be noted that the first point *in limine* was directed against the exercise by the DPP of his discretion, in terms of section 144 of the Act, to order, in the public interest, that the appellants be tried summarily in the High Court. Mofolo J held that the DPP had exercised his discretion in that regard in a proper manner. In my view any challenge directed at the exercise of the DPP's discretion should have been by way of appropriate review proceedings. It is inapposite to raise a review issue by taking a point *in limine.*

9. The question of when appeals to this Court are competent was dealt with, but not finally decided, in Mda and Another v The Director of Public Prosecutions C of A (CRI) No. 10 of 2004 (unreported) ("Mda's case"). As pointed out in Mda's case, as this Court is governed by Statute its jurisdiction is limited to those matters which are prescribed by law. This raises the fundamental question, as stated in paragraph 9 of Mda's case, "whether this Court has the jurisdiction (power) to hear an appeal which is not directed at challenging a conviction or acquittal of an accused, or an order which is made consequent upon a conviction such as sentence, a forfeiture order, compensation order or the like."

10. The relevant statutory provisions in this regard have been set out and reviewed fully in Mda's case and there is no need to repeat them. Two provisions are of particular importance. The first is section 7 (1) of the Court of Appeal Act of 1978 which provides:

> "Any person convicted on a trial by the High Court may appeal to the Court [of Appeal] on any matter of fact as well as on any

matter of law."

The other is section 15 of the Court of Appeal Act which deals with the right of this Court to adjudicate upon a question of law reserved by the High Court and confines the powers of this Court to adjudicate upon such question pursuant to a conviction.

11. The Court in Mda's case concluded (in paragraph 12):

> "*Prima facie* therefore it would seem that this Court in a criminal appeal has no power to adjudicate on any matter other than issues that arise concerning or pursuant to a conviction or an acquittal. However, this matter was not fully argued before us and should therefore not form the basis for this judgment."

12. Apart from the statutory limitations placed on the jurisdiction of this Court, the *prima facie* conclusion reached is consistent with the generally recognized principle that a criminal trial should not be disposed of piecemeal. Thus it was said in Mda's case (paragraph 17):

> "Adams and Wahlhaus and numerous subsequent decisions in the South African courts have held that it is not in the interests of justice for an appellate court to exercise any power 'upon the unterminated course of criminal proceedings' except 'in rare cases where grave injustice might otherwise result or when justice might not by other means be attained' (Wahlhaus). In Adams the Court of Appeal held that as a matter of policy the courts have acted upon the general principle that it would be both inconvenient and undesirable to hear appeals piecemeal and have declined to do so except where unusual circumstances called for such a procedure (per Steyn, CJ at p. 763). The authorities on the point are legion."

(The reference to Adams is to R v Adams and Others 1959 (3) SA 753 (A); The reference to Wahlhaus is to Wahlhaus and Others v Additional Magistrate Johannesburg and Another 1959 (3) SA 113 (A).)

13. The question of appealability was raised and argued before us in the present appeal. Nothing arose from the argument which in my view detracts from the correctness of the *prima facie* view expressed in Mda's case that "this Court in a criminal appeal has no power to adjudicate on any matter other than issues that arise concerning or pursuant to a conviction or an acquittal" (subject of

course to the provisions of section 129 of the Constitution insofar as constitutional issues are concerned). That view falls to be endorsed in the present matter as correctly reflecting the legal position.

14. In any event, even if the dismissal of the first point *in limine* had been appealable, it seems highly unlikely that the appeal could have succeeded. It is not disputed that the DPP had a discretion to order a summary trial if he considered it to be in the public interest to do so. The reasons advanced by him for considering it to be in the public interest were said to be, *inter alia*, the following:

> "1. This is a complex commercial matter which in my experience is best suited for trial in the high court.
>
> 2. This case involves millions of Maloti of state funds and there is a genuine concern that such funds will not be recovered by reason of their for instance, being taken out of the country. Any delays such as that occasioned by a preparatory examination had to be avoided.
>
> 3. This case involves allegations of corruption against senior members in Government and it is in the interest of the public as well as the administration of justice that these allegations be ventilated properly and as soon as possible."

15. The reasons advanced by the DPP for the exercise of his discretion strike me as being both reasonable and rational having regard to the nature of the case against the appellants. There would seem to be no legitimate basis for concluding that there was a failure on his part to exercise his discretion properly. Nor would there appear to be any legal grounds on which either the court below, or this Court, could have interfered with the exercise of his discretion. However, it is not necessary to reach a final decision in this regard, and I refrain from doing so.

16. In support of his argument that the dismissal of the first point *in limine* was appealable, Mr. Engelbrecht (who appeared with Mr. Mosito for the appellants) referred us to the cases of S v De Beer and Another 2006 (2) SACR 554 (SCA) and S v McIntyre and Another 1977 (2) SACR 333 (T). De Beer's case is clearly distinguishable from the present matter. In that case there was a plea to the jurisdiction of the High Court to try the offences alleged.

The plea was dismissed. The Supreme Court of Appeal entertained an appeal against the decision. In the course of its judgment the Court said (at page 559):

> "In the present case the appeal ought to be entertained at this stage because it is clear that the Court has no jurisdiction and also because it is manifestly in the interests of justice to permit an appeal against the ruling without the appellants first having to be exposed to the prejudice of an irregular trial. This court therefore has jurisdiction to entertain the appeal."

17. De Beer's case dealt with a lack of jurisdiction – the appellants in that case were not triable in the High Court on the charges against them. In the present matter the High Court has jurisdiction to entertain the charges – the only issue is whether the matter should proceed by summary trial or be preceded by a preparatory examination. As the appellants' ultimate prospects of success on appeal against the dismissal of their first point *in limine* are in my view practically non-existent they are not likely "to be exposed to the prejudice of an irregular trial." But even in the unlikely event of success on appeal, it does not necessarily follow that the time and money spent on the trial will be wasted, because

in that event this Court, in terms of section 9(2) of the Appeal Court Act, "may, if it considers that no substantial miscarriage of justice has actually occurred, dismiss the appeal." Whether or not there has been a miscarriage of justice will largely depend on whether the summary trial was fair. Ultimately in De Beer's case the court did no more than apply the principles referred to in paragraph 12 above relating to "rare cases" or "unusual circumstances." Likewise the decision in McIntyre's case reflects an application of those same principles.

18. It follows that the court *a quo*'s decision dismissing the first point *in limine* is not appealable. Even applying the broader principles referred to in paragraph 12, the present matter does not fall into the category of rare cases where injustice might otherwise result if the appeal is not entertained.

19. I turn to consider the appeal against the dismissal of the second point *in limine*. In Sekoati and Others v President of the

Court Martial and Others LAC (1995-1999) 812 at 820C to 821H this Court, sitting as a Full Court, set out what it considered to be the correct approach to disputes as to the interpretation of the Constitution. I do not propose to reiterate all the guiding principles laid down. It will suffice for present purposes to quote the following (at 820E to 821C):

> "2. Similar reasoning gives rise to the general approach in constitutional matters that a court will not determine a case on a constitutional basis if it is properly capable of being appropriately adjudicated on another basis (S v Mhlungu and Others 1995(3) SA 867 (CC) at para [59]; *Gardiner v Whitaker* 1996(4) SA 337 (CC) at para [14], and that, by virtue of the presumption in favour of constitutionality, a court will prefer an interpretation of a statute which saves it (*Minister of Home Affairs v Bickle* 1984 (2) SA 439 (ZS)at 448E-G).
>
> 3. Constitutional instruments are further to be interpreted in a very different way to ordinary statutes. The courts are to avoid what Lord Wilberforce has memorably termed 'the austerity of tabulated legalism' *(Minister of Home Affairs (Bermuda) v Fisher* [1980 AC 319 (PC) at 328H. See also *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SCC) at 395-6; 18 CCC (3rd) 385 (Canada); *S v Marwane* 1982 (3) SA 717 (A) at 748-9 and *S v Zuma 1995 (2) SA 642 (CC) at 651* (South Africa); *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (Nm SC) at 362 and *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (Nm SC) at 975-6 (Namibia); *Attorney-General v Moagi* 1982 (2) Botswana LR 124 at 184 (Botswana)). As was held in *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph [15],

by South Africa's Constitutional Court:

> 'A constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of State, including Parliament, the executive and the courts, as well as the fundamental rights of every person which must be respected in exercising such powers.' "

20. Section 6(2) of the Act provides:

> "The Director of Public Prosecutions may retain counsel for the purposes of conducting any criminal proceedings instituted or continued by him."

It is common cause that, acting in terms of the above section, the DPP has retained outside counsel for the purpose of conducting the trial against the appellants. It is contended by the appellants that this is inconsistent or in conflict with section 99 of the Constitution. In this regard section 2 of the Constitution provides:

"This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."

21. Section 99 of the Constitution, to the extent relevant,

provides:

> "(1) There shall be a Director of Public Prosecutions whose office shall be an office in the public service.
>
> (2) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do –
>
> (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;
>
> (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
>
> (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.
>
> (3) The powers of the Director of Public Prosecutions under subsection (2) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions."

22. Section 99 (2) of the Constitution corresponds to section 5 of the Act (which preceded the Constitution), and section 99 (3) is virtually identical to section 6 (1) of the Act. The Constitution contains no provision similar to section 6 (2) of the Act. Section 99 falls under Chapter VIII of the Constitution which deals with The Executive. The office of the DPP in the public service is part of the

executive structure of government. Section 99 (2) defines the powers of the DPP and section 99 (3) provides for the delegation of those powers to "officers subordinate to him". The sub-section, seen in its context, clearly contemplates officers in the public service.

23. The powers conferred on the DPP by section 99(2) vest in him (subject to the rights of the Attorney-General referred to in section 99(4)) the ultimate control of all criminal prosecutions in the Kingdom. That would include the authority to institute, and the ultimate responsibility to oversee (undertake), all criminal prosecutions, the right to take over private prosecutions and to discontinue any criminal proceedings. The DPP's overriding executive authority and decision-making functions in that regard may be exercised by him in person or by officers in the public service subordinate to him acting on his general or special instructions. The powers and functions referred to are matters which only the DPP or his delegated officers may attend to.

24. The Constitution does not, either expressly or by necessary implication, preclude the DPP from retaining counsel outside the public service to attend to the performance of the actual prosecutorial function – the conduct of proceedings in court – on his behalf. The conduct of such proceedings amounts to the carrying out of a process incidental to the DPP's powers as set out above. By engaging outside counsel the DPP does not delegate or abrogate his section 99(2) authority to such counsel; he retains overall control over the proceedings. Thus, for example, no prosecution may be stopped or abandoned, or a plea to a lesser charge under the indictment accepted, without his approval or that of a duly authorized subordinate officer. No logical reason exists why the DPP should be precluded from engaging outside counsel if he considers there is a need to do so. To deny him that right would place an unwarranted fetter on his powers. There are many instances where prosecutions require special expertise or skills in relation to the subject of the charge, expertise and skills which may

be lacking on the part of the DPP or his subordinate officers. It would hamper the DPP in the performance of his duties, and the proper administration of justice, if he could not appoint counsel with such knowledge or skills to conduct the proceedings. Proper and sensible constitutional interpretation would seek to avoid such a result.

25. In my view there is no inconsistency between the provisions of section 99 (2) and (3) of the Constitution and section 6(2) of the Act. They employ different language, operate in different spheres and do not compete with each other in any way. The fact that sections 5 and 6 (1) of the Act have counterparts in the Constitution but section 6(2) of the Act does not, is of no significance. The simple explanation for the omission is that section 6(2) is not the kind of provision that one would normally expect to find in a constitution. It follows that the appeal against the dismissal of the second point *in limine* cannot succeed.

26. In the result the appeal arising from grounds 1, 2 and 4 of the Notice of Appeal is struck off the roll; the appeal arising from ground 3 is dismissed.

_____

J W Smalberger
JUDGE OF APPEAL

I agree:

_____

J H Steyn
President of the Court of Appeal

I agree:

_____

M M Ramodibedi
Judge of Appeal

I agree:

_____

F H Grosskopf
Judge of Appeal

I agree:

_____

L S Melunsky
Judge of Appeal

Delivered on the 4th day of April 2007

For the Appellants: J. Engelbrecht SC and K.E. Mosito

For the Respondents: A.J. Dickson SC