IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) 7/2008

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS
1st Appellant

THE ATTORNEY GENERAL **2nd Appellant**

And

MAMPAI LESUPI **1st Respondent**

ITUMELENG LETSIKA **2nd Respondent**

CORAM: RAMODIBEDI P
MELUNSKY JA
NOMNGCONGO JA

HEARD: 6 OCTOBER 2008
DELIVERED: 17 OCTOBER 2008

SUMMARY

The respondents, magistrates, were charged with defeating or obstructing the course of justice or of attempting to do so arising out of certain entries they allegedly made on court records to the effect

that charges had been withdrawn against a certain accused person when this was not the case.

The respondents pleaded not guilty. During the course of the trial in the High Court, and before the Crown case was closed, they brought an application for an order declaring the prosecution to be unlawful and unconstitutional and for the criminal proceedings to be discontinued. The High Court granted the order.

On appeal it was held:

1. *That while a judicial officer cannot be criminally liable for an error of judgment or for a bona fide mistaken view of the law or facts, decisions made mala fide and unlawfully can attract criminal liability;*

2. *That the guilt of a judicial officer arising out of an unlawful act committed in the course of his duties, may be proved by inference;*

3. *That the institution of the collateral application during the course of the criminal trial was both unwarranted and procedurally incorrect;*

4. *That the other issues raised by the respondents were matters that had to be determined at the trial and not by way of application;*

5. *That no infringement of the sacrosanct principle of judicial independence had occurred;*

6. *That it was not competent for the High Court to have dealt with the guilt or innocence of the respondents before the completion of the evidence;*

7. *There is no order as to costs in criminal matters.*

Appeal accordingly allowed. Trial ordered to commence de novo before another judge.

JUDGMENT

MELUNSKY, JA

[1] During the course of a criminal trial in the High Court before Mofolo AJ and assessors, the two accused (the respondents in the appeal) brought an application before the trial judge for the following relief *inter alia*:

> "2. *Declaring the Prosecution in CRI/T/87/06 [the criminal trial] unlawful and unconstitutional and in contravention of section 118(2) of the Constitution; and*
>
> 3. *Directing that the proceedings in CRI/T/87/06 be and are hereby discontinued as being both unconstitutional and unlawful;*

4. *Granting applicants [the present respondents] such further and/or alternative relief as the Court may deem fit;*

5. *That prayer (1) operates with immediate effect pending the outcome hereof".*

Some months later the learned Judge granted an order in the following terms:

"*In the result, the application succeeds to the effect that charges against applicants (accused persons) be and are hereby discontinued as prayed*".

[2] The respondents are magistrates and at the time relevant to the charges they were stationed at the Maseru Magistrate's Court. In the Court *a quo* they were charged with two counts of defeating or obstructing or attempting to defeat or obstruct the course of justice. According to the indictment, a number of people were charged with fraud in the magistrate's court, Maseru. Among

those charged, it was alleged, was a certain Steven Tseliso Dlamini ("Dlamini") who had been released on bail. The trial of the accused persons was adjourned from 25 August to 27 September 2005. On or after 25 August 2005 and after the aforesaid adjournment, the prosecution alleges in count 1 that the first respondent, acting in concert with the second respondent, unlawfully and intentionally wrote on the charge sheet that the charge against Dlamini had been withdrawn when, to the knowledge of the respondents, this was not the case. The prosecution's averments with regard to count 2 are to the following effect: that early in 2006, and in response to a query raised by a criminal registry clerk in the magistrate's court, the second respondent, acting in concert with the first respondent, unlawfully and intentionally wrote on the charge sheet that the charges against Dlamini had been withdrawn on 27 September 2005 when she knew that the charges had not been withdrawn at all. It is further alleged that in respect of both counts the respondents committed the aforesaid acts with the intention of securing Dlamini's unlawful release, alternatively, of securing the unlawful release of his bail money.

[3] The respondents pleaded not guilty to both counts and three witnesses were called on behalf of the prosecution. Thereafter, and during July 2007 the trial was postponed with the agreement of the parties to 27 November 2007. Before the postponement was granted, counsel for the Crown informed the trial Court that the matter would be heard on 27 November to 30 November 2007 and then from 4 to 7 December. Counsel added that

> *"… those eight days, in which time we hope to complete the matter completely, including argument and everything".*

This pronouncement was confirmed by counsel for the respondents. However, by notice of motion dated 7 November 2007, the respondents indicated their intention to move the application referred to in paragraph [1] hereof on 27 November, the day on which the trial was due to resume. This they did with the result already mentioned. The appellants, the Director of Public Prosecutions ("the DPP") and the Attorney General,

thereafter noted an appeal against the order of Mofolo AJ and it is that appeal that is now before this Court.

[5] With that background, it now becomes necessary to consider the basis on which that application was made. The "root" of the application, according to the respondents' affidavits, is the fact that the charges against the respondents arose in the course of their official duties as magistrates. Moreover it is contended that according to evidence adduced to date and from the statement of further witnesses whom the prosecution intended calling, there is "no evidence of a direct act of criminality" and that the Crown was seeking to obtain a conviction based on inference. It was also contended that the prosecution was calculated to "intimidate, harass and interfere with [the respondents'] independence as judicial officers". The first respondent referred to various occurrences which, she maintained, supports her contention that the DPP and the officials in the Directorate of Corruption and Economic Offences ("the DCEO") instituted the prosecution to prevent her from presiding in cases that were initiated by the DCEO. The second respondent, too, averred that

the DPP had prosecuted her due to his “desire to demonstrate the power of his authority”.

[6] Both respondents, it must be added, denied, that they were guilty of the offences with which they had been charged. They stated that the entries which they had made on the records in the magistrate’s court were effected *bona fide* and without intent to commit any unlawful or criminal act.

[7] So much for the respondent’s application. In response the appellants filed a notice in which they intimated their intention to apply for the application to be set aside as an irregular or improper proceeding in terms of rule 30 of the High Court Rules and to seek leave to be given an opportunity to file opposing affidavits should the rule 30 application fail. No affidavits were filed on the merits, save for a short affidavit by each appellant confirming the contents of the rule 30 notice. I do not propose at this stage, to deal with the issues raised by the appellants in support of their contention that the proceedings were irregular or

improper. It is more appropriate first to consider the judgment of Mofolo AJ.

[8] What seems to be clear from the learned Judge's approach to the matter is that he did not give proper or any attention to the crux of the application, viz. that the charges arose out of the respondents' performance of their official duties and that there was no evidence of a direct act of criminality. What the learned Judge did decide, as I understand the judgment, is that the respondents at the material times made the entries on the records *bona fide* and with no corrupt or unlawful motive or intention. In effect, therefore, he appeared to treat the application before him as one for the discharge of the respondents in terms of section 175 (3) of the Criminal Procedure and Evidence Act 1981 ("the Code"). In terms of the section a Court may return a verdict of not guilty at the close of the case for the prosecution if there is no evidence that the accused committed the offence in issue. In the instant matter, the case for the prosecution had not closed: in fact it is clear that the Crown intended to call at least one further witness. In the result, counsel for the respondents, Adv**. Mohau**,

expressly disavowed placing reliance on the approach of the learned Judge, but nevertheless submitted that the order made by him was the correct one. I shall return to the respondents' submissions in due course.

[9] Before proceeding further, there are three observations which need to be made. The first is that it is not the function of this Court at this stage to consider the evidence led in the High Court with a view to determining the guilt or innocence of the respondents. The second is to note that the learned Judge *a quo* did not return a verdict despite the fact that the respondents had pleaded not guilty, nor did the notice of motion contain a prayer that the Court should order that the respondents be acquitted in terms of section 162 (5) of the Code. In view of the conclusion at which we have arrived, however, it is not necessary to consider what effect the failure to return a verdict had on the respondents or the DPP.

[10] The third observation concerns the stance adopted by the appellants in raising a point *in limine* and seeking, in the

alternative as it were, leave to deal further with the merits should their preliminary point fail. There is considerable doubt whether it is open for a party to adopt such a procedure. In **Bader and Another** v. **Weston and Another** 1967 (1) SA 134 (C) it was held at 136 D-H that a respondent who wishes to oppose an application should place his case on the merits before the Court. Having done so it is also open to him to take preliminary points, for instance, that the application is defective or fails to disclose a cause of action. The learned Judge, Corbett J (later CJ) went on to say that normally it is not proper for a respondent to take a preliminary point without filing affidavits on the merits, although there may be exceptional circumstances in which such a procedure may be permitted. I draw attention to this authority by an eminent judge because of a tendency by legal practitioners to raise points *in limine* without filing affidavits on the merits but the absence of detailed affidavits by the respondents in this case does not affect the outcome of the appeal.

[11] On the respondents' behalf it was contended that according to the appellants' notice of appeal, the only issue raised was the

procedural impropriety of the judgment in the Court *a quo*; that the complaint was not that the order was incorrect on the merits but rather that it was reached unprocedurally. There is no doubt that the appellants' grounds of appeal rely to a considerable extent on the contention that the application in the Court *a quo* was a civil proceeding that had no place during an unfinished criminal trial. Other procedural issues were also raised in the grounds and some of these will be referred to later.

[12] There are, however, answers that effectively meet the point taken by the respondents. The first is that the High Court appears to me to have decided the application on the assumption that the respondents had acted innocently. This, as I have already stated, was procedurally wrong and the grounds of appeal were, it would seem, directed partially, at any rate, against this specific finding of the Court *a quo*. Secondly, and perhaps more importantly, the grounds of appeal raise the point that the issues relied upon in the application before the High Court are all matters that should be dealt with in the criminal trial and not by means of an application *in media res.* In my view, therefore, all of the issues raised by the

respondents in the application are properly before us and were indeed dealt with in argument.

[13] I turn now to deal with the more critical issues before this Court. It is undisputed that the respondents were acting as judicial officers. It was submitted on their behalf that their conduct was not *prima facie* criminal, for example such as taking a bribe and that the Crown seeks to infer guilt from their apparent "misdirection". Put in another form the submission before us is that if it is established that the respondents made the entries on the records in question and that the facts so recorded were incorrect, the question of whether they acted with the unlawful intention of securing Dlamini's release from the charge of fraud or the release of his bail money would have to be decided by inference. This, according to the respondents' counsel, is not permissible. I will assume for present purposes that the respondents are correct in submitting that there is and will be no direct evidence of any alleged unlawful intention and that this element has to be proved inferentially. However that may be, I am not aware of any authority that precludes the prosecution from

relying upon inferences to establish an element or elements of an offence. And the fact that the respondents are magistrates and were acting in their capacities as such makes no difference to that principle.

[14] In support of his submission that the respondents had some sort of immunity from prosecution, counsel relied *inter alia* on a dissenting judgment of van den Heever JA in **Rex** v **Kumalo and Others** 1952 (1)SA 381 (A) and, in particular, on the following remarks at 388C:

> *"If a judicial officer is not liable in an action for damages, I cannot see how he can be punished in criminal proceedings for acts performed in his official capacity".*

Certainly no exception can be taken to the learned Judge's comments but his remarks should be seen in the context of the case before him. In **Kumalo's** case one of the issues was whether a Chief, the appellant, had the power to order corporal punishment to be administered to a person who had committed

contempt of court in *facie curiae*. After holding that the appellant had the power, in exercising his civil jurisdiction, to punish summarily for contempt of court, the learned Judge went on to remark, in the above quoted passage, that as the appellant would not be liable in a civil action for damages, he could not be punished in criminal proceedings. Van den Heever JA certainly did not say that a judicial officer cannot be criminally liable for an intentional and unlawful act committed in the course of his official duties. Moreover, the learned Judge's remarks are clearly obiter for he went on to hold at 389 H that the appellant in the case before him was not criminally liable on the grounds that he had no criminal intent for

> *"At most [he] committed an error of judgment and that bona fide".*

[15] More in point are the following comments of Schreiner JA in a minority judgment in the same case at 386 H – 387 A:

> *"Clearly a judicial officer is not lightly to be made responsible criminally, or even civilly, for his judicial*

acts. But that is not the position as disclosed by the evidence, for the first appellant did not merely give an insupportable judgment, but himself directly instructed his officers to execute the illegal sentence … The first appellant's intervention did not stop at a judicial act and he cannot rely upon any protection afforded to the honest though mistaken exercise of judicial functions".

[16] In the forefront of Adv. **Mohau's** argument was the principle of judicial independence. Not only is it a concept enshrined in the Constitution (section 118(2), but it is indeed one of the fundamental pillars on which a free and democratic society is based. It is also the principle of judicial independence that underlies the immunity of a judicial officer for a wrong decision made bona fide in the exercise of his judicial functions (see **Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA** 2006 (1) SA 461 (SCA) at 471 par [19] – a matter relating to civil liability). The protection thus given to a judicial officer is designed to enable him to carry out his judicial duties fearlessly. It is therefore not open to doubt that a judicial

officer will not be criminally or even civilly liable for a mere error of judgment or a *bona fide* mistaken view of the law or facts. However decisions made *mala fide* are unlawful and can attract both civil and criminal liability (cf. **Telematrix** at 473 G. par [26]). And this is so whether the evidence against the accused is direct or based on inference. In a criminal case the use of reasoning by inference is based on the often quoted "two cardinal rules of logic" stated in **R v Blom** 1939 AD 188 at 202-203. Counsel's submissions, however, are to the effect that in the instant case, the inference of guilt cannot be drawn unless there is some direct evidence of corruption; that such evidence is lacking; and whatever facts the Crown established cannot exclude the reasonable inference that the magistrates acted lawfully and in good faith. These submissions are to a large extent covered by the procedural aspect raised in the appellants' grounds of appeal (see para [12] above).

[17] The aforesaid submissions imply that it is the duty of this Court to now consider the evidence already led in the Court *a quo* and to also have regard to further evidence that the Crown

intends to lead. But as Adv. **Penzhorn**, who appeared for the appellants pointed out, the question of whether or not the magistrates acted lawfully and in good faith is a question to be decided at the trial and I add that this Court cannot divine what further evidence the Crown intends leading. Finally, and as I have already pointed out, there is no merit in the submission that an inference of guilt cannot be drawn without direct evidence of corruption merely because the respondents acted in their capacity as magistrates. This conclusion does not in any way encroach upon their independence as judicial officers. The principle of judicial independence is sacrosanct and no violation of this has been established in this case.

[18] A further obstacle facing the respondents and which is purely procedural concerns the institution of a collateral constitutional application during the course of the trial. A resort to this procedural device has been strongly disapproved of in this Court (see **Fath and Another** v **The Minister of Justice of the Kingdom of Lesotho and Another** (Cof A (CIV) 15/2005) and

the authorities quoted therein at para [37]). At paragraph [38] in **Fath's** case, Gauntlett JA said the following:

> *"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".*

In **Fath's** case the application was made before any evidence was led. This is an *a fortior* case: for here the Court *a quo* had already heard a considerable amount of evidence and it was seized of the matter. Moreover all of the matters raised in the application could, and should, have been dealt with at an appropriate stage of the trial. There was not need for the respondents to have interrupted the smooth functioning of the

ordinary criminal procedures by means of a collateral constitutional application. For this reason, too, the application cannot succeed.

[19] Adv. **Mohau**, however, submitted that there were other considerations which showed that the independence of the magistrates, as judicial officers, had been infringed. The magistrates, he argued, should have first enjoyed the right to a disciplinary enquiry by the Judicial Service Commission. I am not at all satisfied that the failure to carry out an investigation by the Commission before charging the respondents amounted to an attack on their judicial independence nor should it lead to a lack of public confidence in the magistracy. On the contrary, public confidence in the administration of justice may be enhanced by the very fact that judicial officers are seen not to be above the law and that, in so far as alleged criminal conduct is concerned, they are subject to the same legal procedures as any other litigant.

[20] The second consideration relied upon by the respondents' counsel relates to an alleged history of acrimony between the

DPP and the first respondent and the use of what was described as “manifestly intemperate and contemporary language” in an earlier application in the High Court by an officer of the DPP. I hardly need to mentioned that public officials should use restrained and temperate language especially when deposing to an affidavit which reflects upon the conduct of a judicial officer. However whether or not the official’s comments, referred to in counsel’s heads of argument, overstepped the mark, cannot be decided upon without a consideration of the entire record in the previous case. What can be said is that neither the use of intemperate language, whether used by the DPP or his officers, however regrettable that may be, nor the history of acrimony leads to the inference that the DPP or others in his office interfered with the respondents’ judicial independence.

[21] What is clear to me in this appeal is that the issues raised by the respondents, including the apparent implication of malice, are all matters that can, if relevant, be considered at the criminal trial. It is in that forum that they should be dealt with. Moreover the points raised in the application were known to the respondents

before the institution of these proceedings. Thus the first respondent avers in her founding affidavit that

> *"… from the indictment it is clear that the prosecution is seeking an inference that I acted unlawfully. It is this attitude which forms the subject matter of the present application" (emphasis added).*

She adds that from the witnesses' statements supplied to the defence to enable the respondents to prepare for trial, "there is no evidence of a direct act of criminality". It therefore appears that the respondents were prepared for the trial to commence and continue with full knowledge of the prosecution's facts, save, possibly, for a statement from Director Matsoso.

[22] For these reasons I am satisfied that the application was ill-conceived and that the appeal should succeed. Most regrettably, however, and in view of the findings made by the Court *a quo*, the trial will have to commence *de novo* before another Judge. Counsel were agreed, and rightly so, that it would be

inappropriate for the matter to continue before Mofolo AJ. It is unfortunate that this Court's order will involve a waste of judicial time, despite the considerable backlog of cases in the High Court, additional costs that will have to be incurred, further inconvenience to witnesses and continued anxiety to the two accused.

[23] The only remaining matter concerns the costs of the application. Counsel for the appellants requested this Court to make an order for costs against the respondents. The application was brought during the course of a criminal trial and it was an application that was not only incidental to the criminal proceedings: in essence it formed part of those proceedings. It was considered by the Judge who had heard the evidence and who was seized of the matter. Whether the Judge wore black or red robes when he listened to argument is irrelevant. In its substance the application was an integral component of the criminal proceedings and in a criminal matter there is no order as to costs (see **Wessels** v **General Court Martial and Another** 1954 (1) SA 220 (E) at 227 F-G). I only need to add that the

respondents did not seek an order for costs in the notice of motion, nor was a costs order granted by the Court *a quo.*

[24] The following order is made:

1. The appeal succeeds;

2. The order of the Court *a quo* is set aside and is replaced with the following:

   "The application is dismissed";

3. There will be no order as to costs in the Court *a quo* or in this Court;

4. The criminal prosecution in CRI/T/87/06 is remitted to the High Court to commence *de novo* before a Judge other than the Judge *a quo.*

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L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

_____
M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

_____
T. NOMNGCONGO
JUSTICE OF APPEAL

FOR THE APPELLANTS:	ADV. G.H. PENZHORN SC ADV. H.H.T. WOKER
FOR THE RESPONDENTS:	ADV. K.K. MOHAU KC ADV. S.S. RATAU