C OF A (CRI) 6/08

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

MOTSOTUOA BERNARD NTAOTE **Appellant**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

CORAM: SMALBERGER, JA
MELUNSKY, JA
PEETE, JA

HEARD : 7 OCTOBER 2008
DELIVERED : 17 OCTOBER 2008

Summary

Criminal Law - procedure - application brought in High Court pending the commencement of trial.

Disputes of fact not capable of resolution in favour of applicant (appellant) - appellant nevertheless contending that facts should be decided in his favour as he had unsuccessfully applied in the Court *a quo* for oral evidence to be led to resolve disputed issues - such contention incorrect.

Further, preliminary or collateral applications of this nature not to be resorted to - all factual issues where relevant could properly be dealt with at trial.
Moreover prejudice allegedly suffered by appellant must be trial-related and not fanciful or speculative in nature.

Application correctly refused in Court *a quo*. Appeal accordingly dismissed.

JUDGMENT

MELUNSKY, JA

[1] The appellant, a Deputy Commissioner in the Lesotho Mounted Police Service ("the LMPS") and a certain Mamahlohonolo Peko ("Ms Peko"), a financial controller in the LMPS, were charged with two counts of fraud. In short, each count related to an alleged misrepresentation by the appellant and Ms Peko to the effect that the appellant and other officers were entitled to the full per diem rate for undertaking two separate journeys to attend official functions; that to the knowledge of the appellant and Ms Peko, the appellant and the other officers were, in each case, entitled to only one quarter of the per diem rate; that

as a result of the alleged misrepresentations Treasury officials were induced to pay excessive per diem costs, resulting in actual or potential prejudice to the Treasury Department; and that on each occasion the appellant and Ms Peko acted in concert, alternatively, Ms Peko acted on the instructions of the appellant.

[2] The trial of the two accused persons was due to commence in the High Court on 4 September 2007. Before the commencement of the proceedings, counsel for the Crown (Adv Griffiths SC) withdrew the charges against Ms

Peko and indicated his intention to call her as a witness for the prosecution. This resulted in a postponement of the trial as Adv Mda, who appeared for the appellant, intimated that his client intended to make application for a stay of proceedings, alternatively, for an order that Ms Peko be barred from giving evidence. The application was duly launched in the High Court by notice of motion on 21 September 2007 in which the following relief was sought:

> "a) An order declaring unlawful the consultation between Mamahlohonolo Peko and the member(s) of the Directorate on Corruption and Economic Offences and/or officers subordinate to the Respondent without the consent of her lawyer, after the former was formally charged with two counts of fraud.

b) An order declaring that the turning of Mamahlohonolo Peko into a State (accomplice) witness constitutes a violation of Applicant's fair trial right in terms of section 12(1) of the Constitution of Lesotho.

c) i) An order directing that CRI/T/34/07 [the criminal trial] be permanently stayed.

ALTERNATIVELY:

ii) In the event of the Honourable Court not granting the relief sought in (c) (i) above an order restraining Mamahlohonolo Peko to testify as a crown witness.

d) That Applicant be granted further and/or alternative relief as this Honourable Court may deem just."

[3] The application which was opposed by the Director of Public Prosecutions (the DPP), came before Mofolo J whose decision was largely, but not entirely, based on the following: that the decision to withdraw the charge against

a co-accused and to call the person as a witness was a matter solely within the discretion of the DPP; and that the Court was not empowered to order a stay of proceedings. The learned judge accordingly dismissed the application. It is against that decision that the appellant now appeals to this Court.

[4] The affidavits in the application reveal substantial disputes of fact. These fall into two main categories which I will deal with as economically as possible. The first is whether, and to what extent, there was active co-operation

and consultations between the appellant and his counsel on the one hand and Ms Peko and her attorney, Mr. Mokaloba, on the other during the pre-trial preparations. The appellant avers that his counsel and Mr. Mokaloba had a preliminary discussion which revealed that there was no conflict of interest in their "defence strategies", that both accused alleged that they were innocent and that the legal representatives agreed to co-operate in preparing for trial. It is also alleged that on two subsequent occasions, the two accused and their legal representatives met together, that they "evolved a common defence strategy" and that each

accused agreed to be called as a defence witness in support of the other. The appellant contends, too, that further consultations he had with his counsel were based upon the common line of defence that had been discussed at the joint consultations.

[5] Ms Peko states in her affidavit that she did not consult even with Mr. Mokaloba, much less with the appellant's counsel, in preparing for trial; that she attended no joint consultations; and that she gave no authorisation or

instruction for her attorney to attend meetings with the appellant's counsel on her behalf.

[6] The second area of dispute revolves around the appellant's averment that prosecution officials consulted with Ms Peko before the date on which the trial was due to commence without the knowledge or consent of her attorney (or of the defence counsel). The response to this, by Ms Peko and supported by the law enforcement officers, is that Mr. Mokaloba was kept fully informed of the Crown's intention to consult with and to call Ms Peko as a witness

and that he had no objection whatsoever to these proposals. Ms Peko, it might be added, was willing to be called as a Crown witness and she had volunteered this information to the investigating officer when she was charged. The appellant does not suggest that the disputes are not real or genuine.

[7] In the application, and also on appeal to this Court, two main submissions were raised. The first is that the decision of the DPP to withdraw the charges against Ms Peko and to call her as a prosecution witness in the pending criminal

litigation will lead to an infringement of the appellant's legal professional privilege. The second is that it was a breach of professional ethics for the Chief Investigation Officer attached to the Directorate on Corruption and Economic Offences ("the DCEO") to consult with Ms Peko without the consent of her attorney.

[8] Before we can even consider whether the appellant's aforesaid submissions would entitle him to relief in law, we would have to accept his version of the facts. On the record as it stands, however, we are unable to resolve the disputes

in the appellant's favour, by applying the well-known tests laid down in **Plascon-Evans Ltd v van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 622 (A) at 634 H-635C. Counsel for the appellant submitted, however, that in view of the fact that in the Court *a quo* the appellant had applied for oral evidence to be led to resolve the disputes, his version of the facts should be accepted. Authority for this proposition, counsel informed us, is in fact to be found in the **Plascon-Evans** case. Counsel's submission is incorrect. What Corbett JA did hold in that matter was that the court could proceed on the basis of the correctness of the applicant's factual

averments where it is satisfied as to their inherent credibility, where the denial of the respondent does not raise a real, genuine or *bona fide* dispute of fact and the respondent has not availed himself of the right to apply for the applicant's deponents to be cross examined (at 634 H - 635 C). In the Court *a quo* the appellant's application for oral evidence to be led was not granted, and was not even referred to by the learned judge *a quo*. Although counsel did not appear to press this application on appeal, it is quite clear to me that this is not a case in which oral evidence should have been resorted to. Indeed, as I shall point out presently, the

application itself was ill-conceived. All that needs to be said now, however, is that as a real dispute of facts exists - and this, as I have mentioned, was not disputed by the appellant - the relief cannot be granted as the facts stated by the appellant together with those admitted by the respondent, do not justify such an order.

[9] There are other grounds why the application cannot succeed. The present application, pending a criminal prosecution, is not only to be discouraged. It is not to be resorted to unless exceptional circumstances are present.

(See, in this regard, **Fath and Another** v **The Minister of Justice of the Kingdom of Lesotho and Another** (C of A (CIV) 15/2005) and the authorities quoted therein at par [37] and especially at par [38] and for the most recent decision, **The Director of Public Prosecutions and Another** v **Lesupi and Another** (C of A (CRI) 7/2008) at par [18]). All of the issues raised in the application are matters which, if at all relevant, should be dealt with in the criminal litigation. No exceptional factors or circumstances warrant the Court's consideration of these issues at a preliminary hearing. On the contrary it would be far more appropriate for them to be

dealt with at the trial, if the Court considers them to be pertinent and germane to the issues before it. For this reason the application was fatally flawed and the question of the disputed factual matters does not even arise.

[10] Moreover, and in the circumstances of this case, it is untenable that the Court should now investigate the appellant's claim that he will allegedly suffer prejudice should the hearing proceed and should Ms Peko give evidence as a prosecution witness. In **Key** v **Attorney-General, Cape of Good Hope Provincial Division** 1996

(4) SA 187 (CC) at 195-6, par [13] Kriegler J enunciated that while an accused person must be given a fair trial, fairness is an issue which has to be decided upon the facts of each case. It follows, of course, that prejudice that an accused might suffer should generally be decided upon the facts at the trial. Such prejudice must be trial-related and not fanciful or speculative (see **S** v **The Attorney-General of the Western Cape**; **S** v **The Regional Magistrate, Wynberg and Another** 1999 (2) SACR 13 (C) at 25-26). Although there are cases in which the prejudice might be unrelated to the trial (see **Director of Public**

Prosecutions and Another v Lebona (1995-1999) LAC 474 at 497 G-498 C), this is not one of them. The claim of prejudice relied upon by the appellant is purely conjectural and may not arise at all. In the main, it is based on the legal principle, which is in dispute in the application, that the communications allegedly made to Ms. Peko by the appellant and his counsel are privileged. But Ms Peko denied that any such information was ever communicated to her. The notional existence of possible prejudice to an accused does not entitle him to institute a preliminary application of the kind now before us.

[11] It follows that the application was properly dismissed by the High Court and that the appeal cannot succeed. We find it appropriate to point out, however, that nothing contained in this judgment should be construed to mean that this Court either accepts or disagrees with the legal issues raised, in particular, whether the alleged communications to Ms Peko are privileged or not. In view of our conclusion on the grounds already formulated, it is unnecessary for us to consider the specific legal points.

[12] In the result the appeal is dismissed.

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L S MELUNSKY

JUSTICE OF APPEAL

I agree : _____

J W SMALBERGER

JUSTICE OF APPEAL

I agree : _____

S N PEETE

JUSTICE OF APPEAL

For the Appellant : Adv Z. Mda

For the Respondent : Adv G.T. Leppan