C of A (CRI) No. 14/2007

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

REX **APPELLANT**

and

ANTHONY CLOVIS Manyeli **RESPONDENT**

CORAM:

Smalberger, JA
Melunsky, JA
Howie, AJA

Heard : 6 October, 2008
Delivered : 17 October, 2008

SUMMARY

Respondent (accused) charged with contempt of court - charge arising from contemptuous remarks allegedly made by accused concerning certain members of the Court of Appeal – accused discharged at the end of the Crown case – application by accused for recusal of judges hearing appeal – principles relating to recusal stated – application refused – evidence before court a quo considered – held there was evidence on which a reasonable court might convict - application for discharge should have been refused – appeal upheld – matter remitted to court a quo.

JUDGMENT

SMALBERGER, JA

Introduction

[1] On 9 February 2007 this Court upheld the appeal in the matter of the *National Independent Party (NIP) and Others v Anthony Clovis Manyeli and Others* C of A (CIV) No.1/2007, and furnished detailed reasons for its decision in a written judgment (Ramodibedi JA, Steyn P and Majara AJA concurring) handed down on 21 February 2007. The circumstances giving rise to the appeal are comprehensively set out in the judgment.

[2] In summary, the appeal concerned a dispute relating to two party lists submitted to the Independent Electoral Commission ("the IEC"), prior to the national elections in 2007, in terms of section 49 B of the National Assembly Election (No.1) (Amendment Act., 2001). The first party list was submitted by the National Independent Party ("the NIP") acting through its Secretary General; the second was submitted by Mr. Manyeli, the then President and Leader of the NIP. The names of the

candidates on these lists differed. Mr. Manyeli formally objected to the acceptance by the IEC of the NIP's list. His objection was rejected by the IEC.

[3] Mr. Manyeli successfully challenged the IEC's decision in review proceedings in the High Court. That decision was the subject of the appeal upheld by this Court on 9 February 2007. This Court held, *inter alia,* that the decision of the High Court (per Mahase AJ) was "irregular and of no force and effect" and that this Court therefore had jurisdiction to hear the appeal; that the High Court erred in directing the IEC to accept the party list submitted by Mr. Manyeli; and confirmed that the only authentic party list was that submitted by the NIP. (A reading of this Court's judgment in that case is essential for a proper appreciation of the issues and the reasons for its conclusions.)

[4] The Public Eye newspaper of 2 March 2007 featured an interview with Mr. Manyeli by its reporter, Ms 'Mathapeli Ramanotsi, under the heading "Speaking piece of his mind."

The following questions and answers relating to this Court's decision were allegedly recorded:

> "**PE:** Then if there are some acts that support the Judgment of the High Court what do you think are the reasons for the Appeal Court judge to rule against the judgment?
>
> **AM:** *There could be many reasons for that. What Justice Ramodibedi did was a clear violation of the law and therefore it was a crime that must be brought before justice.*
>
> **PE:** Did the President of the Appeal Court agree with the judgment passed by Justice Ramodibedi?
>
> **AM:** *Yes, which was a surprise to me because in a similar case of the same court in 2003, in a case between Thebe Motebang and Bereng Sekhonyana, P. Steyn said: 'Having due regard also to the historical development, there is nothing in the legislative framework which would justify this court departing from the clearly expressed injunction of the constitution, read with the National Assembly Election Act of 1992 and the rules promulgated there under that no appeal to this court shall lie against the decision of the High Court dismissing an election petition. This court therefore does not have the jurisdiction to adjudicate upon any aspect of this appeal. The constitution does not allow it to do so.'*
>
> *So, I am surprised that he agreed with Justice Ramodibedi this time."*

[5] The answers allegedly given by Mr. Manyeli to Ms Ramanotsi's questions as set out above led to Mr. Manyeli being indicted in the High Court on a charge of contempt of court. The indictment alleged that he was guilty of the crime of contempt of court in that what he was recorded as having said:

> "did suggest that the Honourable JUSTICE RAMODIBEDI and/or the Honourable President of the Court of Appeal and/or the Honourable MS JUSTICE MAJARA and/or the Honourable Court of Appeal is incompetent to a criminal degree and/or what it did was unlawful".

[6] The trial of Mr. Manyeli commenced in the High Court on 28 August 2007 before Guni J and two assessors. For convenience Mr. Manyeli will henceforth be referred to as "the accused". The accused pleaded not guilty. At the conclusion of the Crown's case application was made for his discharge. The application was granted on 19 November 2007, the learned judge holding that "there is no evidence that the accused committed the offence charged." The court accordingly returned a verdict of not guilty.

[7] The Crown duly noted an appeal against the judgment of the court *a quo.* Subsequent to the appeal being lodged the accused brought an application for the recusal of the "whole Bench of the Court of Appeal" including any judge, acting or otherwise, who may be appointed to hear the appeal, "on the basis of the existence of reasonable suspicion of bias". The present proceedings before us consequently encompass the accused's application for our recusal and, in the event of such

application not succeeding, the Crown's appeal against the accused's acquittal at the end of the Crown's case.

The application for recusal

[8] After having heard Mr. Khauoe for the accused, we dismissed the application for our recusal and indicated that our reasons for doing so would be incorporated in our judgment. Those reasons follow.

[9] The generally accepted test for recusal is the existence of a reasonable suspicion or apprehension of bias *(BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) at 693 I-J). Bias in the sense of judicial bias has been said to mean:

> "a departure from the standard of even-handed justice which the law requires from those who occupy judicial office"

(see *Franklin and Others v Minister of Town and Country Planning* [1948] AC (HL) at 103, quoted with approval by Howie JA in *S v Roberts* 1999 (4) SA 915 (SCA) at 922 I-J).

[10] The requirements of the test were elaborated upon as follows in *S v Roberts* (supra) at paras [32] and [33] (pp924 E – 925D).

> "(1) There must be a suspicion that the judicial officer might, not would, be biased.
> (2) The suspicion must be that of a reasonable person in the position of the accused or litigant.
> (3) The suspicion must be based on reasonable grounds.
> (4) The suspicion is one which the reasonable person referred to would, not might, have."

In the above regard, as warned in the *BTR Industries* case (supra) at 695 D-E:

> "It is important……. to remember that the notion of the reasonable man cannot vary according to the individual idiosyncrasies or the superstition or the intelligence of particular litigants."

[11] In *Sole v Cullinan and Others* LAC (2000 – 2004) 572 at 586 this Court quoted with approval the following passage from *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at 177 B-D:

> "The question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience.

> It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves."

Regard must also he had to the fact that there exists a presumption against partiality of a judicial officer (*S v Basson* 2007 (3) SA 582 (CC) at 606 E-F).

[12] Applying the above principles we are satisfied that we are not precluded from hearing the appeal as no reasonable grounds exist for perceived bias on our part. Although the indictment alleges the accused's contempt of the Court of Appeal as an institution as opposed to only those members who were party to the judgment in question, there is no foundation for such allegation. The words complained of, if uttered by the accused, were clearly directed only at one, or other, or all of the members of the court concerned, not against the Court of Appeal as an institution. A wider interpretation is not justified. The alleged contempt therefore does not encompass the members of the Court sitting in this matter which defeats any possible suggestion that we are acting as judges in our own cause.

[13] In any event it is correct, as contended by Mr. Molyneaux, who appeared for the Crown, that in most cases of contempt of court it is the very court or presiding judicial officer whose dignity has been impugned that hears the matter, particularly in instances of contempt *in facie curiae* where the power to punish summarily for contempt is essential for a court to uphold its dignity and authority. It is unthinkable that in such cases recusal could be sought simply because of the court's interest in the matter – the presumption of impartiality operates to preclude that, even in this day and age.

[14] Furthermore, the nature of the matter and the issues before us are such that there can be no reasonable perception that we will display bias in dealing with them. It is common cause that the words allegedly spoken by the accused were *prima facie* contemptuous, displaying contempt, I should add, of a very serious nature. At the end of the Crown case it fell to be determined whether a reasonable court might hold that the accused had uttered the words in question. The issue for determination on appeal was whether the court *a quo* was

correct in holding that there was no evidence to justify such a finding. These are issues which judges are uniquely equipped to decide and in which they would normally have no interest apart from the fulfilment of their judicial obligations. No cogent reasons were advanced which could sustain a reasonable perception of bias on our part in dealing with such issues. The accused has no reasonable ground to fear that we will be anything but objective in our assessment of the evidence and true to our oath of office. We accordingly dismissed the application for recusal.

The Appeal

[15] The generally accepted test to be applied at the end of the Crown case when the discharge of an accused is sought is whether there is evidence on which a reasonable court might, not ought to, convict. The dictum in *S v Shuping and Others* 1983 (2) SA 119 (B) at 121, frequently applied in the past, that if there is no such evidence a further question may be asked – whether there is a reasonable possibility that the defence

evidence might supplement the Crown case – may no longer be sound. *(See generally Zeffert and Others:* The South African Law of Evidence pp 159 – 163.) It is unnecessary for us to embark upon the debate in this regard in the present matter.

[16] The article containing the offending words was published on 2 March 2007. On 30 March 2007 the Attorney General and the Director of Public Prosecutions issued a joint public statement decrying the insulting and contemptuous remarks reportedly made by the accused concerning Mr. Justice Ramodibedi which also reflected upon the other members of the court in question (Steyn P and Majara JA). The statement concluded:

> "We end up by stating that the statement of Mr Manyeli, among certain things that one might have heard concerning the Courts of Law, is contemptuous. We despise this statement vehemently. Should Mr Manyeli not retract from his statement and to recant the same publicly, the law shall be put into function to protect the dignity of the Court of Appeal, which has been violated."

[17] On 6 April 2007 the editor of the Public Eye published an apology in the following terms:

> "In the Public Eye of Friday March 2 2007, we ran an interview of Mr. Anthony Manyeli entitled: 'Speaking piece of his mind' and in one of his responses to our questions he is quoted as having said: 'What Justice Ramodibedi did was a clear violation of the law and therefore it was a crime that must be brought before justice.' We apologise for running this

> part of the interview on the basis that it went beyond criticising the court decisions but into attack of the Judge."

[18] The next step was taken on 16 April 2007 when the Attorney-General wrote a letter to the accused which read as follows under the heading "Contempt of Court":

> "I have meticulously read the statement that you made in The Public Eye of 2 March, 2007, particularly where you depicted the Judge of the High Court, of the Court of Appeal, of the High Court, Justice Ramodibedi, as a criminal. As a matter of fact, there is no such a thing. Your statement is derogatory and contemptuous of the Court in my perspective. Attached hereto is the publication which my office has just made in respect of this issue and you are afforded seven days from the receipt hereof, that you retract and recant the statement that you made publicly, failing which, legal measure shall be taken."

The letter together with a copy of the earlier statement was handed over to the accused on the same day by the investigating officer Superintendent Molaoa. It appears from his evidence that no retraction or apology was ever forthcoming from the accused, nor did the accused either at the time he received the letter, or when he was later arrested or at any time thereafter, deny that he had uttered the offending words.

[19] On 21 April 2007 the accused's attorney wrote to the Attorney General in response to the latter's letter to the accused. The letter contains a request to the effect:

> "[W]e will be pleased if your good office could supply us with the said particulars, both in English and Sesotho, as we understand Mr Manyeli was speaking in Sesotho, the reason being that there might have been of interpretation (sic) from Sesotho to English. Your earliest response will be highly appreciated."

Significantly the letter contains no denial on behalf of the accused that he uttered the offending words attributed to him in the article.

[20] Even at the trial there was no clear indication that the accused would deny having spoken the words complained of. The cross-examination appears to have been directed more to the question of lack of intention and a defence of justification. Thus it was pertinently put to Superintendent Molaoa that the accused "never intended to insult Judge Ramodibedi or the Court of Appeal" and later on "Ntate Manyeli has instructed me he did not have an intention to insult the officials of the court." But, and again significantly, it was never put that the accused would deny having used the offending words.

[21] Ms Ramanotsi was not able to confirm that the article correctly conveyed what the accused had said to her. The method she apparently used was to put questions to which the person being interviewed would respond. She would then submit a draft of the interview to the editor who in turn would edit it to the extent necessary and prepare an article for publication. The responsible editor was not available to testify, and the chief editor could not throw light on whether the published article was in line with the draft that had been submitted. Ms Ramanotsi also conceded that the interview may have been conducted in both English and Sesotho.

[22] On the face of it there is no apparent reason why the responsible editor would have altered materially the format, thrust or language of the draft to present something different from what had been submitted to him. The Public Eye published its apology at a time when the events were still relatively fresh in everyone's mind, but it contains nothing to suggest that it may have misquoted the accused. Furthermore,

it is common cause that at no time did the accused ever complain to the Public Eye that he had been incorrectly reported.

[23] It is not apparent from the evidence whether the accused saw the article, or the subsequent apology, when they were published, or when he first became aware of the joint statement. However, by 16 April 2007 at the latest he must have been aware of the situation and the accusation that he was guilty of contempt of court by using the offending words. The accused must be taken to have known whether or not they were his words. If they were not, a reasonable person who disputed using the words, faced with a serious accusation of contempt of court and a threatened prosecution, would have been expected at the first opportunity to have denied using them, and would have persisted in such denial. But, as has been pointed out, no denial, or suggestion of a denial, has at any time to date been forthcoming.

[24] In her judgment the learned judge *a quo* makes persistent references to denials by the accused such as “the accused, as put to the crown witness by his attorney, will say those are not his words”; “vehement denials by the accused”; “had [the investigating officer] attempted to investigate, he would have accepted the accused person’s denial immediately when he confronted him”; and “the accused maintained his denial”. The denials referred to are simply not borne out by the evidence, and the judge *a quo* clearly misdirected herself in that regard. Nor has Mr. Khauoe, despite being given a further opportunity to do so, been able to point to any such denials.

[25] At the close of the Crown case the evidence against the accused that he had uttered the offending words was largely circumstantial. It permitted of various reasonable inferences one such being, in the absence of any denials by the accused, that the article correctly reflects what he said, thus constituting evidence on which a reasonable court might convict. In this respect the remarks of Kumleben J in *S v Ostilly and Others* 177 (2) SA 104 (D) at 107 B-D are apposite where he said:

> "As will be seen, when I turn to consider the facts, the evidence tendered by the State on disputed issues is largely circumstantial. With reference to such evidence, one must consider at this stage whether a reasonable man might, not should, draw the inference sought to be drawn by the State. I respectfully agree with the reasoning and observations in the recent case *of S. v. Cooper and Others,* 1976 (2) S.A. 875 (T) at pp. 888-890, on this question and with the concluding remark that:
> '*If there is more than one inference possible from the facts assumed to be uncontradicted at the close of the case for the prosecution, then that is just the sort of evidence that should be referred to the triers of fact for decision'".*

[26] In the result it follows that the court *a quo* erred in granting the accused's discharge at the end of the Crown case. The appeal accordingly succeeds and the matter falls to be remitted to the court *a quo*.

[27] The following order is made:

(1) The appeal is upheld.

(2) The order of the court *a quo* granting the application for the discharge of the respondent (Mr Manyeli) at the end of the Crown case and returning a verdict of not guilty is set aside and is replaced by the following order:

"The application for the discharge of the accused is refused."

(3) The matter is remitted to the court *a quo* for the trial to proceed in the ordinary course.

_____
J.W. SMALBERGER
JUSTICE OF APPEAL

I agree

_____
L. S. MELUNSKY
JUSTICE OF APPEAL

I agree

_____
C.T. HOWIE
ACTING JUSTICE OF APPEAL

FOR APPELLANT : MR. D.P. MOLYNEAUX
FOR RESPONDENT : MR. K.T. KHAUOE