IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 21/2009

CIV/APN/297/2008

In the matter between

THE DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES **1ST APPELLANT**
THE DIRECTOR OF PUBLIC PROSECUTIONS **2ND APPELLANT**
THE ATTORNEY GENERAL **3RD APPELLANT**

and

TSELISO STEPHEN DLAMINI **RESPONDENT**

Heard : 12 October 2009
Delivered : 23 October 2009

CORAM:

GROSSKOPF, JA
SMALBERGER, JA
MELUNSKY, JA

SUMMARY

Appeal and cross-appeal – appellants appealing against order of court a quo declaring respondent's arrest unlawful – respondent cross-appealing against court's (1) decision that his continued detention lawful, and (2) dismissal of his review application of magistrate's decision denying him bail – appeal dismissed – arrest unlawful because persons executing warrant not authorized to do so – cross–appeal with regard to (1) dismissed – with regard to (2) held leave to appeal from court a quo required – leave not obtained – appeal in relation thereto struck off the roll – no order as to costs of appeal and cross-appeal.

JUDGMENT

SMALBERGER, JA

[1] The respondent (the applicant in the court below) was charged in June 2005 in the Magistrate's Court, Maseru, with five counts of fraud incorporated in two separate charge sheets. He was granted bail pending his trial. His last appearance in court was on 25 August 2005 when the charges against him were postponed to 27 September 2005. He failed to appear in court on the latter date. He subsequently left Lesotho and spent some time abroad before returning.

[2] On 1 August 2008 the respondent was arrested in Maseru pursuant to a warrant of arrest issued by a local magistrate. The arrest was carried out by officers of the Directorate on Corruption and Economic Offences ("the DCEO"). The respondent was taken to the Magistrate's Court where he unsuccessfully applied for bail. At his next court appearance on 15 August 2008 a High

Court indictment charging him with the same five fraud counts with which he had been charged in 2005 ("the fraud counts") and one count of defeating the ends of justice ("the defeating justice count") was served on him. At that stage respondent was represented by counsel. The charges against him were postponed to 2 September 2008 and the respondent was remanded in custody. He has remained in custody since then.

[3] On 25 August 2008 the respondent (as applicant) launched the application which is the subject of the present appeal. He cited five respondents (including the present three appellants) and sought the following orders in terms of the Notice of Motion:

"1. Declaring the arrest on 1 August 2008 and subsequent proceedings in pursuit thereof, including the indictments (in both the Magistrates Court and in this Court) and detention of the applicant unlawful.

2. Ordering the immediate release of the applicant.

3. Ordering the immediate return to the applicant of any and all his documents seized by the First Respondent, including his passport.

4. Interdicting the respondents from arresting and detaining the applicant and charging him with the offences of alleged fraud and provided for in his indictment in cases number CR/R/1496/08, CR/T/69/08 and CR/764/05.

5. Granting the applicant such further or alternative relief as may be deemed expedient or just and equitable.

6. Ordering the first, second and fourth respondents to, jointly and severally, pay the costs of this application.

IN THE ALTERNATIVE:

Granting applicant leave to incorporate the following prayers as part of this application, regard being had to the fact that they are a consequence of his detention and to avoid dealing with the detention of applicant in a piece meal manner.

7. Reviewing and setting aside the proceedings pertaining to the applicant's application for bail in case number CR/R/1496/08 on 1 August 2008.

8. Reviewing and setting aside the Learned Magistrate's judgment and order refusing to release the applicant on bail pending his trial and granting him appropriate bail alternatively referring the bail application back to the Magistrate's Court to be considered anew.

9. Granting applicant such further and/or alternative relief as may be deemed expedient or just and equitable.

10. Ordering the first, second and fourth respondents to, jointly and severally, pay the costs of this application."

[4] Lengthy answering and opposing affidavits were duly filed by and on behalf of the parties. The matter eventually came before Chaka-Makhooane J on 10 March 2009. The learned judge delivered judgment on 22 May 2009. She granted prayer 1 of the notice of motion to the extent that she declared the

arrest of the respondent (applicant) on 1 August 2008 unlawful, and as a consequence also granted prayer 3. However, in relation to prayer 1 she dismissed the latter part thereof, holding that the subsequent proceedings and the detention of the respondent remained lawful. She dismissed all the other prayers, and made no order as to costs. The appellants noted an appeal against the order declaring the arrest of the respondent unlawful; the respondent cross-appealed against the dismissal of the latter part of prayer 1 and the dismissal of prayers 2, 7 and 8. For convenience I shall continue to refer to Mr Dlamini as the respondent and the appellants as designated save that where appropriate the first appellant will be referred to as the DCEO.

[5] The appeal and cross-appeal essentially raise three issues, viz:

1. The lawfulness of the arrest of the respondent on 1 August 2008;

2. Whether, if his arrest was unlawful, his continued detention is unlawful and he is entitled to his release;

3. Whether the trial judge erred in dismissing the application to review and set aside the magistrate's decision on 1 August refusing to grant the respondent bail.

I shall deal with each of these in turn.

[6] Sections 33 and 34 of the Criminal Procedure and Evidence Act, 1981 ("the Act") provide for the issuing and execution of warrants of arrest. In terms of section 34 (1) and (2):

"(1) Every peace officer shall obey and execute every warrant of arrest.

(2) A peace officer or other person arresting any person shall, upon demand of the person arrested, produce the warrant to him, notify him of the substance thereof, and permit him to read it."

In the context of the Act warrants must be executed by a peace officer, although the use of the words "or other person arresting" in section 34 (2) contemplates the conferral of a power to arrest with a warrant on a designated person in terms of other legislation. In the court *a quo*, and before us on appeal, the appellants sought to justify the arrest of the respondent on the basis that, on a proper interpretation of the relevant provisions of

the Prevention of Corruption and Economic Offences Act, 1999, as amended by the Prevention of Corruption and Economic Offences (Amendment) Act, 2006 ("the Prevention of Corruption Act"), the officers of the DCEO were vested with powers of arrest with a warrant, and had acted in terms of such powers in arresting the respondent. The respondent's arrest was accordingly lawful.

[7] The appellants rely upon the authority of a warrant issued by a Maseru magistrate on 27 June 2008 to justify the arrest of the respondent. The warrant is specifically directed "To All Peace Officers" and commands the immediate apprehension of the respondent. It is trite law that a warrant of arrest can only be executed validly by the person, or one of a designated group of persons, to whom the warrant is addressed. A "peace officer" as defined in section 3 of the Act:

"includes a sheriff or a deputy sheriff, any officer, non-commissioned officer or trooper of a police force established under any law or of any body of persons carrying out under any law the powers, duties and

functions of a police force in Lesotho, a gaoler or a warder of any prison or gaol, and any chief recognised as such under any law."

It is a common cause that officers of the DCEO do not fall within the definition of "peace officer". Accordingly the officers of the DCEO who purported to arrest the respondent were not authorized to execute the warrant of arrest. Consequently this rendered the respondent's arrest unlawful. On this basis alone the appeal must fail.

[8] The conclusion to which I have come renders it unnecessary to decide whether the provisions of the Prevention of Corruption Act confer on officers of the DCEO the power to arrest in terms of a warrant addressed to them. Although the Act confers powers of arrest, it is significant that it only does so in the context of arrest without a warrant in the special circumstances envisaged in section 38. There are no express provisions authorising arrest with a warrant; nor do there seem to be persuasive grounds for concluding that such authority

exists by necessary implication. It must be borne in mind that the Legislature specifically applied its mind in the Prevention of Corruption Act to the question of arrest. If it had intended to empower officers of the DCEO to arrest with a warrant one would have expected it to make clear provision to that effect. However, I refrain from expressing a definite view on the matter.

[9] One final comment in this regard. In the appellants' heads of argument it is stated that: "In *Fath and Another v Minister of Justice and Another* (LAC (2005 – 2006) 436) the arrestee, Mr Fath, was arrested by officers of [the] DCEO pursuant to a warrant. The involvement of officers of the Directorate in Mr Fath's arrest attracted no adverse comment from this Honourable Court." The terms of the warrant of arrest in that case do not appear from the judgment, but at 439H it is recorded that there was a police officer (in other words, a peace officer) present at the time of Mr Fath's arrest, which might distinguish that case from the present.

[10] In the result the appeal fails. I proceed to consider the issues raised in the cross-appeal, the first being whether, despite his arrest being unlawful, the respondent's subsequent detention was lawful.

[11] Following upon his arrest, the respondent was brought before a magistrate on the same day on the fraud and defeating justice counts and remanded in custody until 15 August 2009. There is a dispute on the record as to whether the fraud counts had been withdrawn against the respondent before 27 September 2005 leaving him free not to attend court on that day and, indeed, free to leave the country, as contended by the respondent, or whether he had absconded, as claimed by the appellants. The matter is of no moment in relation to the appeal, for even if the fraud counts had previously been withdrawn the Crown was at liberty to re-instate them. Furthermore the respondent faced the additional defeating justice count.

[12] Once the respondent was remanded in custody on the fraud and defeating justice counts pursuant to the magistrate's order his continued detention was lawful. See *Abrahams v Minister of Justice and Others* 1963 (4) SA 542 (C) 545 G to 546 A (cited with approval in *Isaacs v Minister van Wet en Orde* [1996] 1 All SA 343 (A) at 351**)** where the court held:

"There is clear precedent for Mr. *Steyn's* proposition that once there is a lawful detention, the circumstances of the arrest and capture are irrelevant. I refer to the case of *Rex v Robertson,* 1912 T.D.P. 10, in our law, and to an English case *Rex v. Officer Commanding Depot Battalion, Colchester: Ex parte Elliot,* 1949 (1) A.E.R. 373.

It is also clear, and I quote from LORD GODDARD'S judgment in that case: 'Once he is before the Court it can hold him until his trial and conviction.'

No authority has been cited to us which supports Mr. *Kies'* very wide proposition, namely that once a man has been unlawfully arrested, captured or detained, nothing can be done subsequently to cure that defect. On the contrary, the authorities quoted by Mr. *Steyn* are to the opposite effect and we can see no reason why we should not follow them."

[13] In contending to the contrary Mr Mpaka, on behalf of the respondent, relied upon certain dicta in the case of *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54

(SCA). That case dealt with the arrest of one Rashid as an illegal foreigner pursuant to the provisions of section 34 of the (South African) Immigration Act 12 of 2002 by one De Freitas, a senior immigration officer, and his subsequent detention. After his arrest Rashid was taken to the Cullinan police station where he was detained and later deported. At no time did he appear in court, nor was he remanded in custody on any charge. It was held (at 79A – B) that:

> "[F]rom the time that Mr Rashid was handed over by De Freitas to the officials at the Cullinan Police cells until he came to leave the Republic, the conduct of the State officials in whose charge he found himself, was unlawful. It follows that Mr Rashid's detention and subsequent deportation were unlawful."

[14] The facts of *Jeebhai's* case are clearly distinguishable from those of the present matter, as is the underlying principle that needs to be applied. The passage quoted has to be seen in context. It could not have been intended to lay down, as a general proposition, that every detention which is initially unlawful continues to remain so in all circumstances. That

would offend against the established principle laid down in *Abrahams'* case, which was neither considered nor overruled in *Jeebhai's* case. The passage only holds good where the lawfulness of the detention is dependent solely upon the lawfulness of the arrest; it does not apply in a case such as the present where an unlawful arrest is superseded by a lawful detention consequent upon an appearance before a competent court. (*Minister of Law and Order, Kwandebele, and Others v Mathebe and Another* 1990 (1) SA 114 (A) at 122 E – H.)

[15] It follows that the cross-appeal against the decision of the court *a quo* that the continued detention of the respondent is lawful, falls to be dismissed. The remaining issue relates to the cross-appeal against the court *a quo's* dismissal of the review application to set aside the magistrate's refusal to grant bail to the respondent. At the hearing of the appeal the question arose whether the cross-appeal in that regard was properly before us. The right of appeal to this Court provided for in section 16 (1) of

the Court of Appeal Act 10 of 1978 applies, in terms of section 16 (2), only to judgments given in the exercise of the original jurisdiction of the High Court. In terms of section 8 (2) of that Act, an order made by the High Court in its revisional jurisdiction shall be deemed to be a decision in its appellate jurisdiction. The order made by the court *a quo* in relation to the application to review the magistrate's refusal to grant the respondent bail was an order in its revisional jurisdiction. Accordingly, in terms of section 8 (1) of that Act, leave of the High Court, or if such leave was refused, leave of this Court, was a necessary pre-requisite for the noting of an appeal against the court *a quo's* order in that regard. (See *Motlomelo v The Magistrate and Another* LAC(1990 – 1994) 195.) It is common cause that no such leave was sought. There is accordingly no proper appeal before us in relation to this issue. The fact that this issue arose in the context of a wider appeal embracing issues in respect of which leave to appeal was not required does not negate the

need to comply with the relevant provisions of the Court of Appeal Act.

[16] While it is not incumbent upon us to consider the merits of the court *a quo's* dismissal of the review application I propose to make certain comments in relation thereto. The court *a quo* held that the respondent had failed to observe and comply with the procedure prescribed for review applications as stipulated in Rule 50 of the High Court Rules, refused to condone his failure to do so and dismissed the application. Rule 50 is in virtually identical terms to Rule 53 of the South African Uniform Rules of Court. In *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) AT 661 E – J the court said the following in regard to the application of Rule 53:

"Counsel for the Jockey Club made much of the peremptory language in which Rule 53 is couched, for example 'all proceedings . . . . shall be . . .' in subrule (1) and the repeated use of 'shall' in the succeeding subrules. Clearly that use of language cannot be overlooked, but equally clearly it is to be understood conceptually and contextually. The primary purpose of the Rule is to facilitate and regulate applications for review. On the face of it the Rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be

obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the Rule, slavishly – and pointlessly – to adhere to its provisions. After all:

'(R)ules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts . . . .'

(Per Van Winsen AJA in *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654 C – D.)
I am in full agreement with the view expressed by Eloff DJP in *S v Baleka and Others* 1986 (1) SA 361 (T) at 397 *in fin* – 398A:

'Rule 53 was designed to facilitate the review of administrative orders. It created procedural means whereby persons affected by administrative or quasi-judicial orders or decisions could get the relevant evidential material before the Supreme Court. It was not intended to be the sole method by which the validity of such decisions could be attacked.'

I am also in agreement with the observation of the learned Judge in the succeeding sentence:

'There are numerous decisions in our own Courts in which the validity of administrative rulings was considered and adjudicated on in proceedings other than conventional review proceedings . . .' "

The views expressed above apply equally to High Court Rule 50.

The fact that the provisions of that Rule were not followed did not *per se* justify the dismissal of the review application. Given the circumstances that pertained it would seem that the procedure followed by the respondent was a permissible one

and the merits of the review application should have been considered.

[17] Furthermore, given the fact that on a proper application of the rule in *Plascon – Evans Paints Ltd v Van Riebeeck (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C, which has consistently been applied by this Court with regard to motion applications (see e.g. *MNM Construction Co. (Pty) Ltd v Southern Construction Co (Pty) Ltd and Others* LAC (2005 – 2006) 112 at 116 E – G; *Tsehlana v National Executive Committee of the LCD and Another* LAC (2005 – 2006) 267 at 278 F) the magistrate's version of what occurred during the respondents bail application would probably have had to be accepted. In view of the nature of the charges against him, for the respondent to have been entitled to bail he would presumably have had to establish, in terms of section 109 A (1) of the Act, as inserted by section 2 of the Criminal Procedure and Evidence (Amendment) Act 10 of 2002, that exceptional circumstances existed which in

the interests of justice permitted his release, something he did not attempt to do. I make no definite findings in regard to the matters referred to in this and the preceding paragraph.

[18] In the court *a quo* no order was made as to costs. For the reasons appearing above both the appeal and the cross-appeal fail. In those circumstances it would seem fair to make no order as to costs in respect of the appeal and the cross-appeal.

[19] The following order is made:

1) The appeal is dismissed.

2) The cross-appeal is struck off the roll in respect of the purported appeal by the respondent (the applicant in the court below and the cross-appellant) against the decision of the court *a quo* dismissing the respondent's (applicant's) review application; for the rest the cross-appeal is dismissed.

3) No order as to costs is made in respect of either the appeal or the cross-appeal.

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J.W. SMALBERGER
JUSTICE OF APPEAL

I AGREE

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F.H. GROSSPKOPF
JUSTICE OF APPEAL

I AGREE

_____
L.S. MELUNSKY
JUSTICE OF APPEAL

FOR APPELLANTS : ADV H.H.T. WOKER

FOR RESPONDENT : ADV T.R. MPAKA