IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO. 1/2009

In the matter between:

REATILE THABO MOCHEBELELE	**First Applicant**
LETLAFUOA T. MOLAPO	**Second Applicant**

and

THE CROWN	**Respondent**

CORAM:

SMALBERGER, JA
MELUNSKY, JA
HOWIE, AJA

Heard : 27 March 2009
Delivered : 9 April 2009

SUMMARY

Application to set aside the applicants' conviction of bribery and remittal to the trial court for further evidence - test to be applied - underlying principles stated - evidence sought to be led evaluated - requirements for remittal not satisfied - application dismissed.

J U D G M E N T

SMALBERGER, JA:

[1] The applicants were acquitted in the High Court on 5 February 2008 on a charge of bribery. The case against them arose from their involvement with Lahmeyer International GmbH ("Lahmeyer") in the implementation of the Lesotho Highlands Water Project. The Crown appealed against their acquittal. The appeal came before this Court on 1 October 2008. The appeal succeeded; the acquittal of

the applicants was set aside; an appropriately formulated verdict of guilty of bribery substituted; and the matter was remitted to the trial court for the imposition of sentence. (See the judgment in the Crown v Reatile Thabo Mochebelele and Letlafuoa T. Molapo C of A (CRI) 02/08 delivered on 17 October 2008 ("the judgment").)

[2] The applicants have not yet been sentenced, the further proceedings in the High Court having been postponed to enable the applicants to bring the present application. The relief they seek in terms of their amended

notice of motion is that their convictions be set aside and the matter be remitted to the trial court to allow, *inter alia,* for the recall of Mr. Raymond Stock ("Stock"), a Crown witness at their trial, and to hear the evidence (to the extent that such evidence may be admissible) of Mr. Setsabi Lefosa ("Lefosa") and Ms Potsi Mochebelele ("Ms Mochebelele"). The Crown opposes the application.

[3] The judgment deals comprehensively with the issues at the trial, the relevant evidence, the admissibility of certain documentary evidence and this Court's reasons for

concluding that the applicants were guilty as charged. As appears from the judgment, Stock was an essential witness for the Crown; the acceptance of his evidence was a pre-requisite for a successful prosecution. The trial court considered Stock a "shady character" and unreliable as a witness. It did not accept his evidence, hence the acquittal of the applicants. Its findings in relation to Stock were reversed on appeal, resulting in this Court arriving at a different conclusion in regard to the applicants' guilt.

[4] In this respect the following is said in paragraph [62] of the judgment:

"[62] The trial Judge did not find adversely to Stock as regards demeanour. Nor did he find Stock to have been untruthful in his evidence. Stock's fault consisted of falsifying certain entries in Lahmeyer's Maseru records and in that and other respects, contributing to achievement of Lahmeyer's corrupt purpose. All of that Stock readily admitted. There is no evidence supporting the Judge's reference to Stock as a 'shady character'. That would suggest somebody inherently dishonest. An accomplice is always *ex hypothesi* a participant in crime. The question is whether Stock was honest in the witness box and a reliable reporter of what occurred at the 'bribe' meetings, by which I mean the meetings at which, on the Crown case, the money was handed over."

[5] The conclusion ultimately reached with regard to Stock's evidence was articulated as follows in paragraph [83] of the judgment:

"[83] With regard to the considerations examined above in regard to the oral evidence, it seems to me that those adverse to Stock do not detract from his worth as a witness. I bear in mind his criminal complicity which, as I have said, he conceded, and that it requires one to exercise caution in

> evaluating his credibility. It also does him no credit that he falsified documents in respect of one payment but that was part and parcel of his role as accomplice. The criticisms levelled against him in other respects are, for reasons stated when discussing them, explicable on a basis which does not warrant the inference that he gave false evidence. Nor was he shown to have been untruthful in his evidence. The suggested possibility that he could be protecting Zimmermann or Emsmaan can be discarded. On grounds already stated, the theft theory holds no water. I also find no basis for the trial Judge's finding that Stock was 'unreliable'."

[6] The application for re-opening is premised on two bases. The first relates to a statement allegedly made by Stock to the second applicant and Lefosa on the golf course in Maseru some time between the trial court's judgment on 5 February 2008 and the hearing of the appeal on 1 October 2008. On that occasion Stock is alleged to have said that he

"was remorseful about the false evidence he gave against us [the applicants]." The second basis relates to what transpired in the course of communication between Ms Mochebelele and Stock subsequent to this Court's judgment on 17 October 2008. I shall deal with each of these in due course. But first it is necessary to outline briefly the legal principles that need to be satisfied before an application to reopen can be granted.

[7] In S v De Jager 1965 (2) SA 612 (AD) it was emphasized (at 613 A) that it is "well settled that it is only in an

exceptional case" that relief such as is presently sought by the applicants should be granted. This is because of the need for finality in litigation, and because "[i]t is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be reopened and amplified" (at 613 A-B). The court went on to state (at 613 C-E) the requirements that needed to be satisfied for re-opening as follows:-

> "(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
>
> (b) There should be a *prima facie* likelihood of the truth of the evidence.

> (c) The evidence should be materially relevant to the outcome of the trial."

The approach adopted in De Jager's case has been consistently followed over the years, also in Lesotho. (See Hata-Butle (Pty) Ltd v KPMG and Another LAC (2000-2004) 399 at 402J - 403B.)

[8] In this regard it would also be apposite to refer to the following remarks of Centlivres CJ in R v van Heerden and Another 1956 (1) SA 366 (A) at 372H - 373A:

> "To accept at their face value affidavits made by material witnesses who allege therein that they knowingly gave false evidence at the trial would leave the door wide open to corruption and fraud. It is

> not in the interests of the proper administration of justice that further evidence should be allowed on appeal or that there should be a re-trial for the purpose of hearing that further evidence, when the only further evidence is that contained in affidavits made after trial and conviction by persons who have recanted the evidence they gave at the trial. To allow such further evidence would encourage unscrupulous persons to exert by means of threats, bribery or otherwise undue pressure on witnesses to recant their evidence. In a matter such as this the Court must be extremely careful not to do anything which may lead to serious abuses in the administration of justice."

This applies in equal, if not greater, measure where bald admissions of falsity (not even under oath) have been said to be later made by a witness who testified at an earlier trial.

[9] To the above can be added the remarks made in S v W 1963 (3) SA 516 (A) to the effect that:

> "[T]he mere circumstance that a witness called at a trial has subsequently made a statement inconsistent with his evidence will

> seldom in itself be a sufficient ground for re-opening a concluded trial."

(at 524E), and

> "It is not in the public interest that the finality of concluded criminal trial proceedings be lightly disturbed."

(at 524F)

[10] Returning to the first basis put forward to reopen the trial. It would appear from the founding affidavit that Stock's alleged statement about remorse for giving false evidence was allowed, somewhat surprisingly, to pass without comment. Human nature being what it is, one would have expected some enquiry as to why he gave

evidence, and perhaps even to what extent he had falsified his evidence. Yet the matter simply appears to have been allowed to rest - had there been any further elaboration it would no doubt have been mentioned. But even if response or further comment was not considered necessary or appropriate in the circumstances, Stock's alleged bald admission of falsity is unhelpful. Stock's evidence at the trial was not restricted to a single event; it covered a series of events over a period of time. His evidence concerning those events was corroborated by other witnesses in a number of respects. Any statement that he gave false evidence could

not be taken to have applied to all his evidence. If he said what he is claimed to have said, we are in the dark as to what he intended to convey was false in his evidence, and furthermore are unable to assess its materiality. The applicants must always have been aware of the critical nature of Stock's evidence. They must also have been alive to the fact that there was always a danger that his evidence might be accepted on appeal - as in fact turned out to be the case. Yet Stock's alleged utterance was never raised at the appeal, where an appropriate application for remittal of the matter as an alternative to the dismissal of the appeal

could have been made. It is trite law that an application for reopening should be made at the earliest available opportunity.

[11] The second basis on which the application is founded arises from what transpired between Ms Mochebelele and Stock after this Court's judgment was handed down. I agree, as contended by the Crown, that the communication between them must be viewed against the background of the relationship that existed between the applicants and Stock. That relationship had been a cordial one, both

professionally and socially, extending over a number of years. Not only does that reduce the danger that Stock would have testified falsely against the applicants in the first place, it also enhances the likelihood that he would be willing to assist them without unnecessarily compromising his integrity.

[12] It seems fair to conclude that matters came to a head on 16 November 2008 when Stock faxed his handwritten note ("RTM 9") to Ms Mochebelele. Nothing appears to have

happened thereafter which materially altered the attitude conveyed by Stock in RTM 9. It reads as follows:

> "Potsi Mochebelele
>
> I am writing this to explain why I cannot assist you, in your request.
>
> Cash from Li Bank account was always drawn on instructions from Dr Zimmerman when he was going to a meeting with JPTC he would carry the cash with him, I would be with him for the main meeting. I was then told to wait outside the meeting room until all business was completed. I personally never observed any monies change hands, this I previously stated at the hearings.
>
> You must remember that both Dr Zimmerman and Li admitted making payments and produced receipts of all transactions to the Prosecutor, which go back long before I was in Lesotho, it was only in this hearing that I was aware of the facts.
>
> I am sorry that my change of statement would not help at all, you would have to contact the other parties and request that they rescind their statements and documents and then I could withdraw my statement."

[13] Sensibly construed RTM 9 amounts in broad terms to a reaffirmation by Stock of the evidence he gave at the trial. It contains no unequivocal intimation that his previous evidence was false and that he was willing to change it for that reason. In my view his reference in RTM 9 to being "told to wait outside" as opposed to being given a nod to do so is not necessarily inconsistent with his previous testimony. After all, the tenor of his evidence at the trial was that he left the meetings following prior arrangement to do so (told or asked) with a later indication or gesture as to when to do so (nod). The reference to JPTC in RTM 9 is

clearly an error, but does not materially detract from the gist of his previous evidence.

[14] It was argued on behalf of the applicants that the third paragraph of RTM 9 contains a suggestion that the Crown withheld relevant documentary evidence. There is no reason to believe that to be the case, having regard to the very fair and proper manner in which the prosecution was conducted. What Stock is clearly intending to convey is that documentary proof that the payments were made appeared from the Lahmeyer records furnished to the Crown, which

was in fact found to be the case. As far as the fourth paragraph is concerned it reflects on inability to assist but a willingness to consider withdrawing his statement (note, not change his statement or evidence because it was false) if "other parties …. rescind their statements". In my view he is saying no more than, if it were possible to do so, he would consider going along with any attempt to have the charges against the applicants dropped.

[15] It was further suggested that the fax of 27 November 2008 from Stock to Ms Mochebelele ("RTM 10") in which Stock

refers, to threatening phone calls, verbal abuse and his house being watched "conveys a disturbing impression that he gave his evidence under some form of coercion". The source of such coercion has not been identified. There is no suggestion that it emanated from the Crown; given that Stock appears to have co-operated with the Crown (there being no suggestion to the contrary) there is no likely reason why any Crown agency would seek to coerce him. In any event, there is nothing to suggest that pressure was brought to bear upon him to give false evidence.

[16] As far as the recorded communications (RTM 1-8) that preceded RTM 9 are concerned, they in my view do no more than indicate a willingness on the part of Stock to assist if he could to alleviate the applicants' plight without compromising his own situation. But nowhere, either expressly or by implication, does he concede to having given materially false evidence. Nor can it be said, as claimed in the founding affidavit, that Stock expressed "in unequivocal terms that he is willing to change his version".

[17] In paragraph 15.5 of the first applicant's affidavit reference is made to a telephone call from Ms Mochebelele to Stock. It is alleged that Stock, on hearing the outcome of the appeal "expressed his shock and also indicated in their conversation that he was willing to tell the truth, if subpoenaed regarding the matter but was concerned that he might get extradited". In paragraph 15.8 reference is made to a further conversation on 25 October 2008 during which it is claimed that Stock "wanted Potsi to tell him how he must state the true facts", upon which she advised him that it was preferable that he, "in his own words must make the

statement pointing out the respects in which his evidence before the above Honourable Court was false". No such statement was ever forthcoming from Stock - the only communication from him that amounted to a statement was RTM 9. What is interesting (and indeed significant) is that Ms Mochebelele in her fax to Stock of 27 October 2008 merely records "Thank you for calling me on Saturday" without confirming the details of their discussion referred to in paragraph 15.8 (as one might have expected) or any reference to the statement she claims he had been asked to make. Nor, were there any subsequent references to, or

enquiries made about, the envisaged statement, save in RTM11 dated 3 December 2008. By then, however, Stock had made his position clear in RTM9. No further communications ensued between Ms Mochebelele and Stock.

[18] The onus rests upon the applicants to satisfy us that the requisites for reopening have been met. In reaching our decision we have to be guided by the underlying principles that apply. One is conscious of the fact that Stock's credibility was a vital issue at the trial, and that if it were to be impugned it could, and probably would, have a material

bearing on the outcome of the trial. What is needed, however, is *prima facie* acceptable evidence that Stock was untruthful in a material respect or, at the very least, suggests that if he is willing to retract material aspects of his evidence. This, in my view, has not been forthcoming. The suggestion that Stock admitted at the golf course to having given false evidence is unconvincing, to say the least, particularly in the light of the failure to respond to it, or to act on it. Likewise, Ms Mochebelele's claims that Stock admitted to giving false evidence is doubtful when viewed in the light of subsequent events. Even if Stock did admit to

giving false evidence, one is not in a position to determine its nature and materiality. There is no written confirmation by Stock to support a claim that he gave false evidence at the trial. If anything, RTM9 negatives any suggestion that he did. Nor is there anything in the documentation preceding or following RTM9 which amounts to either an unequivocal indication that he gave false evidence, or that he was willing to change his evidence. The fact that further cross-examination of Stock might reveal something which adversely reflects on his credibility does not *per se* justify a reopening. In my view the applicants' case for reopening is

based on speculation rather than substance, and falls short of satisfying requirements (b) and (c) in S v De Jager (supra). It can therefore not succeed.

[19] In the result the following order is made:

The applicants' application is dismissed.

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J.W. SMALBERGER

JUSTICE OF APPEAL

I agree: _______________

L.S. MELUNSKY

JUSTICE OF APPEAL

I agree: ______________

C.T. HOWIE

ACTING JUSTICE OF APPEAL

For Applicants : Adv. I.A.M. Semenya SC

Adv. K. Mophethe

For Respondent: Adv. G.H. Penzhorn SC

Adv. H.H.T. Woker