IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C of A (CRI) No 9/2011**

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

HER WORSHIP MRS TAOLE 1ST RESPONDENT

LEBAJOA LEPHATŠOE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

CORAM: Ramodibedi, P
Howie, JA
Farlam, JA

Heard : 4th April, 2011

Delivered : 20th April, 2011

SUMMARY

Criminal Procedure – Application by D.P.P. for ruling overturning decision by trial court in undetermined criminal proceedings – exceptional circumstances not present – undesirability of hearing appeals piecemeal.

JUDGMENT

Farlam JA

[1] In this matter the Director of Public Prosecutions, acting in terms of section 78 of the Subordinate Courts Order of 1988, approached the High Court on notice of motion for a ruling on the correctness of a decision given by the first respondent in a criminal trial in which the second respondent was the accused.

[2] The decision whose correctness the Director sought to challenge related to the admissibility of a printout detailing the telephone calls made from a mobile telephone belonging to the second respondent. The printout was obtained from Econet

Lesotho by the fourth prosecution witness, Detective Inspector Selia-lia, after he had applied to the Magistrate's Court Maseru for an order directing Econet Lesotho to release the printout. The order granted by the magistrate stated that the director of Econet Lesotho was to provide the print out in respect of the mobile telephone in question from the 18th to the 20th March 2007. It did not state to whom the printout was to be provided.

[3] When the Director, who appeared for the Crown at the trial, endeavoured to have the printout handed in as an exhibit Advocate Thabane, who appeared for the second respondent, objected. She submitted that the document was not admissible because the order on the strength of which it was obtained from Econet Lesotho did not comply with section 46 of the Criminal Procedure and Evidence Act of 1981 in that it did not name the policeman to whom Econet had been directed to hand over the print out.

[4] The first respondent upheld the objection and the document

was not admitted in evidence. No further evidence was led at the trial and the Director as I have said, approached the High Court for an order setting aside the first respondent's decision on this point.

[5] In his founding affidavit the Director stated that in his view the decision sustaining the objection was "patently wrong and bad in law in as much as it amounted to reviewing the decision (court order) earlier granted by the very same court". He further stated that the decision had "potentially serious consequences of discontinuing the case for the Crown in that part of the Crown evidence is refused to be admitted". He also said that he was seeking the intervention of the High Court as the ruling prejudiced the Crown in its presentation of the evidence of the witness concerned.

[6] When the matter was argued in the High Court before Majara J, Advocate Thabane, who again appeared for the second respondent, submitted that the court should not allow what

amounted to a piecemeal review or appeal by the Crown in the case because exceptional circumstances warranting a review or appeal at this stage were not present.

[7] The learned Judge in the court below rejected this submission because she was of the view that it was just for her to entertain the application at that stage as the decision of first respondent disallowing the evidence might have a bearing on the possible outcome of the case.

[8] The Judge then dealt with the application and dismissed it, holding that she could not find fault with the first respondent's ruling.

[9[In my opinion the Judge in the court below erred in entertaining the application. This Court has on at least two occasions given its approval to the principle that criminal trials should not as a general rule be disposed of piecemeal. In ***Mda and***

Another v DPP LAC (2000-2004) 950 the Court said (at 957 C-E).

> "Wahlhaus [***Wahlhaus and others v Additional Magistrate Johannesburg and Another 1959 (3) SA 113 (A)]*** and Adams ***[R v Adams and Others 1959 (3) SA 753 (A)]*** and numerous subsequent decisions in the South African courts have held that it is not in the interests of justice for an appellate court to exercise any power 'upon the unterminated course of criminal proceedings' except 'in rare cases where grave injustice might otherwise result or when justice might not by other means be attained' (Wahlhaus). In Adams the Court of Appeal held that as a matter of policy the courts have acted upon the general principle that it would be both inconvenient and undesirable to hear appeals piecemeal and have declined to do so except where unusual circumstances called for such a procedure (per Steyn CJ at p 763). The authorities on the point are legion."

See also ***Millenium Travel and Tours and Others v DPP C of A (CRI) No. 15 of 2006*** (as yet unreported) at page 10 (paragraph 12).

[10] In my view it cannot be said that this is one of those rare cases where grave injustice would otherwise result or where unusual circumstances call for intervention on appeal or review despite the fact that the proceedings are not terminated in the trial court. It follows that the court *a quo* applied the wrong test.

[11] Furthermore there is nothing to prevent the investigating officer from going back to the magistrate's court and obtaining an order which complies with section 46 of Act 9 of 1981 and thereafter returning to the offices of Econet Lesotho and asking for another copy of the printout he obtained earlier. As the ruling by the first respondent was based solely on the fact that the order obtained by the investigating office did not comply with the section it will not prevent the subsequent handing in of a copy of the printout obtained on the strength of a warrant which does comply with the section.

[12] The court below should in my view have struck the application from the roll, as was done in the Mda and Millenium Travel and Tours cases (*supra*).

The following order is made:

1. The appeal is dismissed subject to paragraph 2 below.

2. The order of the court a quo is altered to read:

'The application is struck from the roll.'

I.G. FARLAM

Justice of Appeal

I agree

M. M. RAMODIBEDI
President

I agree

C. T. HOWIE

Judge of Appeal

For the Appellant	:	Adv. L. Mofilikoane
For the Respondent	:	Adv. N. Thabane