IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.3/2014

In the matter between

ASHRAFF ABUBAKER	**1ST APPELLANT**
STEFAN CARL BUYS	**2ND APPELLANT**
TSEBO MONYAKO	**3RD APPELLANT**

And

THE CROWN	**RESPONDENT**

CORAM : SCOTT, AP
THRING, JA
LOUW, AJA

HEARD : 7 OCTOBER 2014

DELIVERED : 24 OCTOBER 2014

SUMMARY

Application for a permanent stay brought in the course of uncompleted criminal proceedings – will be granted only in rare cases where there has been a gross irregularity resulting in grave injustice or where justice might otherwise not by other means be obtained – prejudice caused by late discovery of documents more properly determined at conclusion of the trial – alleged bias on the part of the prosecutor – what must be established.

JUDGMENT

SCOTT AP

[1] The appellants are presently on trial before **Monapathi J** in the High Court charged with contravening various provisions of the Customs and Excise Act 10 of 1982 as well as one count of theft with an alternative of fraud. There are altogether seven counts. Two relate only to the first appellant, one relates only to the second appellant and the remainder relate to all three appellants jointly. The charges arise out of the discovery on 10 and 11 March 2005, following information received, of a large number of manufactured

garments concealed in an underground storage facility on the combined premises of a company controlled by the first appellant and a company called Tony Textiles (Pty) Ltd in the course of a search conducted by officers of the Lesotho Revenue Authority ("LRA"), the Directorate of Corruption and Economic Offences and the Lesotho Mounted Police Services.

[2] The garments are alleged to have been manufactured by Tony Textiles and another company, T.W Garments Manufacturing (Lesotho) (Pty) Ltd, from material imported under rebate item 470.03 of the schedule to the Regulations published under the Customs and Excise Act 1982. In terms of this item raw materials imported into Lesotho for manufacture and export to countries outside the Southern Africa Customs Union are not subject to import duty, nor are the manufactured textiles liable for export duty when so exported. If, however, they are utilised or sold within the customs union duties become payable. Both companies were licensed to import material in terms of item 470.03 and both were in liquidation at the time of the search. The second appellant, an attorney, was an appointed liquidator of both companies.

[3] Broadly stated, the first and second counts are founded on the first appellant's alleged refusal or failure to comply with the lawful requests made by those conducting the search and the making of false statements to them. The subject of the third count is an alleged false declaration concerning the garments made by the second appellant. Counts four to six relate to the alleged removal, diversion of and dealing with the garments in question, while the seventh count is one of theft of the garments.

[4] Following the service on the appellants of a final draft of the indictment in which the third appellant was joined as a co-accused, the first and second appellants requested further particulars to the indictment and documents from the Crown. Not satisfied with the response, they requested further and better particulars. The Crown's response was considered still to be inadequate and they applied for an order to compel the delivery of the particulars and documents that had been refused by the Crown. There was some delay but eventually the application was heard on 31 May 2010 and dismissed by **Monapathi J** the following day. When

refusing the documents requested, the Crown indicated, however, that the appellants were free to obtain them from the LRA by way of *duces tecum* subpoenas. Some nine months later in March 2011, the appellants made use of the procedure suggested and on 27 June 2011, before pleading to the charges, inspected the documents they had requested which included a large number bills of entry, customs declarations and purchase orders. The documents were contained in some 67 lever-arch files. On 28 June the appellants' attorneys wrote to the LRA indicating that there was no need for the documents to be brought to Court when the trial began.

[5] The trial commenced on 11 July 2011. All three appellants pleaded not guilty. The Court sat on five occasions, but only for relatively short periods – sometimes for only a few days – with lengthy intervals in between, mainly to accommodate the legal representatives. On 16 April 2012 the trial was postponed until 18 February 2013. It is not clear why there was such a lengthy postponement. By then eight crown witnesses out of an anticipated total of 44 had testified. In the main, their evidence in chief dealt with

the events of 10 and 11 March 2005 when the garments were discovered.

[6] On 31 August 2012, that is to say more than a year after the appellants had inspected the documents made available to them by the LRA, and five and a half months prior to the date on which the trial was due to resume, the Director of Public Prosecutions ("the DPP") wrote to the appellants' attorneys enclosing a copy of a thirty-two paged forensic report with annexures comprising some 5990 pages contained in 17 lever-arch files on which a forensic auditor would rely when testifying for the Crown.

[7] The first appellant responded by filing on 29 January 2013 a notice of motion to be heard on 18 February 2013 (being the date on which the trial was due to resume) in which he sought an order for the permanent stay of the prosecution and in the alternative an order that the Crown be precluded from making use of any documents discovered subsequent to the previous hearing. The second and third appellants filed a separate notice of motion (although represented by the same attorney) also to be heard on 18 February 2013 in

which they sought an order for a permanent stay on the ground that their right to a fair trial had *"been infringed by the recruitment and appointment of the prosecutor and the conduct of the prosecutor in the matter by the complainants, the Lesotho Revenue Authority....being investigators in their own case."* The applications were heard together and were dismissed by **Monapathi J** on 11 September 2013. No written judgment has been forthcoming. The appeal is against this decision.

[8] The first appellant's complaint is in essence that he was entitled to all relevant documents prior to the commencement of the trial and that the Crown's conduct in producing at a late stage a forensic auditor's report, supported by a large number of documents which the Crown had previously refused to discover amounted to an abuse and violation of his constitutional right to a fair trial entitling him to the relief claimed in the notice of motion. He contends that had he been given the auditor's report in advance he would have been better able to prepare his defence and were the trial to continue and the auditor's report be admitted it may be necessary to recall witnesses for further cross-examination.

[9] The DDP's answer, briefly stated, is that the documents annexed to the auditor's report were included in those to which the appellants had had access more than a year before; that the report was in any event delivered to the appellants five and a half months prior to the date on which the trial was due to resume, giving them more than enough time to study it, and that the evidence previously adduced by the Crown related in the main to the search conducted on 10 and 11 March 2005. It was contended further, that in the unlikely event of the contents of the report giving rise to the need to cross-examine the witnesses who had already testified, the appellants were free to apply to have these recalled. Accordingly, it was argued, the appellants had suffered no prejudice.

[10] I purposely refrain from commenting on the issues raised. The question that arises is whether at the present stage of the proceedings in the Court a quo it is appropriate for this Court to determine those issues. It is a well-established principle that a superior court, whether sitting as a court of appeal or on review, will be slow to intervene in undetermined proceedings in the court below. It will exercise its power to do so sparingly

and only in rare cases where there has been a gross irregularity resulting in a grave injustice or where justice might otherwise not by other means be obtained. **(See Walhaus and Others v Additional Magistrate, Johannesburg, and Another 1959 (3) SA 113 (A) at 19H – 120C**; **Ismail and Others v Additional Magistrate, Wynberg and Another 1963 (1) SA 1 (A) at 5G – 6A; Sita and Another v Olivier NO and Another 1967 (2) SA 442 at 447 E-F; Adonis v Additional Magistrate, Bellville and Another 2007 (2) SA 147 (C) at para 21; Motata v Nair NO 2009 (2) SA 575 (T) at paras 9-12.)** The normal method of determining the correctness or otherwise of an allegation of criminal conduct is by the full investigation of a criminal trial. Whether a superior court will exercise its powers to intervene at an earlier stage will depend on the particular circumstances of the case and no precise definition of the ambit of the power is possible. Ultimately, the inquiry will involve the exercise of a judicial discretion. What is clear however, is that the mere fact that the point sought to be decided would put an end to the trial will not on its own justify the exercise of the power. Nor does it follow that every irregularity will cause prejudice resulting in a failure of justice.

[11] As far as the first appellant's appeal is concerned (I shall deal later with the appeal of the second and third appellants) I am unpersuaded that the issue raised is one that should be dealt with by this Court at this stage. The question whether by reason of the late production of the auditor's report there has been or will be prejudice, and its possible extent, is by its very nature one that should be determined at the conclusion of the trial and not at this stage.

[12] I should add that the issue of the late production of the auditor's report has no doubt resulted in a lengthy delay in the proceedings which were due to recommence on 18 February 2013. But the delay has been largely the appellants' own doing. Counsel's contention that the late production of the auditor's report will result in the trial having to start over again is in my view without substance. The appeal of the first appellant accordingly falls to be dismissed.

[13] The second and third appellants in their application rely not only on the ground raised by the first

appellant but also on a number of additional grounds which they say constituted an infringement of their right to a fair trial entitling them to an order that the prosecution be permanently stayed. The additional grounds, in short, are that the LRA has taken over the entire investigation of the case to the exclusion of the police force and to the extent that it has wrongfully usurped the function of the latter; that the prosecutor was *"sourced"*, *"recruited*" and *"appointed"* by the LRA which is *"in bed with"* the prosecutor resulting in a situation where the LRA, which is the complainant, is investigator and prosecutor in its own case; that the prosecutor's *"unnecessary proximity"* to the LRA and his refusal timeously to afford the appellants documents to which they were entitled justified the inference or at the least gives rise to a reasonable apprehension that he was not independent; that he had lost his objectivity and that he had ceased to act fairly. A further complaint is the Crown's refusal to hand over certain video recordings which are said to constitute *"valuable evidence"*. It is convenient to consider each of the points raised in turn.

[14] The DPP, Mr Leaba Thetsane KC, points out in his answering affidavit that the LRA is the main body

responsible for the assessment and collection of fiscal revenue and is specifically authorised to investigate cases of tax evasion and fiscal fraud for which purpose it has an Investigations and Intelligence Department. I did not understand this to be in dispute. Indeed, it is clear from the provisions of the Lesotho Revenue Authority Act 14 of 2001 ("the LRA Act") which must be read together with the Customs and Excise Act 10 of 1982, that wide and extensive investigative powers are afforded to LRA officers including the power to enter and search premises, require the production of certain documents, examine and question persons and detain goods. Provisions such as these are not uncommon in the western world. The increase in sophisticated criminal activity, particularly in the field of fiscal fraud and tax evasion, has caused governments to legitimately empower state entities having the requisite expertise and forensic skills, other than the police, to investigate certain kinds of criminal activity. See eg **S v Botha 1995 (2) SACR 598 (W)**. The provisions of the LRA Act referred to demonstrate quite clearly that the police force in Lesotho has no monopoly on criminal investigations. The contention that the LRA has *"usurped"* the investigative function of the police is without substance.

[15] The appellants sought to make something of the Crown's denial that the LRA is *"the complainant"* in the case. The issue is, however, essentially one of semantics. Thetsane makes it clear in his answering affidavit that what was meant was that the LRA is not a *"complainant"* in the ordinary sense of the word, that is to say a private individual who initiates a prosecution to satisfy his own personal agenda and possibly benefit himself; the LRA bears a statutory duty and obligation to enforce in the public interest the tax laws of the Government of Lesotho. It does not do so for its own benefit or for that of its employees. Whatever the nomenclature, the distinction is undoubtedly a valid one. The LRA and its officers cannot be said to have a direct or personal interest in the prosecution. To the contrary, the LRA acts in the public interest as the responsible government agency. In my view the adverse inference of a conspiratorial agenda the appellants seek to draw from the denial is misplaced.

[16] Thetsane denied in his answering affidavit that the prosecutor was recruited or appointed by the LRA, he says that acting in terms of section 6 (2) of the Criminal

Procedure and Evidence Act, and after making the decision to prosecute the appellants, he appointed Mr Louw, an advocate practising at the Johannesburg bar, to conduct the prosecution in the High Court. He said it was his practice to appoint *"outside"* counsel to prosecute high profile cases in the High Court and that it was not the first time that he had made use of Louw's services as a prosecutor. The fees payable to Louw by the Crown were fixed in terms of a written agreement previously entered into between Louw and himself on behalf of the Crown, copy of which he annexed to his affidavit. He said that while it was inevitable, having regard to the nature and complexity of the case, that Louw would work closely with officers of the LRA's Investigations and Intelligence Department, Louw nonetheless conducts the prosecution under his, Thetsane's, directions and it is to him that Louw reports and to him that Louw reverts for any decision on matters pertaining to prosecution policy. Louw, in a separate affidavit, confirmed that he was briefed by the DPP and denied that the LRA exercised any control over him or the prosecution. As far as the payment of Louw's fees are concerned, Thetsane acknowledged that these were being paid in the present case by the LRA. He explained that this was initially in terms of an arrangement

between his office and the LRA in terms of which the LRA would pay Louw's fees for work done prior to the trial and that he would pay Louw's fees thereafter. However, because of bureaucratic difficulties in his office it was subsequently agreed that the LRA would continue to pay Louw's fees once the trial commenced. He said that while the LRA pays Louw's invoices, it does so only after he, Thetsane, has authorised the LRA to do so. No sound reason was advanced why this evidence should not be accepted.

[17] The appellants' counsel, however, placed great emphasis on the payment of Louw's fee by the LRA and argued that this was enough to disqualify the prosecution from being perceived as fair, impartial and independent. In support of this submission, counsel relied on two cases, the one reported, the other not. In the first, **Bonguli and Another v Deputy National Director of Public Prosecutions and Others 2010 (2) SACR 134 (T)**, the two applicants, who had been charged with fraud, sought an order reviewing and setting aside the decision of the Deputy National Director of Public Prosecutions ("the DNDPP") appointing two practising advocates, Hellens and Vetten, to conduct the

prosecution on the ground inter alia that the prosecution would not be conducted *"without fear, favour or prejudice"* as required by the South African constitution. The facts were somewhat complicated but what is significant is that two days prior to the commencement of arbitration proceedings, the first applicant was charged with fraud based on precisely the same allegations of fraud that formed the subject matter of the arbitration. Previously, Hellens had been briefed by a party involved in the arbitration who was also the complainant in the criminal case to give an opinion as to whether the first applicant's conduct amounted to fraud. The prosecutor in the Magistrates' Court subsequently experienced difficulty formulating the charge. Hellens and Vetten were briefed by the complainant to assist her. However, the arbitration was settled and the criminal case was withdrawn. It appeared that not all the issues in the arbitration had been settled and further proceedings were instituted. The attorney acting for the same complainant then persuaded the DNDPP to reinstate the charge of fraud against the first applicant (and the second applicant who had also been involved). The DNDPP agreed to do so but subject to certain conditions, including that Hellens and Vetten conduct the prosecution and that the complainant provide the funds

for the payments of their fees. On these facts Du Plessis J found that the appointment of Hellen and Vetten as prosecutors was in conflict with the constitution in that there was a reasonable perception that they might not always act without fear, favour or prejudice. The Judge noted, however, that it had not been argued that the appointment constituted a valid limitation of the applicants' right to a fair trial.

[18] It will be observed that not only were both prosecutors in effect to be paid by the complainant, both had previously been briefed by the complainant to advance the case of fraud against, at least, the first applicant for the purpose of civil proceedings in which the complainant was intimately involved. Indeed, it is clear that the object of the complainant in persuading to DNDPP to reinstitute the criminal proceedings was to advance its goal in the civil proceedings and for this reason it was prepared to pay for the prosecution. It is also fair to infer that but for the employment of Hellens and Vetten as prosecutors and their funding by the complainant, the criminal charge would not have been reinstituted. The case is clearly distinguishable from the present.

[19] The other decision on which the appellants rely is **Porritt and Another v NDPP and Others** decided by the South Gauteng High Court in 2012. It, too, is distinguishable on the facts. In that case the prosecution was at the instance of the South African Revenue Services ("SARS"). The two advocates subsequently appointed as prosecutors had been intimately involved in the investigation of the matter, working with SARS before the decision to prosecutors was taken. One of then, Coetzee, had been part of the team that advised SARS not only on the merits of the prosecution but also on related civil litigation. Both had been actively involved in prior related litigation on behalf of SARS. The prosecutors' fees were the exclusive responsibility of SARS and were paid by the State Attorney, the DNDPP having no control over their payment whatsoever. The order of the High Court for the removal of the two advocates as prosecutors has, however, since been reversed on appeal, see **Porritt and another v the NDPP and Others (978/13) [2014] ZA SCA,** and nothing further need be said about this case.

[20] The somewhat extravagant allegations made by the appellants in the instant case that Louw was

"sourced", "recruited", "appointed" by and *"in bed with"* the LRA are wholly unsubstantiated. The evidence is that Louw was briefed by the DPP after the latter had taken the decision to prosecute the appellant and had not been involved in any way with the LRA in relation to the subject matter of the charges prior to being briefed. There was nothing untoward about his consulting thereafter with witnesses who were employees of the LRA or working with officers of the Investigations and Intelligence Department while preparing for trial. It was, moreover, not the first time that he had been engaged by the DPP to prosecute a case in the High Court and his fee had been previously determined in an agreement concluded with the DPP. The arrangement that in the instant case Louw was to be paid by the LRA was merely to accommodate administrative difficulties in the DPP's office. It played no role in the motivation of the prosecution. Nor did it make any difference to Louw whether his fee was paid from the budget of the DPP or the LRA. In **S v Tshotshoza and Others 2010 (2) SACR 274 (GNP) Hartzenberg J**, writing for the full court, held that outside contributions for prosecutions were not *ipso facto* unacceptable; what were unacceptable were:-

> *"…contributions made with the object of having a public prosecution, where the NPA itself would not have prosecuted, and where the contributor arranges a form of control for itself over the prosecution." (at para 20)*

There is, of course, nothing to suggest that in the present case there would have been no prosecution had the LRA not paid Louw's fees.

[21] The inquiry whether there is a reasonable apprehension or perception of bias on the part of a prosecutor requires elucidation. (The phrase "without fear, favour or prejudice" does not appear in the Lesotho Constitution or the Criminal Procedure Act.) It must be recognised immediately that the independence and impartiality required of judicial officers cannot be equated with that of prosecutors. Their function is fundamentally different. While the latter undoubtedly owe a duty to carry out their functions independently it is inevitable that they will be perceived to be partisan. They conduct the case for one of two sides in an adversarial contest. It follows that the mere perception

that they are or may be biased is not sufficient to justify their disqualification. Indeed, if the position were otherwise, a private prosecution (which is paid for by the complainant) in terms of section 12 of the Criminal Procedure and Evidence Act, would be impermissible. For the disqualification to be justified the perception of bias must be objectively determined and founded on correct facts giving rise to a real, not remote or fanciful, possibility of unfairness that would constitute a valid limitation of the accused's right to a fair trial.

[22] On the evidence before us neither the payment of Louw's fees by the LRA nor any other aspect of the relationship between Louw and the LRA gives rise to an inference of bias or to a reasonable perception of bias on the part of Louw.

[23] A further ground relied upon by appellants for the contention that Louw had lost his objectivity and was biased in favour of LRA was his initial refusal to discover the documents subsequently produced as annexures to the auditor's report. It was submitted that the refusal was deliberate and with the dishonest intention of

concealing them from the appellants. A further contention advanced by counsel in argument was that the refusal was in pursuance of a *"designed strategy"* to commence the trial before an analysis of, and a forensic report in relation to, the documents had been completed so as to avoid further delay which would have resulted in an application for a permanent stay on the grounds of delay. These far-reaching allegations against an advocate are founded in the first place on the premise that he must have foreseen the relevance of the documents even at an early stage before the appellants had been called upon to plead. But in a case such as the present, facts can be established in various ways, including by inferential reasoning. It also does not follow that a prosecutor can reasonably be expected to anticipate at an early stage every eventuality and every line that will be taken in cross-examination. This is particularly so, as in the present case, where the nature of the accused's defence has not been forthcoming. Nor does it follow that a prosecutor cannot simply change his mind about the relevance of documents as the case proceeds. The alleged intention to conceal the documents is in any event refuted by Louw (who drafted the reply to the request for particulars and documents) having directed the appellants to the LRA and advised

them to obtain the documents they might require by way of subpoenas *duces tecum*. As to the *"designed strategy,"* there is nothing to support it. The contention is founded on speculation and conjecture. In the circumstances, I am wholly unpersuaded that there is any proper factual basis to justify an inference of *mala fides* on the part of Louw regarding the production of the documents in question.

[24] The final ground on which the appellants relied was the failure on the part of the prosecution to produce two video recordings. The one was a video recording of the search and seizure operation conducted on 10 and 11 March 2005; the other was a video recording of interviews held with witnesses. Thetsane says that he advised the appellants as long ago as September 2012 that the video of the search and seizure had been lost. He refuses to produce the video recording of the interviews on the grounds that it is privileged. He points out that the appellants have been provided with detailed *"executive summaries"* of the witnesses' interviews. It is unnecessary to decide whether the recording is privileged or not. The appellants' argument is that the alleged loss and the refusal are evidence of the LRA's "*manipulation"*

of the prosecution and the "*LRA driven nature of the case.*" I agree with Respondent's counsel that this is pure conjecture without any basis in fact.

[25] It follows that in my view the second and third appellants have similarly failed to discharge the burden of establishing their entitlement to the order they seek and their appeal, like that of the first appellant, must fail.

[26] There remains the issue of costs. The appeal arises out of an application made before the trial court in the course of criminal proceedings. An order of costs will not normally be made in such circumstances. Counsel for the respondent argued, however, that an order of costs was justified in the light of the allegation of dishonesty on the part of Louw made in the appellants' affidavits. On the other hand, it is no doubt so that the application was precipitated by the admittedly late production of the auditors' report together with its voluminous annexures. In the circumstances, I do not think an order as to costs is called for.

[27] In the result, the appeals of all three appellants are dismissed with no order as to costs.

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D.G. SCOTT
ACTING PRESIDENT

I agree:

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W.G. THRING
JUSTICE OF APPEAL

I agree:

_____

W.J. LOUW
ACTING JUSTICE OF APPEAL

For the first appellant	:	K.J. Kemp SC and C J Van Schalkwyk SC
For the second and third appellants	:	T.N. Price
For the respondent	:	G Marcus SC and S. Budlender