IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CRI) 06/2011

In the matter between:

THE CROWN **Appellant**

And

ADIL OSMAN **1st Respondent**

MOHAMED OSMAN **2nd Respondent**

CORAM: DAMASEB AJA
MOKGORO AJA
MONAPATHI JA

HEARD: 20 JULY 2015
DELIVERED: 07 AUGUST 2015

SUMMARY

Criminal Procedure - Appeal against judgment of the Court a quo, upholding respondents' points taken in limine – Application for amendment of indictment only for purposes of clarity in terms of section 162(1) (b) of the Criminal Procedure and Evidence Act, 1981 - No consequential prejudice to respondents in their defence shown – Application for amendment of indictment granted – Respondents withdrawing their opposition to the appeal – trial ordered to commence de novo in the court a quo before another judge.

JUDGMENT

MOKGORO, AJA

[1] This is an appeal against the judgment of Mahase J, upholding points *in limine* taken by now respondents in this case, sitting in the High Court, and handed down on 25 September, 2014, acquitting the respondents on all 25 counts of fraud committed against Wesbank.

[2] In this Court, the appellant is the Crown and the respondents, Adil Osman and Mohammed Osman. The latter were the accused in the court *a quo*.

[3] In defrauding Wesbank, the respondents, together with a Wesbank employee who later turned Crown witness after charges had been withdrawn against him, are alleged to have connived for false bank statements, inflating the financial standing of potential clients. In so doing, clients' chances of obtaining finance from Wesbank for the purchase of motor vehicles would be enhanced and the respondents would then receive some "kickbacks" from the sale of the motor vehicles.

[4] Soon after their pleas of "not guilty" had been entered, and during the course of their plea explanation, respondents took two points *in limine* along these lines:

(a) at the time that the offences constituting all the counts of fraud are alleged to have been committed[1] Wesbank, being a subsidiary of First National Bank of Lesotho, (FNB Lesotho), where the latter had yet to be registered to operate its business in Lesotho in terms of the Companies Act of Lesotho[2], was not entitled to trade in Lesotho. Thus, any transactions, concluded before registration, including the alleged fraudulent ones, were invalid *ab initio*. The alleged fraud could therefore not have been committed against an entity which was legally non-existent.

(b) Further, Mr. Molyneaux of Webber Newdigate, the briefing attorneys of Adv. H.T. Woker, who in turn is counsel appointed by the Director of Public Prosecutions (DPP) to prosecute the current matter, are the same attorneys who had assisted FirstRand

[1] Between September 2007 and 5 June 2008
[2] Act 25 of 1967

and First National Bank of Lesotho to obtain their registration for lawful operation in Lesotho. That, the respondents contended, makes this matter "complainant-driven", thus questioning the prosecution's ability to meet the standards of objectivity and fairness as officers of court.

[5] Regarding these points raised *in limine*, appellant in a nutshell, strongly argued that the facts relied upon by respondents were not all accurate or factual. At no stage it was contended, did the Crown aver that Wesbank was a branch or subsidiary of FirstRand, or FNB Lesotho which, we agree, would indeed make it a distinct legal entity with its own identity, distinct from the holding entity[3]. Rather, the argument went, Wesbank was a trading name or trading arm of FNB Lesotho, with its company registration as 2004/393 E and incorporated into Lesotho on June 30, 2008. Appellant thus conceded its error, having attributed, in the indictment, the company registration number 2004/393E to FNB Lesotho and as it turned out, that registration number is of FirstRand.

[3] See ABSA Bank Ltd. V Blignaut and Another 1996 (4) SA 100 (OPO), where the Court viewed a subsidiary as a stand-alone legal entity with its own distinct life of its own.

[6] Having pointed out the error, a rectification of the indictment became necessary, so the Crown submitted. Obviously, once the indictment is rectified and aligned with the Crown's elucidation that Wesbank was not a stand-alone legal entity, but a trading arm or name, operating within FNB Lesotho, as part of it, with no registration identity of its own, the points *in limine* raised by the appellants cannot hold and would fall away.

[7] Important is that first, the amendment of the indictment must serve only to make clear the indictment. In addition, it must certainly not alter the charges themselves, nor have that effect, resulting into prejudice to the respondents in their defence[4]. To do otherwise would impact the fairness of the subsequent trial, contrary to the right to a fair trial, which is fundamental in the Constitution of Lesotho. In this case, the respondents have not alleged any prejudice, nor have they shown any[5].

[4] See generally Section 12 of the Constitution of Lesotho.
[5] In this regard see the unreported case of Pontso Lebotsa v The Crown, C of A (CRI) 13/2008 where an amendment was allowed, and Ntaote v DPP, LAC (2007 to 2008) 414, at 419 C-E where the court held that prejudice must be determined from the facts of the case.

[8] Thus, it came as no surprise when respondents, before the date set down for hearing before this Court, and correctly so, in a letter, dated 1 April, 2015, addressed to the Appellant and copied to the Registrar and the Presiding Judges of Appeal in this matter, indicated that they would "not oppose the appeal".[6] Although the letter indicated that there would be no appearance on behalf of the respondents at the hearing, Adv. Hlalele, who in essence agreed with the contents of the letter, did appear for the respondents.

[9] Based on the clarity of the facts which informed the indictment, the absence of claims of any prejudice to the respondents in their defence, the indictment corrected along the lines reflected in the order of this court below, together with the respondents' withdrawal of the opposition to the appeal, this Court finds its way clear to grant the application for amendment of the indictment.

[10] Further, in view of the respondents' withdrawal of opposition to the appeal, the matter must appropriately be remitted back to the High Court to be heard *de novo* before another judge.

[6] See the letter penned by Adv. Du Preez Liebetrau & Co. SC Buys, dated 1 April 2015; Ref: SCB/cr

[11] Before proceeding to determine the order, it is necessary to attend to the question of costs, ordinarily not an issue in matters of a criminal nature. Based on the exceptional circumstances shown by the facts of this case, the appellant raised squarely the issue of costs.

[12] The Appellants, asking for costs, averred that the cost of the preparation of the voluminous court record in this matter, running into 3,420 pages, mostly consisting of reels of unnecessary and irrelevant documentary evidence and exhibits, insisted upon by respondents in their demands for the Crown to justify the charges against them, cannot be permitted to be borne by the Crown.

[13] Respondents indeed conceded that the bulk of the record that is about 2,660 pages, making up about 78% of the court record would not be necessary for the determination of the appeal. They also conceded, as the appellant contended and had shown, that only about 760 pages would be necessary and relevant to determine the issues raised in their grounds of appeal.

[14] Respondents made no submissions as to affordability of a cost order against them. On the contrary, as they indicated, in their letter mentioned above, they were "prepared to accept responsibility only for the costs of preparing the additional records requested…." Having considered these concessions and appellants' submissions, we are persuaded that the remainder, which constitutes the bulk of the record, is indeed of no consequence and is superfluous, despite the effort and costs expended in the preparation of the record. We are therefore moved to make an exception to the general rule, ordering costs against respondents, based on the above contentions and concessions.

[15] We conclude that the cost of preparing the bulk of the Court record, estimated at a little more than 75%, must not be the burden of the tax payer. Most certainly, a cost order against respondents for 75% to 78% of the total costs of compiling the record is reasonable and in the circumstances of this case, would be justified. The appellant, submitted that 75% of the total costs would suffice. That is also my inclination.

[16] Whether a matter is criminal or civil, litigants have the right to make demands for documentary evidence and or for exhibits to be produced in support of allegations made against them. However, litigants would be remiss if they insist that their unreasonable and exaggerated demands be met, and as in the circumstances of this case, end up mulcting other litigants in unnecessary and astronomical costs[7].

[17] This Court, for the above reasons, finds that using its discretion to order costs against the respondents, in the exceptional circumstances of this case is not only reasonable. It is appropriate and it is just.

[18] In the result, the following order is made:

1. The Appeal is upheld.

2. The order of the Court *a quo* is set aside and is replaced with the following:

[7] See Director of Public Prosecutions v. Bury Magistrates' Courts, (2007) 13/12/2007 EWHC for guidelines in cost orders made in criminal proceedings, in the United Kingdom.

"The points *in limine* taken by the respondents in their plea explanation dated 18 August 2014 are dismissed."

3. The prosecutors in the court *a quo*, Advocate H.H.T. Woker and Mr. D.P. Molyneaux are reinstated as prosecutors and the matter remitted back to the High Court to commence *de novo* before a judge other than the judge who sat in the matter in the court *a quo*.

4. The Crown's application for the indictment to be amended in the following respects is granted:

4.1 To avoid doubt, the front page of the indictment, at p. 591 of the Appeal Record, where the details of Kagisho Godfrey Peale Selebano are set out, is amended in the fifth line thereof, to add the following after "Company Registration No.2004/393E" and before "-" (i.e. before the hyphen):

"Alternatively the trading name of FirstRand Bank Limited company registration No.2004/393E".

4.2 Paragraph 2 of the preamble to the charges at p. 593 of the Appeal Record, is amended in the second line thereof, to add after “First National Bank of Lesotho aforesaid”, and before “a business that specializes in”, the following:

> “Alternatively FirstRand Bank Limited”.

4.3 Paragraph 1.1 of the Crown’s Reply to the request of the Accuseds for further particulars at p.643 of the Appeal Record, is amended at the end of this sub-paragraph, to add, after “a registered financial institution” and “.” (i.e. the full stop), the following:

> “Alternatively, at all material times it was a trading name of FirstRand Bank Ltd, company registration No.2004/393E”.

9.5 The *de novo* trial as provided for in paragraph 3 of this Order to proceed on the indictment as amended.

9.6 The accused are ordered to pay 75% of the total of the costs of preparing the Appeal Record, jointly and severally.

9.7 With regard to the remaining 25% of the total of the costs of preparing the Appeal Record, there is no order as to costs.

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J.Y. MOKGORO
ACTING JUSTICE OF APPEAL

I agree

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P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree

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T. MONAPATHI
JUSTICE OF APPEAL

For the Appellant: Adv. H.T. Woker

For the Respondents: Adv. N. Hlalele