IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU **C OF A (CIV) 33/2018**

In the matter between:

PITSO RAMOEPANA **APPELLANT**

And

DIRECTOR OF PUBLIC PROSECUTIONS **1ST RESPONDENT**

THE ATTORNEY GENERAL **2ND RESPONDENT**

CORAM: DR K E MOSITO P

P T DAMASEB AJA

DR P MUSONDA AJA

M H CHINHENGO AJA

DR J VAN DER WESTHUIZEN AJA

HEARD : 25 OCTOBER 2019

DELIVERED : 01 NOVEMBER 2019

SUMMARY

Constitutional litigation – Right to fair trial (s 12 of Bill of Rights) – accused accusing the Director of Public Prosecutions of breach of his

constitutional rights to fair-trial violation – Director of Public Prosecutions denying allegations – Alternative redress available – This matter is moot – Appeal dismissed with no order as to costs.

JUDGMENT

DR K E MOSITO P

Introduction

[1] The appellant, Major Pitso Ramoepana, applied in the High Court exercising constitutional jurisdiction for a declarator that, the decision of the Director of Public Prosecutions (DPP) to withhold witness's statements and other contents of the docket relevant to the prosecution's case against the appellant in CRI/T/MSU/0711/17, until the date of trial in CRI/T/MSU/0711/17 has been allocated, violates the appellant's right to fair trial and is therefore unconstitutional. He further asked the Court to direct the DPP to furnish the appellant and/or his legal representatives with the said witness's statements and other contents of the docket as well as a print out of access cards and finger print records of people who entered the Ratjomose Baracks Command Block between 8.00am and 12.00 noon on 5 September,2017. The appellant also asked for costs of suit.

[2] The application was opposed by the learned DPP. On 3 May 2018, the matter was heard by a panel of three judges (M. Mahase J, L.Chaka Makhooane J and Moahloli AJ]. The learned judges

dismissed the application with no order as to costs on 14 June 2018.

Factual matrix

[3] The facts are briefly that, following the killing of the late Commander of the Lesotho Defence Force, the appellant was charged in connection therewith along with 5 others.

[4] On 10 January 2018, the appellant requested the DPP to make discovery to him in the manner I set out above. The purpose of the requested discovery was so as to enable the appellant to prepare for his defence.

[5] The DPP did not oblige. She wished to first consult investigating officers and witnesses on the potential compromise that such early release of the statements may have on the wellbeing of crown witnesses. She went on to promise that as soon as the Court grants dates of trial in the matter, such statements would be provided. The appellant's legal representatives were not satisfied with this explanation. They repeated their request for the statements and that if not provided within seven (7) days, they would approach the courts of law for an appropriate remedy. The DPP did not comply with the demand and that triggered an urgent application to the High Court exercising constitutional jurisdiction.

[6] As indicated above, the application was opposed by the learned DPP. On 3 May 2018 the full bench as I stated before and the

application was dismissed with no order as to costs on 14 June 2018, triggering the present appeal.

The Issue

[7] Should this Court intervene to declare the decision to withhold witness's statements and other contents of the docket from appellant to be in violation of the appellant's rights to a fair trial unconstitutional? Should the Court direct the DPP to furnish those statements and other documents? Those are the questions raised in the present appeal which had been brought before the High Court on the basis of urgency.

The law

[8] The convenient starting point is the Constitution of Lesotho (the Constitution). The Constitution is the supreme law of Lesotho. Section 2 of the Constitution provides that '[t]he Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.' Section 4 of the Constitution provides for fundamental human rights and freedoms. Section 4 (h) provides for the right to a fair trial of criminal charges against an accused and to a fair determination of his or her civil rights and obligations. Section 12 of the constitution provides that:

> (1) if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within reasonable time by an independent and impartial court established by law:

> (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
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> (b) shall be informed as soon as reasonably practicable, in language that he understands and in adequate detail, of the nature of the offence charged;
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> (c) shall be given adequate time and facilities for the preparation of his defence;
>
> (d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice.
>
> (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

[9] In ***Molapo v Director of Public Prosecutions***[1] Ramodibedi J interpreted the above section. He pointed out that this section should be interpreted in such a way as to give true colour, flesh and meaning to it. As the learned judge correctly pointed out in this regard, the Constitution has ushered in a new order. It is a decisive break from the unacceptable past and has introduced a culture of equality, openness, justification, transparency and universal human rights all of which are protected in the Constitution. The learned judge bore these noble principles in mind in interpreting section 12 of the Constitution. He referred to the English case of ***R v Ward***[2]in which it was held that:

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[1] Molapo v Director of Public Prosecutions CRI/T/1/97) (CRI/T/1/97.

[2] R v Ward (1993) 2 ALL ER 577 (CA) .

> "(1) The prosecutions' duty at common law to disclose to the defence all relevant material, ie. evidence which tended either to weaken the prosecution case or to strengthen the defence case, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial, to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses. Furthermore, an expert witness who had carried out or knew of experiments or tests which tended to cast doubt on the opinion he was expressing was under a clear obligation to bring the records of such experiments and tests to the attention of the solicitor who was instructing him so that they might be disclosed to the other party. On the facts, the non-disclosure of notes of some interviews by the police to the Director of Public Prosecutions, the non-disclosure of certain material by the Director of Public Prosecutions and prosecuting counsel to the defence and the non-disclosure by forensic scientists employed by the Crown of the results of certain tests carried out by them which threw doubt on the scientific evidence put forward by the Crown at the trial cumulatively amounted to a material irregularity which, on its own, undoubtedly required the appellant's conviction to be quashed."

[10] In addition, Ramodibedi J also underscored the importance of the remarks by Gildwell LJ at page 601 J of ***R v Ward*** that, '.....'all relevant evidence of help to an accused' is not limited to

evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.' In my view, there is no need to overburden this judgment with the discussions in ***Molapo v Director of Public Prosecutions*** (supra). Suffice it to say that I do hereby adopt and endorse the interpretation of section 12 of the Constitution by the High Court of Lesotho in the above case.

[11] The second legal aspect worth considering is the implication of the ***High Court (Amendment) Rules 2016***. These Rules came into operation on 21 October 2016. The Rules were made pursuant to section 16 of the **High Court Act, 1978**. The Rules introduced the Criminal Pre-trial planning conference, the setting down of criminal trials as well as the procedure for securing the attendance of witnesses in criminal cases.

[12] In terms of Rule 61, the criminal pre-trial planning conference may be held before an action may be set down for hearing to consider: (a), the number of witnesses both the crown and the defence would present at the trial, to facilitate for the determination of the duration of the trial. Thus, issues that have nothing to do with whether or not the accused is guilty may be determined at such a conference. (b) the criminal pre-trial planning conference facilitates the possibility of obtaining admissions of fact and of documents with a view of avoiding

unnecessary proof. (c), The Rule also facilitates the exploration of prospects for plea bargaining or the applicability of section 341 of the **Criminal Procedure and Evidence Act, 1981**.

[13] The purpose of the pre-trial conference process is to avoid pointlessly long trials. Whether a trial is needlessly long is not something which can be measured solely by its length. Some potentially short trials may be gratuitously long while some potentially lengthy may be efficiently managed and reach an appropriate just and, in context, timely result. The difficulty in assessing the ideal length of a trial is that its length is highly dependent on a number of factors many of which are outside the control of the court. The mutual result of those factors can be trials which are long by any objective measurement, but which are nonetheless no longer or less efficient than required in a judicial system focussed on achieving a fair and just result.

[14] The conference may involve a consideration of evidence. The prosecutor must provide items like police reports and surveillance footage to the defence. An accused person will be entitled to review the criminal complaint and all the evidence the prosecutor plans to use at trial. The value and strength of the criminal pre-trial conference system is that it envisages rigorous management of trials on a case-by-case basis in order to ensure that criminal proceedings proceed efficiently and effectively while still adhering to the fundamental principles of our criminal justice system: an accused is presumed innocent until proven guilty and the Crown

is required to prove its case at a fair and public trial before an independent decision-maker.

Consideration of the appeal

[15] When the appeal was called, this Court enquired from the appellant's Counsel whether the matter was not moot regard being had to the indication by the respondent's counsel that the required statements had already been furnished. The learned Counsel for the appellant, advocate Letuka, argued that the matter was not moot as it would serve to straighten the legal position as to whether the DPP was in law entitled to refuse to release the required statements until after the accused had been indicted. It then became clear that the issue before court was simply one as to timing.

[16] I agree with the sentiments expressed in ***Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another***[3] that, a prosecutor who uses a legal process against an accused person to accomplish a purpose for which it is not designed abuses the criminal justice system and subjects the accused person to that abuse of process. As was said in the Zuma case (*supra*), abuse of process through conduct which perverts the judicial or legal process in order to accomplish an improper purpose offends against one's sense of justice. In the present case,

[3] Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another 2018 (1) SACR 123 (SCA) at para 31.

there was no evidence before us that the timing had a sinister motive.

[17] In any event, I am of the view that, no discrete legal issue of public importance arises in this matter, which, despite the mootness, justifies a consideration of the merits.[4] As this Court pointed out in ***Moteane v Minister of Agriculture and Food Security***[5] (per Musonda AJA], in an erudite judgment by **Innes CJ** in ***Gel*denhuys *Neethling v Beultilis***[6] it was held that: "[a]fter all, courts of law exist for settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important." Musonda AJA went on to refer to the decision in **Canada v Jervis**,[7] where the House of Lords said: 'It is an essential quality of an appeal (such as may be disposed by it) that there should exist between the parties to an appeal a matter in actual controversy which (the court) undertakes to decide as a living issue.' This appeal is moot as we have been told that the required statements have already been furnished to the appellant.

[18] There is no merit in grounds 2.1 and 2.1.1 either. In this jurisdiction, the ***High Court (Amendment) Rules 2016*** govern criminal pre-trial conferences whereat all documents would be exchanged. This is a redress to which appellant is entitled and which he can use to his benefit before a matter could even be set

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[4] *Legal Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA); [2014] 4 All SA 570 (SCA) (Supreme Court of Appeal judgment) at para 15.

[5] Moteane v Minister of Agriculture and Food Security C of A (CIV) 41/2018 at para 7.

[6] 1918 AD 426.

[7]

down. We have already been told that the case in which appellant is charged is set down for 4 November 2019. That being the case, I cannot see how the matter could have been set down without a pre-trial planning conference. If such statements are denied, then the trial court would be approached as a matter would not be set down without the pre-trial planning conference.

Disposition

[19] In light of the foregoing discussions, I would make the following order:

(a) The appeal is dismissed.

(b) The judgment of the court a quo is confirmed.

(c) There will be no order as to costs in this appeal.

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DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree

P T DAMASEB
ACTING JUSTICE OF APPEAL

I agree

DR P MUSONDA
ACTING JUSTICE OF APPEAL

I agree

M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree

DR J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

For Appellant: Adv K Letuka

For Respondents: Adv L E Molapo