

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 23/2021

CC/NO 24/2018

In the matter between-

SEFIRI PHAILA

APPELLANT

and

DIRECTOR OF PUBLIC PROSECUTIONS

1st RESPONDENT

HER WORSHIP PALESA RANTARA

2nd RESPONDENT

DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES

3rd RESPONDENT

STANDARD LESOTHO BANK

4th RESPONDENT

MINISTER OF LOCAL GOVERNMENT

5th RESPONDENT

ATTORNEY GENERAL

6th RESPONDENT

CORAM: KE MOSITO, P
PT DAMASEB, AJA
P MUSONDA, AJA
M CHINHENGO, AJA
J VAN DER WESTHUIZEN, AJA

HEARD: 18 OCTOBER 2021

DELIVERED: 12 NOVEMBER 2021

JUDGMENT

J VAN DER WESTHUIZEN, AJA

SUMMARY

By creating statutory offences and the Directorate on Corruption and Economic Offences, the Prevention of Corruption and Economic Offences Act of 1999 does not give the Directorate the exclusive authority to investigate and prosecute economic offences under the Act. The constitutional mandates of the Police to investigate and of the National Director of Public Prosecutions to prosecute all criminal offences in Lesotho remain untouched.

Introduction

[1] In this appeal against a judgment of the High Court (sitting as a Constitutional Court) the central question is: May the Police Service (Police) and the Director of Public Prosecutions (DPP) (the first respondent), respectively, investigate and prosecute alleged corruption under the Prevention of Corruption and Economic Offences Act of 1999 (Corruption Act), as amended; or does the Directorate on Corruption and Economic Offences (DCEO) have the exclusive power to do so?

Factual background

[2] As part of an investigation into alleged corruption in the Thaba-Tseka Urban Council, the Police required information from the fourth respondent (Standard Lesotho Bank). On the strength of an

order by a magistrate in terms of section 247 of the Criminal Procedure and Evidence Act (Criminal Procedure Act) 7 of 1981, the fourth respondent released bank statements and other material. The Police presented the docket to the first respondent (the Director of Public Prosecutions) who decided that the appellant, Mr Sefiri Phaila, be prosecuted.

[3] The appellant (Mr Sefiri Phaila) was charged in the Magistrate's Court of Thaba-Tseka with contravening section 21 of the Corruption Act (as amended by section 13(3)(a) of Act 8 of 2016) with embezzling, misappropriating, or diverting public funds to the amount of M 31,957.88.

[4] Based on his interpretation of the meaning of the Corruption Act for the relationship between the offices of the DCEO and DPP, he unsuccessfully challenged the conduct of the fourth respondent in the trial court. Then he approached the High Court.

High Court

[5] The appellant argued that only the DCEO had the authority to investigate and prosecute offences under the Corruption Act. The Court ruled against him.

Appellant's case

[6] The Corruption Act, as amended, creates the DCEO, describes offences (in section 21) and prescribes procedures to be followed. Section 6(1)(a) gives powers to the DCEO, inter alia to "receive and investigate any complaints alleging corruption in any public body".

[7] On the strength of these and other provisions of the Corruption Act the appellant argues that the DCEO is the only institution empowered to investigate corruption cases involving a public body. The Police may not do so. Similarly, only the DCEO – not the DPP – may prosecute corruption cases under section 21.

[8] Section 7(1), as amended, provides that for the performance of the functions of the Directorate, the Director-General may, inter alia, authorize an officer to conduct an inquiry or investigation, require a person to produce books and records and take other related steps. Section 7(1)(c) states that the Director General may “(r)equire a person, within a specified time, to provide any information or to answer any question which the Director-General considers necessary in connection with an inquiry or investigation which the Director-General is empowered to conduct under this Act”. According to the written argument submitted on behalf of the appellant, section 7(1)(c) “authorizes the DCEO exclusively to charge and prosecute individuals for committing statutory offences in section 21 ... and that is only the DCEO which exclusively has the authority and competence to investigate statutory offences created by Part IV” of the Corruption Act.

[9] On behalf of the appellant it was argued that the Corruption Act is not inconsistent with the Constitution of Lesotho. The appellant’s interpretation of the Corruption Act is, however, necessary in order to protect his right to a fair trial, protected in section 12 of the Constitution, so it was argued.

Respondents' case

[10] It is not necessary to deal with the respondents' submissions in detail. Some of them are reflected in the analysis below.

Analysis

Constitutional matter?

[11] The appellant contends for an interpretation of the Corruption Act that would have implications for the authority allocated to the Police and the DPP by the Constitution. This is a constitutional matter.

Constitution

[12] Thus the Constitution must be the starting point. It is the supreme law of Lesotho.

[13] Section 147(1) gives to the Police overall responsibility for the maintenance of law and order in Lesotho. Section 147 does not contain any provision for allocating any of the responsibility or authority of the Police to another institution or body, by legislation or otherwise. Section 147(5) states that an Act of Parliament shall make provision for the organization and administration of the Police. This kind of provision is not uncommon in modern-day constitutions.

[14] Section 99 confers the authority to prosecute offences upon the DPP. Subsection (1) creates the office of the DPP; and (2)(a) states that the DPP has the power to "institute proceedings against any person before any court (other than a court-martial) in respect of any offence ...". Subsections (2)(b) and (c) empower the DPP to "take over and continue any such criminal proceedings that have

been instituted or undertaken by any other person or authority”; and to “discontinue at any stage before judgment is delivered any such criminal proceedings ...”. And section 99(4) states that the powers conferred on the DPP by subsections (2)(b) and (c) “shall be vested in him to the exclusion of any other person or authority except the Attorney-General”.

[15] The exception of a court-martial in section 99(2)(a) is an example of the limitation of the scope of the DPP’s authority. It is expressly stated in the Constitution itself. No other limitation of the authority of the DPP to prosecute is provided for in the Constitution. Subsection (2)(b) refers to “criminal proceedings” instituted or undertaken by anyone other. It is highly unlikely that it refers to prosecutions by the DCEO. Even if it does, the DPP may take over the proceedings.

Other legislation

[16] Legislation cannot override, limit, or otherwise amend the Constitution. Any statute purporting to do so, has to be interpreted in accordance with the Constitution. If this is impossible on its plain wording, the statute or relevant part of it would be unconstitutional and invalid.

[17] Nothing in the wording of the Corruption Act indicates that it is intended to take away or diminish the constitutional mandate of the Police or DPP. To the very limited extent that the wording might be open to an interpretation that implies such a reduction of constitutionally granted authority, it has to be interpreted in favour of its conformity with the Constitution.

[18] The Act of Parliament envisaged in section 147(5) of the Constitution (referred to in [13] above), is the Lesotho Mounted Police Service Act of 1998. It spells out the functions of the Police and states in section 4 that the Police “shall be deployed in and throughout Lesotho to uphold law, ...to detect and prevent crime, to apprehend offenders, bring offenders to justice, and for associated purposes”.

[19] As stated in [3] above, section 247 of the Criminal Procedure Act provided a procedure for obtaining information from the fourth respondent. The appellant did not rely on the Criminal Procedure Act or attack its constitutional validity.

Conclusion

[20] The appellant’s interpretation of the wording of the Corruption Act is misconceived. So is his construction of the statutory and institutional scheme regarding the investigation and prosecution of economic and other crimes. The authority on which he relies does not support his position. The responsibility to investigate of the Police, and to prosecute of the DPP, is grounded in and emanates from the Constitution. Legislation neither can nor does limit or take away from this authority.

[21] The Police are entitled to investigate all crimes, including offences under the Corruption Act. The NDPP may prosecute any crime in any court - except a court-martial, as indicated in [14] above. The purpose of the DCEO, created by the Corruption Act, is to complement the existing law enforcement structures in the fight against crime. This particularly applies to economic offences like corruption which can often be complex and may require some

expertise and specialization to prove. The intent of the Corruption Act is not to weaken or reduce the jurisdiction and mandate of the Police and DPP.

[22] It is hard to see how the appellant's right to a fair trial was threatened by the fact that the Police investigated the matter and the DPP prosecuted, without the involvement of the DCEO. Even if the DCEO were involved, the DPP would have to consent to prosecution. This is stated in section 43 of the Corruption Act and follows from the Constitution.

[23] The decisions of the Magistrate's Court and High Court were correct. This appeal must fail.

[24] The decisions of the appellant to cite the magistrate as a respondent and of the magistrate to participate in the appeal by filing papers is unusual indeed. On the face of it, it seems doubtful whether this was appropriate. However, this aspect was not properly argued before this Court.

Costs

[25] The appellant asked for the appeal to be upheld with costs; and the respondents for dismissal with costs. In cases where an individual unsuccessfully approaches the Constitutional Court to vindicate rights against the state, costs should not easily be ordered. In this case the appellant's position was utterly devoid of merit. It came close to being frivolous and vexatious. Yet, he was arguing for what he (or his legal adviser) held to be in the interests of his right to a fair trial. There should be no costs order.

Order

[26] In view of the above, it is ordered:

- (a) The appeal is dismissed.
- (b) There is no order as to costs.



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree:



KE MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



PT DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:



M CHIHENGO
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: ADV CJ LEPHUTHING
 ASSISTED BY MR MS RASEKOAI

FOR THE RESPONDENTS: ADV LP MOSHOESHOE