

IN THE HIGH COURT OF LESOTHO

CRI/APN/623/2011

CRI/T/120/2011

In the matter between:-

SELKOL 1983 (PTY) LIMITED

(REG. NO. 83/239)

OSMAN SALLY MAHOMED MOOSA

AND

THE CROWN

LESOTHO REVENUE AUTHORITY

FIRST APPLICANT

SECOND APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

IN RE:

THE CROWN

AND

SELKOL 1983 (PTY) LTD

OSMAN SALLY MAHOMED MOOSA

SHAMEEM OSMAN MOOSA

FIRST DEFENDANT

SECOND DEFENDANT

THIRD DEFENDANT

RULING

Coram : Hon. Mahase J.
Date of hearing : Various dates
Date of Judgment : 9th September, 2013

Summary

Criminal Law – Fraud – Contravention of provisions various Act to wit Prevention of Corruption and Economic Offences – Value Added Tax – Pleas of guilty tendered by accused – Deferment of fines imposed – Provisions of section 317 of the Criminal Procedure and Evidence Act No. 9 of 1981.

ANNOTATIONS

CITED CASES

- **Sanderson v. Attorney General Eastern Cape 1997 (12) BCLR page 1675.**
- **Permanent Secretary, Department of Welfare, Eastern Cape and Another v. Ngxusa and Others, 2001 (4) S.A. 1184 (SCA) para [8] page 1194.**
- **Olympic Passenger Service (PTY) LTD v. Ramlagan 1957 (2) S.A. 382 (D) 383 D-F.**
- **Lesotho Evangelical Church v. Pitso, LAC (1990 – 1994) 474 at 480.**
- **Met Cash Trading LTD v. Commissioner of SARS, 2001 (1) S.A. 1109.**
- **Osman v. Lesotho Revenue Authority and Others 2005 LC (CIV/APN/304/2005).**
- **Secretary for Customs and Excise and Another v. Taffany’s Jewellers (PTY) LTD 1975 (3) S.A. 578 @ 5888 -589.**
- **Hassim v. Craven, N.O. 1960 (2) S.A. 16 @ 20H**

STATUTES

- **Criminal Procedure and Evidence Act No. 9 of 1981**
- **Sales Tax Act No. 14 of 1995**

- **Income Tax Order No. 9 of 1993**
- **Prevention of Corruption and Economic Offences Act No. 5 of 1999 (as amended)**

BOOKS:

- **Herbstein and Van Winsen – The Civil Practice of the Supreme Court of South, 4 Edition (1997) at 825 – 827**
- **Commentary on the Criminal Procedure Act by Du Toit, De Jager at el (Service, 2007)**

[1] The accused, now applicants in this application were tried and later convicted before this Court on the 18th August 2011, for having contravened various provisions of the following Acts; as well as of theft:

- Section 30 of the Prevention of Corruption and Economic Offences Act No. 5 of 1999 as amended.

Alternatively

- Sections 176 (1) and 188 (1) of the Income Tax Act No. 9 of 1993 as amended

Alternatively

- Sections 61 and 67 (1) of the Sales Tax Act No. 9 of 2001.
- Section 61(1) (b), 64 and 170 (1) (a) of the Value Added Tax No. 9 of 2001.

[2] All in all, the accused/applicants herein were charged with and were convicted of 49 counts of fraud, 41 alternatively counts of theft, and alternatively, 45 counts of having contravened the various sections and

provisions of the Prevention of Corruption and Economic Offences Act (Supra)

- [3] The sentences/fines imposed upon the applicants/accused in the instant application appear in exhibit “A”; an order of this Court dated the 18th August 2011. In that order of Court, the parties had agreed as to the mode of payment of the fines within the periods therein specified. The fines were to be paid beginning the 30th November 2011 up to the 28th February 2012.
- [4] In the instant application, the applicants are seeking an extension of the period for payment of the fines. They ask this Court to grant them an extension for payment and or for deferment of payment for periods ranging between 12 and 54 months respectively.
- [5] Of course, applicants have also asked this Court to stay execution of the said judgment pending finalization of this application.
- [6] The instant application has been filed pursuant to the provisions of section 317 of the Criminal Procedure and Evidence Act No. 9 of 1981.
- [7] The reasons in support of this application are clearly spelt out in the founding affidavit herein filed.
- [8] In brief, the said reasons are that:
- The applicants are in a predicament of failing to secure funds meant for satisfaction of this judgment.

- The applicants' bank, viz the Standard Lesotho Bank having refused to advance or to finance the first applicant in anyway after the trial and conviction of the applicants by this Court. Refer to first applicant's founding affidavit.

- When the applicants and the respondents entered into the deed of settlement and/or a plea bargaining agreement which resulted into exhibit "A" – (an order of this Court), the applicants had not anticipated the change in circumstances brought about by the applicants' bank. It is the applicants' averment that this application is not made for purposes of delaying justice to take its course, but it is made bona fide.

[9] The application is being opposed by the respondents

[10] It is apposite to note at this juncture that the provisions of section 317 of the Criminal Procedure and Evidence Act referred to above deal with issues pertaining to deferment or to suspension of a fine. Issues pertaining to payment of tax and or to the tax liability are not at all covered by the provisions of this section. Such issues pertaining to tax liability and an obligation by some people to pay same to the second respondent are dealt with and provided for in other, relevant tax laws; which laws the applicants herein have been found to have violated over a period of time.

[11] The above proposition is buttressed by the fact that nowhere has any reference been made to any tax laws existing in this country in the provisions of this section 317 of the Criminal Procedure and Evidence Act

(supra). This particular section is therefore drafted in such a way that it only covers issues pertaining to the fines imposed upon persons who have committed an offence except an offence created in the relevant tax laws. Put differently, one must observe that in dealing with the instant application, a clear distinction between the application of the provisions of the said section 317 referred to above, and which provisions the applicants have invoked in support of their application, and the application of the relevant provisions of the tax laws which the applicants have violated must be made.

[12] Regrettably, the applicants have not made out this distinction. That explains why they have filed this application in general terms invoking only the provisions of section 317 of the Criminal Procedure and Evidence Act (supra), in oblivion of the fact the issues therein raised or subjected-matter in this application are governed by separate or different statutory enactments.

[13] It is the considered view of this Court that the tax liability owing and payable to the second respondent by the applicants is not a fine per se, and is therefore not covered by the provisions of the said section 317 referred to above.

[14] On the other hand, the fines imposed upon all of the applicants and as tabulated in exhibit A are indeed fines as envisaged by the provisions of the above section 317.

[15] It has been submitted on behalf of the respondents that before a Court can grant further suspension or deferment, it must be satisfied that a person

making an application has been unable through circumstances beyond his control, to fulfil the conditions of the order. Consequently, the person making an application for suspension or deferment bears the onus of proof on the balance of probabilities. This is a general principle of the law.

- [16] The respondents have very ably given a description or a meaning of the words “circumstances beyond (his) control” – vide paragraphs 6 and 7 of their written argument.
- [17] In a nutshell, the circumstances which applicants say are beyond their control is the fact that their bank; the Standard Lesotho Bank has refused (declined) to finance them. This, the bank did after it got to know of the judgment and sentence of this Court dated the 18th August 2011. Refer to applicants founding affidavit, paragraphs 5.1 up to 6.3 and to their written argument.
- [18] It has been submitted on their behalf, that the applicants have not acted mala fides in their failure to comply with the order of court – Refer to their arguments paragraph 2.1 up to 2.4.
- [19] In a nutshell it has been argued on their behalf that the applicants are being exemplary in making a section 317 application so as to permit them to comply with the order in question thereby dispelling a notion that they have deliberately failed, neglected and or refused to comply with the terms of an order of court.

- [20] The applicants have not placed anything before court to satisfy this court that firstly, the first applicant has sufficient funds with the Standard Lesotho Bank which funds they could use as a collateral in order for its banker to advance a loan to it so as it could meet its fine and the tax liability.
- [21] Secondly, the said banker of the applicant has not filed any supporting affidavit to confirm and or to at least inform this Court whether or not it has been approached by anybody on behalf of the first applicant for it to loan or advance first applicant that required sum of money; and to explain why, if indeed it has turned down such an application, it did so. As it were, nobody can vouch to the truthfulness or not of the applicants' story that the said banker has declined to fund the first applicant. The same is true of the business acquaintances alluded to by the applicants.
- [22] Be that as it may, this Court is mindful of the trite principle that it is required of the Honourable Court in Criminal Procedure matters to follow a robust approach to dispense justice and fairness. It has in this regard, been pointed out that there is therefore need to conduct criminal matters in accordance with open-minded notions of basic fairness and justice.
- [23] In the instant case, the contents of this order of court (exhibit A) have come about as a result of plea bargaining entered into, and voluntarily or with good intentions on the part of parties herein. The applicants, for their part have demonstrated their serious intentions and have displayed an immense respect to Court by indicating their intention to honour their obligation hence why they have approached this Court as they did immediately when their

banker could not assist them as they had hoped would be the position when they agreed to a plea bargain.

[24] To this end, and subsequent to the plea bargain, they did, on the 28th October, 2011, pay to the Government of Lesotho (L.R.A) sums of money in the tune of M100,000.00 and M500,000.00 respectively. Refer also to the Standard bank letter dated 31st October 2011 – titled Lesotho Government Revenue ETF – addressed to second defendant.

[25] A proper reading of the order of Court in question reveals that if the above be a correct reflection of what appears on the said copies of these cheques; then the fines of M500,000.00 and M100,000.00 in respect of the fines imposed upon them as appears in the said order of Court under subparagraphs 2.2 and 2.3., then the said fines were accordingly paid on the 28th October 2011; which is some two days before the actual date on which payment of same had been deferred.

[26] What has obviously not yet been paid were the sums of money in relation to the tax liability which all the accused owed jointly and severally to the Lesotho Revenue Authority. This are respectively the sums of one and a half million and four million maluti.

[27] These were to be paid by instalments of one million maloti per month within a period of four months form the 30th November 2011. The tax liability of the accused to the second respondent (the Lesotho Revenue Authority) therefore remained unpaid as on the 4th November 2011, for reasons

explained in the applicants/accused certificate of urgency and notice of motion, filed in this Court on the 26th October 2011 and served upon the respondents on the 26th November 2011. The application is being opposed.

[28] Now, the issues for determination by this Court can be formulated as being the following:

- Whether the first and second applicants are entitled to relief under the provisions of section 317 of the Criminal Procedure and Evidence Act No. 9 of 1981 to vary the terms of the aforesaid sentences and payment of tax liability in the way that has been suggested by the applicants.
- Whether the applicants are entitled to be granted an application for stay of the execution of the sentence as prayed for in their papers.
- Whether, this Court after accepting the plea bargain and settlement under criminal case (trial) number 120 of 2010; and which settlement was made an order of this court; this court has thereby ousted the rights of the second respondent to dictate terms of payment ex post facto or whether only the court is vested with such rights in pursuance of a possible relief under the provisions of section 317.
- Whether the only relevant consideration is the literal meaning of section 317 (circumstances beyond the control of applicants)

- If the Court is endowed with a discretion to vary the terms as the Court deems appropriate, whether the amended payment terms put forward by the applicants are reasonable; being:

- M74,000.00 per month over 54 months for the M4 Million payment due to second respondent and

- M125,000.00 per month over 12 months for the M1,5 Million fine.

[29] The applicants have of course, prayed that if the above not be not deemed reasonable, then the Court should afford them such further and alternative relief as would be deemed reasonable by this Court.

[30] It is trite law that the criminal offence of contempt of court can only be committed by deliberate and mala fide ignoring of orders of court. It is on the basis of the above principle as well as to why they have not been able to get funds which they had sourced from their bank and other business associates, that the applicants submit that they are not in willful default to obey the orders of court; subject-matter herein.

[31] On their part, the respondents argue that the applicants have not done enough by way of disclosing all relevant information and details pertaining to their other sources of income. They say applicants have not disclosed all accounts held by them in other financial institutions in Lesotho and elsewhere. Refer to the respondents' written submissions in this regard; at paragraphs 12 and 13 etc. They argue therefore that due to such failure or

none disclosure of all such relevant information by the applicants, this Court is not in a position to exercise its discretion in their favour.

[32] In other words, respondents argument is that failure by the 2nd applicant to disclose to this Court his other financial interests or such property from which he generates a lot of income, which could be enough to allow him to meet his obligations in respect to payment of the fines and the tax liability to the second respondent, should be a factor influencing this Court to decline to grant the instant application.

[33] While what the respondents argue above may be persuasive, the difficulty here is that nothing has been placed before court to convince this Court that indeed the listed properties and or items are indeed the property of the second and or the third applicants nor has the exact and or the estimated value of same been disclosed to this Court. As for the meaning of circumstances beyond one's control, this Court has not been referred to any authority by way of explaining the meaning of same. The fact that respondents know of the applicants' luxurious life style (whatever this means) does not advance the respondents' case any further. What is clear and undisputed is the fact that, firstly, the applicants' banker has refused to advance any loan to them for them to pay the fines. Secondly, and contrary to what the respondents say, the applicants have paid the fine using the available finances from the accounts of one of the sister companies; Build World (PTY) LTD. Refer to respondents' written submissions, paragraph 21, page 7 of same. There is no mention of the existence of any other sister

companies from where the applicants could source out some further finances so as to enable them to meet their obligations.

[34] The respondents have also not gainsaid the applicants' story that their banker, the standard bank of Lesotho has since declined their application for a grant of a loan in order for applicants to meet their obligations and or to enable them to comply with the order of Court in question. Of course, courts will always take judicial notice of matters generally known to well-informed people, such as the rough average earnings of the class of persons involved. However, courts cannot make nor rely on a general speculative guess on the above.

[35] The respondents have further argued that, and in relation to the payment of the tax liability of the applicants to the second respondent, in terms of the relevant taxation laws, tax is a debt to the Government of Lesotho payable to the Commissioner General. The time within which tax has to be paid is dictated by the relevant statutes. Should any taxpayer want extension of time for payment, he must then make an application to the Commissioner General for such an extension. Refer to their written submissions.

[36] It is accordingly argued that any order of court made contrary to the said relevant tax laws and beyond the terms consented to by the Commissioner General of the second respondent, in effect, nullifies the relevant tax law provisions thereby rendering the statutory powers of the Commissioner General to enforce tax laws and collect tax nugatory.

- [37] In short, the respondents' argument is that Courts have no power to interfere in the way the Commissioner General of the second respondent administers the relevant tax laws of this country for as long as such is done according to the relevant provisions of same, except probably where he might have acted ultra vires.
- [38] This is of course not the case in the instant application. This invariably means that for the application to succeed, there has to be compliance with the relevant statutory provisions invoked by and or on behalf of the applicants. Of course, sight should not be lost of the fact that the applicants have tendered pleas of guilty to the numerous charges which have been preferred against them by the respondents.
- [39] The time periods within which a fine or sentence may be postponed or suspended is a period not exceeding three years. This is of course with a rider that one has successfully satisfied the court that one has been unable, beyond circumstances beyond one's control to pay the imposed fine.
- [40] Periods within which any tax owed to the Commissioner General of the second respondent is to be paid are clearly spelt out in the provisions of all such relevant laws. Most importantly any tax payer who is liable for tax has been given an opportunity to make an application addressed to the Commissioner General asking for an extension of time within which to pay tax beyond the date on which that tax is due and payable under the various sections of the relevant laws.

- [41] What is imperative is that such an application is made to the Commissioner General and if the application is successful, then the Commissioner will allow such a person to make appropriate arrangements to ensure payment of the tax due. In that way, the provisions of the said relevant tax laws are not rendered nugatory and no one will be seen as usurping the powers of the Commissioner.
- [42] In the instant matter, the second applicant has said in his written submissions that he did approach the second respondent to request for deferment and applied for extension for payment of the fine and tax due but his application was declined, hence why he approached the court as he did.
- [43] The application referred to above was refused by the second respondent because it was the feeling of the Commissioner General that the applicants were denigrating their serious criminal conduct to commercial agreements. The basis for this argument being that the applicants have not disclosed all of their assets and finances which would enable them to meet their liabilities to the second respondent.
- [44] Further reasons in support of the second respondent's refusal and or opposition to this application are spelt out in their answering affidavit, to wit refer to paragraph 30 etc from page 12 of same. They are accordingly incorporated herein. In a nutshell, the respondents argue that the alleged cash flow predicament and the inability by the applicants to secure funding which would enable them to meet their obligations herein in respect of the fines and tax liability due to the second respondent is self created and is a

further demonstration by the applicants of their contemptuous approach to the sentences herein imposed upon them and to the criminal justice system.

[45] One must not lose sight of the fact that an order of this court now in question came about as a result of a plea bargain entered into between all the parties herein involved, with this Court having never been involved in the said plea bargain, (correctly so), it is understandable that the first and second respondents feel that the applicants are not bona fide in having filed this application.

[46] Indeed the time periods stipulated in the said order of court for payment of the sum of four million maluti tax liability owing to the second respondent should have come to an end on or before the 28th February 2012. Nowhere do the applicants say or argue that, that time period and the amounts therein specified are unreasonable. It is the considered view of this Court that same are not unreasonable because according to the strict provisions of the tax laws in question, those lump sums of tax liability and other related such amounts should have been paid once when they were due.

[47] In short, the plea bargain entered into and the payment methods agreed to, are very reasonable such that one cannot deny that the first and second respondents have been generous in agreeing to same.

[48] In conclusion, one may point out that to date, it is now almost two years since the Court pronounced itself on the 18th August 2011; while the tax liability accrued around the years 2003-2007; the applicants should have

done all in their power and control to abide by the order of court referred to above.

[49] In premises, and for the foregoing reasons, this court is of the view that it has no power to interfere with the exercise of the discretion or with the statutory powers of the Commissioner General to enforce tax laws and to collect tax. As such the application for an extension of time for fifty four (54) months as suggested on behalf of the applicants is refused and the application in this regard is accordingly dismissed.

[50] However, the application in respect of deferment of sentence and fines is granted as prayed only because the law empowers the court to suspend in whole or in part sentence for a period not exceeding three (3) years. In any case, the applicants have, as indicated above already paid a total sum of M600,000.00 fines. For any outstanding fines, the applicants' application for deferment of same is granted provided that they pay same within a period of three (3) years from the 31st October 2011.

[51] This being a criminal matter, no order as to costs is made.

M. Mahase

Judge

For Applicants - Adv. N. Hlalele

For Respondents - Adv. A.R. Mathaba