IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL NO. 20/2005

In the matter between:

ALTON NGCAMPHALALA	1ST APPLICANT
MICHAEL DUMISANI DLAMINI	2nd APPLICANT
PARESH VALOP	3rdAPPLICANT
MITESH VALOP	4th APPLICANT

AND

THE KING	RESPONDENT

In re:

THE KING	APPELLANT

AND

MITESH VALOP	1st RESPONDENT

PARESH VALOP	2nd RESPONDENT
MICHAEL DUMISANI DLAMINI	3rd RESPONDENT
ALTON NGCAMPHALALA	4th RESPONDENT

CORAM:

LEON JP

TEBBUTTJA

ZIETSMAN JA

FOR 1st APPLICANT: MR. T. MLANGENI

FOR 2nd APPLICANT:MR. B. MDLULI

FOR 3rd & 4th APPLICANTS:MR. C.S. NTIWANE

JUDGMENT

Tebbutt JA

The four applicants in this matter were charged before the Acting Chief Justice, Annandale ACJ, with two counts of fraud.

At the conclusion of the Crown case against them all four of them, through their legal representatives, moved applications for their discharge under the provisions of Section 174(4) of the CRIMINAL PROCEDURE AND EVIDENCE ACT N0.67 OF 1938 on the basis that there was no evidence that they had committed the offences with which they were charged. Their applications were granted by Annandale ACJ who then ordered that they be acquitted and discharged.

The Crown now seeks leave from this Court, in terms of Section 6 of the Court of Appeal Act 1954, to appeal to it against the decision of the trial court. That application is opposed by the four applicants in an application by them, brought before this Court as a matter of urgency, that the Crown's application be set aside for failure to comply with the provisions of Rule 9 of the Rules of the Court of Appeal.

Section 6(1) of the Court of Appeal Act provides that the Attorney General i.e. the Crown may, with the leave of the Court of Appeal, appeal to it against any judgment of the High Court:-

"on any ground of appeal which involves a question of law but not a

question of fact...

Section 6(2) provides that

"For the purposes of this Section, the question as to whether there was any evidence upon which Jhe court could have come to the conclusion to which it did come shall be deemed to be a question of fact and not of law."

Rule 9 provides that an application for leave to appeal shall be filed within six weeks of the judgment

against which it is sought to appeal and "shall be made by way of petition in criminal matters... stating shortly

the reasons upon which the application is based..."

The applicant's first complaint is that the Crown's application is not made by way of petition. The Crown in turn avers that the four applicants' application fails to comply with Rule 41 of the Rules of the Court of Appeal which requires that an application to a judge of the Court "shall be by petition" and that their application is brought not by way of petition but by way of notice of motion.

In its inherent jurisdiction this Court mero motu may excuse any party from strict compliance with any of its rules if there is no prejudice to any other party, (see HERBSTEIN AND VAN WINSEN : The Civil Practice of the Superior Courts in South Africa 3rd Edition page 19-20). That is clearly the position here. Each party knows full well what the other party's case is; each came prepared to meet the other's case and even though each one may have not strictly brought its case in the manner prescribed by the rules, this Court will condone that. The matter must be decided on the merits of the matter and the principles applicable to them and not on some inconsequential technical procedural defect.

I respectfully adopt what was said by Schreiner JA in TRANS-AFRICAN INSURANCE COMPANY LTD V MALULEKA 1950(2) SA 273 (AD) at 278

viz;

"Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decisions of cases on their real

merits."

The Crown has also taken a point in limine that the four applicants have not shown that there is any urgency in bringing their application before this Court at this stage. I think they have.

The charges against the four applicants emanated from alleged misrepresentations pertaining to shoes to be used in the Correctional Services Department of the Government, through the use of tender documents applicable to other sectors of the public service. The third and fourth applicants are directors of Paramount Tailors and Outfitters (Pty) Ltd which supplied the shoes while the first and second applicants were procurement officers within the service who were involved in the placing of the orders for the shoes with the suppliers. The first two applicants have been under suspension in their employment since 2004 and have, they say, suffered financial disadvantage as a result. Although this latter averment is denied by the Crown, it is not denied that they are under suspension and it cannot be gainsaid that this, preventing them, as it does, from working and carrying on with their careers, is prejudicial to them. The firm of which the third and fourth applicants are directors is, as it appears from the judgment of Annandale ACJ in granting their discharge, one which tenders, successfully in certain instances, for Government contracts. There must be potential prejudice to them if the validity of any attack on their acquittal were to be left unresolved for any length of time. This Court sits only once in every five or six months and it is obvious that all four applicants would be prejudiced if their application were not to be heard at this session of the Court. The point in limine on the question of urgency must fail and is dismissed.

Rule 9 provides that an applicant for leave to appeal - in this case the Crown - must shortly state the reasons upon which its application is based. The Crown's application merely states that it "enters application for leave to appeal against the ruling of the court a quo in that -

1. The learned Judge misdirected himself in law by failing to exercise his discretion judiciously (sic)

2. The learned Judge in the court a quo misdirected himself in law by failing to apply the fundamental rights of "the principles of fair trial."

Both of these grounds are so vague as to be incomprehensible. No reasons are provided as to how the learned Judge failed to exercise his discretion judicially (which obviously is what is meant even though the word "judiciously" is used) nor as to how he failed to observe the principles of a fair trial. They do not therefore comply with the provisions of Rule 9.

It appears that what the Crown is really attempting to aver in language which is obscure and clouded in obfuscation is that the learned Judge was wrong in discharging the four applicants at the end of the Crown case. That would depend on a consideration of the facts upon which it is, of course, not competent for the Crown to appeal.

Any assessment of whether the learned Judge failed, in granting the discharge of the applicants, to exercise his discretion judicially would clearly involve a consideration of the facts and the evidence upon which he exercised his discretion. The discretion, it has been held, must be properly exercised, depending on the particular facts of the matter before Court. This statement by Masuku J in REX VS GOVU DLADLA AND 3 OTHERS CRIMINAL CASE NO.168/1998 finds support from the judgment of Williamson J in S V MPETHA AND OTHERS 1983(4) SA 262 at 265 D-G where he said, in relation to an application for a discharge at the end of the prosecution case, -"The sole concern is likewise the assessment of the evidence."

It will be recalled that Section 6(2) deems an assessment of the evidence to be a question of fact and not one of law and an appeal by the Crown on this ground is thus precluded.

A consideration of whether there was a fair trial by the trial Court would also involve an assessment of the record of the evidence before it.

Mrs. Dlamini, the Acting Director of Public Prosecutions, who appeared for the Crown, sought to differ from what I conceive to be the legal position in an application for leave to appeal by the prosecution as set out above. She referred the Court to a handbook on CRIMINAL PROCEDURE compiled by Professors S.A. Strauss and J.H. van Rooyen and Advocate J.J. Joubert of the University of South Africa in 1973, and revised in 1976, in which at page 286 the following appears in relation to the question "When may the State appeal?"

"It is not open to the Attorney General to debate whether the Magistrate should or should not have found as he did, since this would be a matter of fact. But he may argue that the Magistrate could not have found as he did: this is a matter of law."

This statement by the authors of the handbook is based on a passage, in the exact terms quoted, in a judgment of Curlewis A.J. (as he then was) in S V COLGATE-PALMOLIVE LTD AND ANOTHER 1971(2) SA 149 (T.P.D.) AT 154 E-F.

For his dictum Curlewis AJ referred to a statement in a judgment in the South Africa Appellate Division by Centlivres CJ in R V LUSU 1953(2) SA 484 (AD) at 487-488. In that case certain waiting rooms at the Cape Town railway station had been reserved for the exclusive use of what was termed "Europeans". A person who was not a "European" had entered and made use of one of the waiting

rooms. He was charged in the Magistrate's Court with contravening the section of an Act under which the waiting rooms had been reserved but was acquitted on the ground that reserving the waiting rooms had resulted in partial and unequal treatment between Europeans and non-Europeans rendering the section of the Act void. A question of law reserved on the correct interpretation of the statutory provision concerned was answered by the Cape Province Division adversely to the Attorney General who then appealed to the Appellate Division. What the latter had to decide was the correct interpretation of the section of the Act concerned. It upheld the decision of the court a quo. In his judgment, however, Centlivres CJ said

the following: at 487-488:

"At the outset I should point out that the question which we have to consider is a question of pure law. Presumably that question was framed deliberately in the language in which it is couched. It does not ask the Court to consider, what would also have been a question of law, viz.: whether there was evidence on which it could reasonably be held that the action of the Administration in reserving waiting rooms at Cape Town Railway Station resulted in partial and unequal treatment to a substantial degree as between European and non-European. Had such a question been raised it would have been necessary to consider the evidence but that question not having been raised we must accept as a fact that the action of the Administration has resulted in partial and unequal treatment to a substantial degree as between Europeans and non-Europeans."

It is these remarks that have formed the basis for what Curlewis A.J, said and which latter statement is repeated verbatim in the passage in the handbook to which Mrs. Dlamini referred and which I have set out above.

Pointing out that the remarks of Centlivres CJ are purely obiter, and were made apropos a hypothetical question posed by him, the South African Appeal Court has recently stated that they are not binding on the Court and has declined to follow them (per Corbett CJ in MAGMOED V JANSE VAN RENSBURG AND OTHERS 1993(1) SA 777 (A.D.) at 818 A-D.)

The remarks are indeed obiter and this Court, too, will not follow them. Decisions of the South African Courts, while of assistance to this Court and of persuasive value if this Court considers them to be pertinent and correct, are not binding on this Court. Obiter dicta, such as the passage quoted undoubtedly is, are a fortiori not binding and particularly when made, as these remarks were, in relation to a hypothetical question.

Moreover, in my view they are clearly wrong. Whether a trial court could have found as it did obviously requires a consideration of the evidence which it had before it and is thus a matter of fact.

We also do not think this Court should follow the judgment of the High Court of Venda in South Africa in ATTORNEY-GENERAL, VENDA V MOLEPO AND OTHERS 1992(2) SACR 534(V), (which our own researches have found) the headnote of which reads thus -

"The decision by a court to grant an application for the discharge of the accused at the end of the State's case in terms of Section 174 of the CRIMINAL PROCEDURE ACT 51 OF 1977 (the South African Act) is appealable by the Attorney General in terms of Section 310 of that Act."

The learned Judges in that case relied on dicta in three early judgments of the South African Appellate Division viz R V LOUW 1918 AD 344; R V THIELKE 1918 AD 373 and R V LAKATULA AND OTHERS 1919 AD 362 and, in particular, the latter. In all three cases jury trials were involved where

the arbiters of fact are, of course, the juries and not the presiding Judge. In the Lakatula case Solomon ACJ stated that a refusal by the Judge to withdraw the case from the jury at the end of the prosecution case was not appealable "seeing that it is left to the discretion of the Judge whether or not he should withdraw the case."

He then went on to say the following (and it is this statement which the learned Judges in the Venda case say support the decision at which they arrived)

"If, however, at the close of the trial there is no legal evidence upon which the jury were entitled to convict, that is a point of law which may be raised (as a point of law reserved)"

The learned Acting Chief Justice was dealing with a situation differing entirely from the one with which we are seized. In both the Louw and the Thielke cases (supra) it was stated that if at the close of the prosecution the Judge considered that there was no evidence that the accused committed the offence charged, it would be his duty to direct an acquittal. (See at pages 352 and 379 respectively.) It was only if there was some evidence that he had to leave it to the jury, as the arbiters of fact, to decide on it. It is obvious that Solomon ACJ was saying that if the Judge had not withdrawn the case, as was his duty, and at the close of the trial it appeared that there was indeed no evidence, it would be a point of law that the Judge had failed in his duty to withdraw the case when he should have done so.

There is, in my view, nothing in the judgment of Solomon ACJ (which dealt with an entirely different situation) which held either expressly or by necessary implication, that a decision by a trial Judge to discharge an accused at the end of the Crown case is a question of law.

Solomon ACJ, as I have stated, stressed that it was left to the discretion of the Judge as to whether or not he should withdraw the case. The Judges in the Venda case stated that the forming of an opinion as envisaged by Section 174 does not involve "the exercise of a discretion properly so called but merely an evaluation of the evidence and its relevance to the essentials of the crime which the State must prove."

I can, with respect, not agree with this view. As Solomon ACJ stated the referral to or withdrawal of a case from the jury was a question for the discretion of the presiding Judge. It is obviously a fortiori a matter for the discretion of the trial Judge where he has to decide whether or not to grant the discharge of an accused at the conclusion of the prosecution case. In any event, a consideration and evaluation of the evidence, as the learned Judges suggest, is deemed by Section 6(2) to be a matter of fact and not of law and an appeal by the Crown is then precluded. In any event the Venda case is not binding on us and I decline to follow it.

If a court on the evidence concludes that the requisites of a crime have not been established, and it is wrong with regard to those requisites, that is a question of law. But if the court is not challenged on its view of what are the requisites of an offence and only on the evaluation of the evidence, that is a question of fact.

It is the latter which the Crown is seeking to do on the two grounds advanced by it as to why it should be allowed to appeal in this case.

In any event both these grounds advanced by the Crown have no substance. A reading of the judgment of the learned Chief Justice shows that he carefully and in detail - (a) set out the principles by which he

had to be guided -correctly so in my view; (b) the ambit and import of the indictment against the four applicants and, (c) in the light of both of these, carefully and in detail assessed the evidence adduced by the Crown and considered it insufficient to put them on their defence.

It can, in my opinion, in no way be said that he did not exercise his discretion judicially. His judgment is a model of judicial rectitude. Nor can he be said not to have observed the principles of a fair trial. His judgment is an unbiased and balanced consideration of the evidence before him.

In the result the application by the four applicants must succeed and the Crown's application for leave to appeal must fail and be dismissed and it is so ordered.

There remains only the question of costs. The four applicants in their application asked for their costs and that these be paid by the Crown on the attorney and client scale. At the hearing of the matter before us, however, because of the provisions of Rule 28 of the Court of Appeal Rules precluding the allowing of costs in criminal appeals and matters incidental thereto, they abandoned their claim for costs. No order for costs will therefore be made.

P.H. TEBBUTT JA

JUDGE OF APPEAL

I AGREE

R.N. LEON JP

JUDGE PRESIDENT

I AGREE

N.W. ZIETSMAN JA

JUDGE OF APPEAL

DELIVERED IN OPEN COURT THIS 14th DAY OF NOVEMBER 2005.