IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Criminal Case No. 188/04

In the matter between

REX

Versus

MITESH VALOB, PARESH VALOB,

MICHAEL DUMISANI DLAMINI and

ALTON NGCAMPHALALA

Coram: Annandale, AC J

For Accused No. 1 and 2: Mr. C. Ntiwane

For Accused No. 3: Mr. B. Mdluli

For Accused No. 4:Mr. T. Mlangeni

RULING ON SECTION 174(4) ACT 67 OF 1938 APPLICATION FOR DISCHARGE AT END OF THE CROWN'S

CASE 6 OCTOBER, 2005

[1] All four accused persons on trial are prosecuted on two counts of fraud. These charges emanate from alleged misrepresentations pertaining to the ordering of shoes to be used in the Correctional Services Government Department through the use of tender documents applicable to other sectors in the public service. The first two accused persons are directors of Paramount Tailors and Outfitters (Pty) Ltd which entity supplied the shoes while third and fourth accused persons were procurement officers within the service who were involved in the placement of the two orders for shoes with the supplier.

[2] All four accused pleaded not guilty to both counts. No plea explanation was tendered and no formal admissions were made.

[3] At the conclusion of the crown's case, all four accused, through their legal representatives, moved applications to be discharged under the provisions of Section 174(4) of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938). The crown opposes the applications with the result that the court has to judicially consider and decide whether any or all of the accused should be acquitted and discharged at this juncture, or whether any or all have a case to meet

with the result that his or their application(s) should be refused.

[4] Since much emphasis has been placed on the question as to whether the credibility of the prosecution witnesses should be considered or not and whether adverse credibility findings should result in acquittal due to a weakened prima facie case, I refer extensively to a judgment by my learned brother, Masuku J, in (unreported) Criminal Case No. 168/1998, Rex vs Govu Dladla and 3 others, where he summarised the legal position on this issue from pages 2 to 4.

"Section 174(4) of the Criminal Procedure and Evidence Act, 1938, as amended, reads as follows:-

'If at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him.'

As correctly observed by Dunn J, in The King v Duncan Magagula and 10 others, Criminal Case No. 43/96 (unreported), the Section is of similar effect with the south African Criminal Procedure Act 51 of 1977. In the same case, Dunn J laid out, the test to be applied in such applications as being whether there is evidence on which a reasonable man, acting carefully might or may convict -See also Commentary on the Criminal Procedure Act, Du Toit et al p. 174 and the cases therein cited.

The test is not should a reasonable man convict - See GASCOYNE v PAUL AND HUNTER 1917 TPD 170; SUPREME SERVICE STATION (1969) (PVT) LTD V FOX AND GOODRIDGE (PVT) LTD 1971(4) SA 90 AND SV MORINGER AND OTHERS 1993(2) SACR 268.

From the test laid out above, it is clear that the decision to refuse a discharge is a matter solely within he discretion of the trial court. This is borne out by legislature's choice of language, namely, the use of the word "may". The exercise of this discretion may not be questioned on appeal. See GEORGE LUKHELE AND 5 OTHERS v REX COURT OF APPEAL CASE NO. 12/1995, at page 8 where the learned Judges of Appeal stated as follows:-

'It is now well established that no appeal lies against the refusal of the trial court to discharge an accused at the conclusion of the prosecutions case'.

Having said this, the discretion must be properly exercised, depending on the particular facts of the matter before court.

Having ascertained the test to be applied as herein above set out, the question that arises is whether or not the credibility of crown witnesses should be taken into account in deciding whether or not to grant a discharge.

I n S v MPETHA AND OTHERS 1983(4) SA 262 at 265 D - G, Williamson J, sated the position of the law as follows:-

'Under the present Criminal Procedure Act, the sole concern is likewise the assessment of the evidence. In my view, the cases of Bouwer and Naidoo correctly hold that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage. If a witness gives evidence which is relevant to the charges being considered by the court, then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can

possibly be believed. Before credibility can play a role at all, it is a very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled 'while rejecting one position of the sworn testimony of a witness, to accept another portion.' See R v KHUMALO 1916 AD 480 at 484. Any lesser test than the very high one which, in my judgment, is demanded would run counter to both the principle and the requirements of S. 174.'

In the Kingdom of Lesotho, this very question was considered by Cotran C.J. in the case of REX V TEBOHO TAMATI ROMAKATSANE 1978(1) CCR 70 at 73-4. The learned Chief

Justice propounded the law as follows:

'In Lesotho, however, our system is such that the judge (though he sits with assessors is not bound to accept their opinion) is the final arbiter on law and fact so that he is justified, if he feels that the credibility of the crown witness has been irretrievably shattered, to say to himself that he is bound to acquit no matter what the accused might say in his defence short of admitting the offence.'

In the case of THE KING V DUNCAN MA GA GULA AND 10 OTHERS (SUPRA), Dunn J, was of the strong persuasion that this court should follow a similar approach as that in Lesotho, proper regard being had to the similar position in which trial judges are placed in both Kingdoms. Similarly, I endorse that view."

Likewise, I find myself in respectful agreement with the views of the learned judge, Masuku J, based to great extent on MPETHA (supra). The bottom line of this approach is that evidence of a particular witness is only ignored, for purposes of Section 174(4) of the Act, when the credibility finding is so adversely and utterly destroyed that no part of his evidence can possibly be believed. At this stage of the proceedings, unless evidence that is relevant to the charges is of such poor quality that no reasonable person could possibly accept it, credibility of witnesses play a very limited role.

The crown's key witness, Assistant Commissioner Dlamini, has come under severe attack by

the defence attorneys on the basis of credibility. Some of the criticisms are valid, some not. I do not propose to deal with his evidence in any detail for motivating the conclusion that I come to, mindful of the caveatby Roper J in R V KRITZINGER AND OTHERS 1952(2) SA 401(W) at 406-G, where he said:-

"I do not think it is expedient for me to give reasons, because this would involve a discussion of the evidence and of the law, and it is undesirable that I should commit myself to any expression of opinion upon these matters before the defence is entered upon.".

This dictum concerned the motivation for the credibility finding of a witness, as it is in the present matter. Bearing this in mind as well as the present exigencies, my prima facie view of Dlamini's evidence is that despite valid criticism against it, his credibility and the plausibility of his relevant evidence is not of such poor quality that no reasonable person would not believe at least some of it. Otherwise put, his evidence should not be struck out of the equation, fully rejecting and ignoring it. The evidentiary value may ultimately not be of the highest order, for instance, due to well established bias and prejudice, to which revert below. For present purposes however, I will need to have regard to the gist of his evidence.

I now turn to briefly deal with the amended indictment, which details the case or factual and legal averments which the crown has to prove - it sets out the case the accused have to meet and which the crown has to prove. In both counts, a common purpose between the accused

persons is alleged, whereby they would have misrepresented to the Government that Paramount Tailors and Outfitters (a company) had a tender to supply shoes, to correctional services, which it did not have at the relevant time. Further, that it supplied cheaper shoes of a different specification, inducing real or potential prejudice in that more money had to be paid than what the liability to pay would have been if the correct supplier's tender was used, and if shoes of the correct specification had been supplied. Essentially two prongs of attack are stated, firstly, the incorrect tender, secondly the incorrect shoes (of lower value than specified on the government Order).

[9] Concerning the tender documents, it is common cause that Paramount Tailors may have successfully have tendered in the past to supply shoes to Correctional Services, further, that in the period concerned with the alleged offence, the tender to supply shoes to Correctional Services had been awarded to other suppliers, while Paramount had valid tenders for the same period, to supply shoes to other governmental Departments, like Fire and Emergency Services and the Army. The tender prices of Paramount to the other departments were higher than the prices of the authorised suppliers of shoes to Correctional services. Different tenders apply to different Government Departments vis-a-vis different suppliers.

Concerning the different accused persons, different roles are established in the evidence, pursuant to the alleged common purpose which they would have shared to defraud Government.

The first two accused are cited and charged in their personal natural capacities, not as directors of the company known as Paramount Tailors and Outfitters (Pty) Ltd., though it is common cause that they are directors. See for instance exhibit 42, a bank signature card where both are identified as "directors" and exhibit 36, extracts of the company documents indicating shareholders and directors. It is not the company itself which is prosecuted.

The evidence is that government orders were addressed to the company and that it was the company which supplied the shoes, not the directors. These orders were issued by the third and fourth accused. It is common cause that the orders, the tenders and the suppliers did not match up with each other.

From the evidence of Dlamini and the other prison officials called by the crown, there is one significant factor that emerged, namely that it was not the rare exception, such as the present case, that tenders by a supplier to one government department are also used to order supplies for a different department. This was the position where the Assistant Commissioner himself, more than once, authorised such purchases.

What seems to be the stone in the shoe is that the shoes supplied by Paramount Tailors were not the same as specified in the orders. Concerning the men's shoes, there is a difference in cost between "formal" shoes and rubber soled "parabellum" shoes. The latter shoes are issued to rank and file officials while the "formal" shoes are meant to be worn by officers when

something smarter than standard uniform shoes are required.

The crown's witnesses were at their wits end to describe the difference in quality, specification and appearance. They simply could not do so convincingly. The same applies to the female shoes. The only consistency, even though shaky, is that when rubber soled shoes bear the mark "parabellum" on the soles, they seem to be considered the cheaper version.

But this is not all what the prosecution is about, the supply of inferior shoes contrary to approved shoes on tender of a particular description, quality and specification. The charge as levelled against the accused persons is that a non-authorised tender company was asked to supply shoes to correctional services by the third and fourth accused, further that that supplier delivered shoes on strength of the government order of a different quality than specified.

The latter aspect has been mentioned above. The differences between "formal" or "WSC" shoes and "rubber soled" shoes, as charged in the indictment, could not convincingly be explained by any crown witness, save for the fact that the one has rubber soles. Whether "formal" or "WSC" shoes could or could not also have rubber soles, remains unknown. Whether the make or manufacturer be "John Drake" or any other, has neither been alleged nor has it been proved by evidence. Whether the soles of the expensive shoes has to be of leather also remains in the open.

[18] In this regard, the variation between the description and quality or specification of the shoes that were ordered and those that were supplied by Paramount Tailors, the burden of proof, to show beyond reasonable doubt, on the evidence, falls far short of the standard required in a criminal trial. Not even prima facie evidence has been adduced in order to shift the burden onto the accused persons to indicate the contrary through their own evidence. In so saying, I am mindful of the evidentiary burden and the time when it has to be weighed. I am also mindful of the onus on the crown to prove the essentialia of the case, the essential averments, during the case for the prosecution and that there is no onus on an accused to "prove his innocence".

[19] Coupled with the probative value of evidence pertaining to the actual physical shoes themselves is the essential allegation in the indictment of a misrepresentation. The alleged misrepresentations are that "...the said accused, each or all of them, acting in furtherance of a common purpose did unlawfully (sic, not wrongfully) and with intent to defraud, misrepresent to Swaziland Government that Paramount Tailors Outfitters had been awarded a government tender to supply the Correctional Services department ...with shoes... (well knowing) that Paramount ...had not been awarded such tender...".

[20] The main manifestation of the alleged mischief lies in issuing orders to Paramount to supply shoes to Correctional Services while the supplier was not awarded a tender to supply such shoes to Correctional Services, but to other government departments.

[21] The version of the third and fourth accused, the authors of the orders, is well established through ultra meticulous and exhaustive cross examination. They could not timeously obtain supplies of shoes, due to be used shortly at the time for passing out parades, from the formally contracted suppliers. The shoes were needed for newly trained recruits and they thought best to order from the only supplier that could timeously deliver, and which did so, namely Paramount. The government orders were issued to Paramount Tailors to supply the shoes at the formally accepted tender prices that were applicable to Fire & Emergency Services and the Defence Force (Army). Thus, the one government department substituted the tender for another department to purchase shoes for itself.

[22] As aforesaid, precisely this very same practice has been openly exercised in the past by none other than their superior officer, Dlamini, as well as others. Nothing came of it, as it was deemed to meet the exigencies of the moment. It just so happened that the third and fourth accused ended up facing a criminal charge for doing so while the others did not. Two wrongs do not make a right. Illegal procurement of government supplies is a malpractice that goes against the public interest. It cannot be condoned, least of all by the courts.

From the evidence adduced in court it seems to me that there are internal directives as to how the procurement of items on tender has to be dealt with. Those regulations or standing orders or stated procedures have not been placed before this court for consideration. Even if it was done, it has to be borne in mind that the accused persons are prosecuted for the common law offence of fraud and not a contravention of a statutory or even internal infringement of regulations or

procedures.

According to the evidence of the assistant commissioner, the real malady was that too much money was paid or to be paid for the stock received from the suppliers and that proper accounting procedures were the initial solution to rectify the anomaly. Credits could be passed, "discounts" could be factored in, refunds could be made, and so forth.

The burning issue remains whether the crown has proved a common purpose to defraud government. There is no evidence whatsoever of any form of collusion between the accused to do so. Evidence of a common purpose remains as elusive as mythical fairies in the forest. The third and fourth accused happened to be working in the same place and the first two accused persons entered the stage when they were called upon to assist in rectifying the anomalous situation. Never was there even a hint or suggestion in the evidence presented thus far that they schemed in any manner whatsoever to defraud the government, which is alleged in the indictment by necessary implication.

Furthermore, it is common cause that the tender documents that accompanied the government purchase orders clearly reflected that Paramount had valid tenders for other government departments than Correctional Services. The tender papers were not altered or camouflaged in any manner. There was no subterfuge that established in the crown's case, save that valid tenders were openly used to procure shoes for a different department than that of Correctional Services, as seems to be the practice when the tendered supplier cannot deliver. This is openly admitted not by the accused persons but by their supervising superior officer, the chief

complainant. The suggestion by the defence, as put to him but which is not before me to be determined as a fact, is that he himself has benefited unduly in the past, on the receiving end from unscrupulous government suppliers. There is no such suggestion in respect of any of the accused persons.

The position of the first two accused, directors of Paramount, is somewhat vague in this matter. If Paramount Tailors is blamed for performing on strength of deliveries it made, it remains unknown on what legal basis two of its directors are prosecuted.

The evidence before court is that when the assistant commissioner formed the opinion that Correctional Services is being overcharged for the shoes, he wanted the supplier to adjust the accounts accordingly. The procurement officers, accused three and four, then had the first accused present himself to assist. In turn, he called for the second accused, who later "joined the party" and provided his input. Fact of the matter is and remains that Paramount Tailors received an order to deliver certain shoes. It is a body corporate, a company with limited liability. To hold directors of a company liable for wrongs committed by such entity does not fall automatically when they are charged in their personal capacities.

[29] For present purposes, it is not an issue that needs to be decided. It is not Paramount Tailors and Outfitters (Pty) Ltd that is before court, but two individuals, Messrs. Mitesh and Paresh Valob, who also happen to be directors of the company that supplied the shoes. As has been

pointed out in more than a few judgments of the High Court over some years, the Swaziland legislation still lacks proper provision for criminal liability of the officers of a company, such as for instance section 332 of the South African Criminal Code.

[30] One further factor that needs to be considered at this stage of the proceedings is the probability and likelihood that any or all of the accused will incriminate themselves or their co-accused if they are not now discharged and they choose to testify. From what I gathered during the tedious and oftentimes superfluously meticulous cross examination when the versions of each accused was put to crown witnesses, such a possibility seems entirely unlikely. No previous statements of any accused that blame any of the accused was placed before me. On a full consideration of all evidentiary material, there is no prospect that any accused, if he chooses to testify, will implicate any co-accused to the extent of possibly securing a conviction.

[31] Defence document No.l sets out the financial rectification that has to be followed to balance the books. If not implemented, the department of Correctional Services may well consider taking legal advice on the institution of a civil action. This court does not pronounce on either the figures or the issue of liability, but it seems to be about in consonance with the evidence before me. Further (forensic) accounting and auditing might well result in some adjustments. What the document does not do is to invest any of the accused persons with criminal responsibility.

[32] Defence document No. 2, which is not yet a proven document, contains material that the crown would have wanted to prove, but which it did not. It is a memorandum from the Assistant Commissioner of Correctional Services in which he details aspects of "mismanagement and possible misappropriation of funds."

[33] One paragraph reads:-

"Also noted was that the staff officer finance at one point used a Police Tender Award to purchase formal shoes at an exorbitant price of E589 per pair but the delivered shoes were ordinary black parabellum which the supplier tendered at E369. This effectively means that out of 1 000 shoes Messrs Paramount Tailors from whom the shoes were brought went home smiling with a Christmas gift of E220 000 at the expense of tax payers' money. This fraudulent expense was incurred without the overall knowledge of Stores and Financial Regulations."

[34] Apart from the difference in calculated loss vis-a-vis the indictment, it sums up the crown's allegation. What this document does not do is to prove the case any further. Mismanagement and lack of control measures certainly seems to cause "the recurring complaint about early exhaustion of funds in the department" as stated elsewhere in the same document. That the lack of control measures and compliance with financial instructions leads to losses is clear. That however remains distinctly different from proof of mens rea on the part of the accused persons.

[35] Their intention has clearly and succinctly been placed before the court. The two officers

were required to procure shoes. The contracted approved suppliers could not deliver but Paramount could do so. The order that was issued to Paramount was supported by tenders of the same suppliers, at those prices, but the tenders were in respect of different government departments. As aforesaid, this is not an isolated incident but a practice followed when the need arises, also followed by their superior officer himself.

[36] When shoes of the wrong description were delivered, it again does not also follow that in itself it establishes an intent to defraud government.

[37] The crown bears the onus to prove mens rea, an intent to defraud and a common purpose between the accused to do so. From the evidence before me, this has not been done by necessary implication, certainly not by any direct evidence.

[38] A further aspect of the alleged misrepresentation, as detailed and alleged in both counts, is that none of the four accused made any such misrepresentation. The indictments on both counts allege that the misrepresentation lies in holding forth that Paramount Tailors were awarded with a tender to supply male and female shoes to the department of Correctional Services -black formal shoes for the men and brown WSC shoes for the ladies.

[39] The evidence does not support this most essential element. That an order was issued to Paramount does not suffice. The two orders concerned each was accompanied by a tender

award, to Paramount, to supply other departments with shoes. As stated above, the tender documents to supply the other departments were openly attached to the orders when processed for payment, as well as earlier in the process when approved. Nowhere does it state in the documents, or in the oral evidence, that there was a presentation that purported to say that Paramount was awarded any tender to supply shoes to Correctional Services at the applicable time, as it is alleged in the indictment.

[40] The absence of any proof of mens rea in any of its forms on the part of any of the four accused persons deals a fatal blow to the case for the prosecution, a defect and absence that could only be cured if the accused persons were to admit it during the course of their case for the defence. It is however trite law that an accused person cannot be expected to be called to his defence in order to supplement deficiencies in the crown's case against him. To do so would negate the right to a fair trial and an abrogation of the presumption of innocence. As said above, there is furthermore no indication whatsoever that any of the four accused would be implicating any of their co-accused if called to testify.

[41] Although I wish to refrain from a detailed analysis of the evidence of Dlamini, there is one aspect that stands out as a sore thumb - that of severe prejudice. In cross examination, he was shown photocopied documents, marked as defence documents 9 and 12. On this, there appears the image of a document, the contents of which is common cause. However, on the same photocopy, below the copied document which is smaller than an A4 size such as the full photocopy, a portion of another document can be seen to protrude from underneath it. Clearly it

shows two documents, the main one being the document meant to be photocopied and the second one being a document incidentally photocopied at the same time, with only its lower portion being visible. This was clearly explained to be the situation when Dlamini was shown this document.

[42] Despite the explanation and the obviously visible correctness of that, he repeatedly steadfastly and adamantly repeatedly insisted that it was a "fraud" another example of a fraudulent pattern of behaviour by the accused persons he was trying to convey to the court.

Such a totally skewed and biased opinion is hardly ever seen in the evidence of any witness. A more patently clear example of absolute bias can hardly be expected to be found. To add insult to injury, the same witness brazenly and openly admits in court that he has a hatred of Indians, describing them as vultures, "creatures who take what does not belong to them." There is no evidence of the racial origins of the third and fourth accused but clearly he regards them as Indians, tarring them with the same brush in the process. The crown's argument that he had no vendetta cannot under these circumstances hold water.

When full and final consideration of the case against the four accused is given, considering all of the evidence and the two counts against them, it is my considered view that presently, at the end of the crown's case, there is no evidence upon which a reasonable person might convict. Without a foreseeable possibility that any of the accused will incriminate either himself or a co-

accused, it would be unreasonable to refuse a discharge under the provisions of Section 174(4) of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938) and all four accused persons are accordingly ordered to be acquitted and discharged.

JACOBUS P. ANNAN DALE

ACTING CHIEF JUSTICE