IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.5/2004 In the matter between:

THE KING APPELLANT

VS

CELANI MAPONI NGUBANE RESPONDENT

CORAM BROWDE JA

STEYN JA

TEBBUTT JA

FOR THE APPELLANT MRS. M. DLAMINI

FOR THE RESPONDENT MR. B.S. DLAMINI

JUDGMENT

The Court

The respondent, Celani Ngubane, brought an application in January 2004 before Masuku J in the High Court for his release from custody in terms of Section 136 of the CRIMINAL PROCEDURE AND EVIDENCE ACT NO.67 of 1938 (the Act), He averred that he was arrested by the police in March 2002 (the police say it was in 2003) and had been in custody awaiting trial since then.

The certificate of the Chief Justice committing him for trial was dated 20th May 2003 but he had not by January 2004 been allocated a date for trial, hence his application.

In his application Ngubane cited as the respondent the Director of Public Prosecutions (the DPP).

At the hearing of the application before Masuku J, the DPP took a point in limine that his office should not have been joined as the respondent. It was not averred that the office was responsible to set a trial date or for the non-enrolment of the case and it had therefore been misjoined. The DPP contended that his office was not the correct persona to be cited as the respondent in applications brought in terms of Section 136 of the Act. Masuku J rejected this contention holding that it was proper to cite the DPP in Section 136 applications. It is against this ruling that the DPP now comes on appeal to this Court.

It may at first blush appear that this appeal is of purely academic interest only because, firstly, Masuku J dismissed Ngubane's application on the ground that it was brought prematurely and, secondly, because Ngubane's trial is now in the process of being heard in the High Court. Moreover, he has no direct or substantial interest in who the appropriate person is who should be cited in Section 136 applications. We were, however, urged by Mrs. Dlamini who appeared for the Crown, to hear the appeal as, she said, the question was far from academic as far as the DPP was concerned. The number of Section 136 applications was large and were increasing. The DPP's office, inundated as it was by these, had no way of limiting them. More than 120 accused persons charged with serious crimes of violence had at the time of the application in casu already been released because of a non-compliance with the provisions of

Section 138. The duty to allocate trial dates for criminal cases in the High Court, so she submitted, was the responsibility of the Registrar of that Court. This office, despite persistent requests by the DPP for trial dates, was failing to set the cases down. The appropriate persona to be cited in Section 136 applications was therefore, Mrs. Dlamini submitted, the Registrar of the High Court.

Before considering these submissions it is necessary to deal with two points in limine in relation to the appeal raised before us by Mr.

Dlamini, who appeared at the request of the DPP for Ngubane. They are the following:

Firstly, he contended that as the heads of argument on behalf of the DPP were filed late, it was necessary, in order to obtain condonation for such late filing, for the DPP to make a substantive application on notice of motion supported by an affidavit explaining the reason for filing the heads late. This had not been done. Mrs. Dlamini countered this by pointing out that the rule requiring that procedure (Rule 17 of the Court of Appeal Rules) applied to non-compliance with the Rules and there was no similar provision in regard to what was a requirement of practice i.e. the filing of heads of argument. There was before this Court an application for condonation together with reasons as to why the heads had been filed late. This was sufficient to obtain condonation, without the need for the procedure referred to by Mr. Dlamini to be followed. It would seem that Mrs. Dlamini is correct.

The first point in limine is therefore dismissed.

Mr. Dlamini's second point is based upon Section 6(1) of the Court of Appeal Act No.74 of 1954. It reads:

"The Attorney General or, in the case of a private prosecution, the prosecutor, may appeal to the Court of Appeal, against any judgement of the High Court [given] or made in its criminal original

or appellate jurisdiction, with leave of the Court of Appeal or upon a certificate of the judge who gave the judgment appealed against, on any ground of appeal which involves a question of law but not a question of fact, nor against severity of sentence."

(The word "given" appears in the section in its original form and was clearly omitted in error in the revised printing of the Court of Appeal Act) Mr. Dlamini says that no leave from this Court or a certificate from the judge a quo was obtained by the DPP. Mrs. Dlamini submitted that the section only applied to appeals from the High Court in respect of its appellate jurisdiction. It is unnecessary, we feel, to decide this point. We are of the opinion, in view of the importance not only to the DPP but also to legal practitioners generally representing accused persons in criminal matters, of the issue raised in this appeal viz whether it is the DPP or the Registrar of the High Court who should be cited as the respondent in Section 136 applications, that we should hear and deal with the appeal on that issue. Furthermore, the present respondent, Ngubane, has no interest in that issue. Allowing the appeal to be heard involves no prejudice to the respondent. The point in limine raised by Mr. Dlamini appearing on his behalf, is of no direct or substantial interest to him. No harm can be done to him by declining to uphold the point in limine, as we hereby do.

We turn then to the substantive issue before us. For its proper consideration, it is necessary to set out what Section 136 of the Act provides. It reads thus:

"(1) Subject to the provisions of this Act as to the adjournment of a court, every person

committed for trial or sentence whom the Attorney General has decided to prosecute before the High Court shall be brought to trial at the first session of such court for the trial of criminal cases held after the date of his commitment, or else shall be admitted to bail, if thirty-one days has elapsed between such date of commitment and the time of holding such session, unless –

5

1. the court is satisfied that, in consequence of the absence of material evidence or for some other sufficient cause, such trial cannot then be proceeded with without defeating the ends of justice; or

2. before the close of such first session an order has been obtained from the court under Section 136 for his removal for trial elsewhere.

1. If such person is not brought to trial at the first session of such court held after the expiry of six months from the date of his commitment, and has not previously been removed for trial elsewhere, he shall be discharged from his imprisonment for the offence in respect of which he has been committed."

In his judgment Masuku J held that the Director of Public Prosecutions not only initiates criminal proceedings but must also "bring the accused to trial". He deals with the role of the Registrar and then proceeds to say the following:

"It is my view that the responsibility to bring a person to trial rests not with the Registrar but with the DPP. If the DPP has not brought an accused person to trial because no date has been secured, he/she may say so but that is not to be equated to transferring the responsibility to bring a person to trial to the Registrar. It is my view that the question of bringing a person to trial must not be confused with the setting of trial dates which is governed by the provisions of Rule 54 of the Rules of Court, as amended, and not by Section 7 of the High Court Act, 1954, as contended by the Respondents. Section 7 deals with sessions".

He concludes as follows:

"In my view, the action of bringing accused persons to trial remains the preserve of the DPP in terms of Section 136 but is facilitated and made real and efficacious by the Registrar complying with the provisions of Rule 54 as aforesaid. It remains proper in my view to cite the DPP in Section 136 applications even if the DPP's answer is that "we have decided to prosecute him by applying for a summary trial but our only let down is that we have not been allocated a date and time to bring accused for trial". (own emphasis)

6

He accordingly dismissed the contention of the appellant that the DPP had been wrongly joined as a party.

It is our view that the reasoning of the court a quo is unassailable. An accused person who wishes to enforce the provisions of Section 136 against the Crown would clearly perceive the office of the appellant as the responsible entity to be ordered to give him the relief he seeks. This office is the symbol of the authority of the Crown in respect of matters involving the conduct of criminal proceedings.

In this regard the provisions of Section 137 and 138 are instructive. Those sections deal with the position where a trial is transferred from the High Court to another court. They provide that if the trial is not heard at the next criminal session of the latter court, the accused may apply for his discharge from custody. The office of the Registrar is not involved at all in this process but the office of the DPP is. These two sections therefore make it clear that the DPP is indeed the person charged with accountability in the context in casu. That is also the effect

of the decision of Didcott J. in S V LULANE 1976(2) SA 204 (N) at page 208-209 where the learned Judge analyses the purport of provisions of this kind as follows:

"The object of the sub-section is plain. It is devised to meet the situation in which an accused person is detained while he awaits trial and unable to get bail in the ordinary way; and its aim is to limit the period during which someone in that situation must remain in custody. But for its provisions, his captivity would inevitably have lasted until his trial began, whenever that happened to be. I, therefore, think it important to an understanding of the legislation to consider where, from time to time, the power ordinarily lies to determine the date when the trial of such a person starts, and when the period of his pre-trial detention accordingly ends". Didcott J then deals with the next phase of the process as follows:

7

"Until the case gets to court, the power in question rests with the - State as dominus litis. But, as soon as the accused person comes before the Court for any purpose whatsoever the power passes decisively and exclusively to it. If a postponement is then sought, one of the factors which the Court will take into account when it deals with the application is that delay would protract the duration of the pre-trial detention, and that this consequence ought if possible to be avoided or kept within bounds. The Court may grant the application, but insist upon postponing the trial to an early date so that the period of custody is not unduly prolonged. Or the Court may refuse the application altogether, with the result that, when the prosecutor has asked for the remand, he is compelled either to proceed immediately with his case or to withdraw the charge at once and to let the accused person go free. If on the other hand the adjournment is wanted by the defence, the Court will be not indifferent to, but obviously less concerned with the prejudice to the accused person ensuing from a course which he has deliberately chosen".

I have cited these excerpts from Lulane's case because they correctly describe the purport of the procedural protection which the legislature has in mind when enacting provisions of this kind.

As Masuku J points out in the second passage in his judgment referred to above, it is the Registrar who makes the terms of Section 136 "real and efficacious" by complying with the provisions of Rule 54 of the High Court Rules. The relevant provisions of the Rule read as follows:

"CRIMINAL PROCEEDINGS 54.

(1) When an accused has been committed for trial or when the Chief Justice has directed that an accused shall be tried summarily, and an indictment has been lodged with the Registrar, the Registrar shall issue a notice of trial substantially in accordance with Form 24 of the First Schedule and shall cause such notice to be served upon the Director of Public Prosecutions or other prosecutor or his attorney and the accused.

(2) The Director of Public Prosecutions or other prosecutor or his attorney shall deliver to the Registrar the original and two copies of the indictment and, if there is more than one accused, as many additional copies as there are accused persons.

8

(3) The Registrar shall cause a copy of the indictment to be served upon the accused.

(4) When any person is committed for sentence to the court by a Magistrate's court under the provisions of Section 292(1) of the CRIMINAL PROCEDURE AND EVIDENCE ACT, 1938 the Registrar shall set the matter down for hearing as soon as may be possible and shall cause the notice of hearing to be served upon the Director of Public

Prosecutions and the person committed and his attorney, if known to the Registrar, at least ten days before the date for hearing".

These provisions clearly confer obligations on the Registrar which that office must perform and over which the DPP's office has no control.

In order to enable a court that has to deal with a Section 136 application to do so in an informed and meaningful way, it would in our view, be necessary to join the Registrar as a respondent in such an application. The Court will then be able to determine whether the Registrar has carried out the obligations conferred by Section 54(3) of the Rules. That office would also be able to give an account of what other steps have been taken to render the process efficacious. Doing so would also have an impact, albeit it only indirectly, on the speed with which matters are allocated, inter alia by highlighting the extent and impact of delays. Backlogs could be quantified and such information could then be used to justify a request for resources, both human and financial. The real reasons for unjustified delays could then also be more readily identified.

For the above reasons we make the following order:

1. The ruling that the DPP was correctly cited as a respondent in the Section 136 proceedings is confirmed.
2. This Court rules that in all future proceedings for relief in terms of Section 136 of the Act the Registrar shall be cited as a co-respondent with the DPP.

3. There will be no order as to costs.

J .BROWDE

Judge of Appeal

I agree J.H STEYN

Judge of Appeal

I agree P.H. TEBBUTT

Judge of Appeal

DELIVERED IN OPEN COURT ON THE 29th DAY OF NOVEMBER 2004