

IN THE LESOTHO COURT OF APPEAL

In the matter between:

PHAKISO MOLISE

APPELLANT

and

MR JUSTICE MAHAPELA LEHOHLA
ATTORNEY GENERAL
COMMISSIONER OF POLICE

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

HELD AT:
MASERU

CORAM:
STEYN P.
BROWDE AJA.
SHEARER AJA.

JUDGMENT

STEYN P:

The parties in this matter have asked the Court to make the following order by consent:

"CONSENT ORDER OF COURT

By consent, the appellant and the respondents have agreed to settle this application on the following terms:

1. The Court-order dated 27-08-97 is set-aside.
2. CIV/APN/306/97 is remitted to the High Court for adjudication by another judge of the High Court.
3. No order as to costs.

DATED AT MASERU THIS 28TH DAY OF JANUARY, 1998"

We intend to do so. However because the proceedings instituted by the Appellant sought to review the decision of a High Court Judge who had refused an application brought by the Appellant, it is necessary to record very briefly the nature of the relief claimed, and the cause of action. Appellant in his notice of motion filed with this Court sought the following relief:

- "1. Calling upon the first respondent to dispatch, within 14 days after receipt of the Notice of motion, to the registrar, the record of the proceedings in CIV APN:306/97 of the High Court, together with such reasons as he may be required to give or make, and to notify the applicant that he has done so.
2. That the decision of the first respondent dismissing applicant's application be reviewed, corrected and set aside.
3. Directing that applicant's application be dealt with by

another Honourable Judge of the High Court.

4. Directing second and third respondent to pay the costs hereof.
5. Granting applicant further and/or alternative relief as this Honourable Court may deem fit."

This relief was based upon allegations of irregular conduct by the High Court Judge concerned (Lehohla J). It is not necessary to set these out, suffice it to say that should these allegations be established, Appellant would appear to have made out a *prima facie* case that the proceedings were irregular and that in conducting the "hearing" in the manner in which he did, the Appellant may well have been denied his right to a fair trial in terms of the Constitution.

These review proceedings were initiated in reliance upon a judgment of this Court delivered in February last year. A passage in the judgment was construed by Counsel for the Appellant as pronouncing that this Court of Appeal has powers of review i.r.o. the proceedings of the High Court similar to those conferred on the High Court in respect of a Subordinate Court. The decision in point is:

Bolobo and Others v. the D.P.P. C of A (CRI) No.8 of 1996

.....

(unreported)

In this matter, the Court was adjudicating upon an "appeal" against a decision refusing the Appellants' bail. This Court ruled that "there was no appeal from a decision of a High Court refusing bail on an application brought before it". (p.35-36 of the BOLOFO judgment) (See also the decisions of this Court *Motloung and Others v Rex* 1974-1975 L.L.R. 380 at 354 and *Sekhobe Letsie and Others v D.P.P.*; C of a (CRI) No.3 of 1991 delivered on 13 February 1992).

In the *Boloro* case the Court, after the passage cited above went on to say, "However there is a right of review of such proceedings where they are conducted irregularly and offend against the required principles of a fair hearing. These are set out above".

The passage on which Counsel relied for his contention that the *Boloro* judgment delivered by me was not confined to the right to review the *sui generis* proceedings in bail applications, but also extended to the review of all proceedings initiated in the High Court, reads as follows:

"In the absence of a legislative constraint, I can conceive of no reason why the right of this Court to review the proceedings of any tribunal including those of the High Court - should not be unfettered, save by the tried and tested limitations laid down in our common law. Clearly if the decision of a Court adjudicating a

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bail application is e.g. *mala fide*, arbitrary or so grossly unreasonable as to be demonstrative of the fact that the decision-maker had failed to apply his mind, such a decision would be a nullity and capable of challenge and revocation on review."

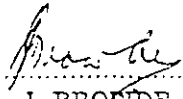
Inasmuch as the passage is capable of a construction that this Court is seized with general powers of review, it needs to be clarified. The Court was dealing only with the review of bail proceedings, where bail had been refused and an application for review was initiated "based on such gross irregularity or illegality as to render the High Court's decision a nullity...." (See *Motloung's case, op cit*). The Court of Appeal Act and the Constitution make it clear that certainly in civil cases, which the present case is, this Court only has appellate jurisdiction and unlike the High Court has no powers of review i.r.o. decisions of the High Court.

I have delivered this judgment to clarify any ambiguity as to the meaning of the passage cited above; which Mr. *Phoofolo*, understandably, interpreted as articulating the assumption of the wider powers referred to above.


An order is granted in terms of the consent order referred to above.


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J. B. STEYN
PRESIDENT OF THE COURT OF
APPEAL

I agree:


.....
J. BROWDE
ACTING JUDGE OF APPEAL

I agree:


.....
D. L. L. SHEARER
ACTING JUDGE OF APPEAL

Delivered at MASERU this 14th day of February, 1998.