

IN THE HIGH COURT OF LESOTHO

In the matter between:

THE SENIOR CLERK OF COURT  
THE ATTORNEY GENERAL

1<sup>ST</sup> APPLICANT  
2<sup>ND</sup> APPLICANT

and

'MATLI HLALELE  
THE MAGISTRATE (Ms Letsie)

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT

**JUDGEMENT**

Delivered by the Honourable Mrs Acting Justice A.M. Hlajoane  
on the 10<sup>th</sup> day of June, 2002

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The Application is for stay of execution and review of proceedings in case No. CC809/2001 of the Maseru Magistrate's Court. That Application before the Magistrate's Court was moved *ex parte* and was for the release of a vehicle. The

prayers sought in this Application are as follows:-

That a *rule nisi* be issued returnable on the day and time to be determined by this Honourable Court, calling upon the Respondents to show cause if any, why an order in the following terms shall not be made:

- (a) That the said Judgment in CC809/01 be reviewed, corrected and set aside.
- (b) Calling upon 2<sup>nd</sup> Respondent to dispatch within 14 days of receipt of the Notice to the Registrar of this Honourable Court, the record of proceedings sought to be reviewed, corrected and/or set aside together with such reasons as it is required or desired to give and notify 2<sup>nd</sup> Applicant that it has done so.
- (c) That the execution of the judgment in CC809/01 by Her worship Mrs Letsie be stayed pending the determination of this matter.
- (d) Directing the Respondents to pay the costs of this Application in the event of opposing same.
- (e) Further and/or alternative relief.

This application is brought mainly on the basis that the Magistrate's Court proceedings were fraught with serious irregularities as the Magistrate is said to have flouted the elementary principles of natural justice in having granted an order *ex-parte* which had a final effect.

The prayers that were granted and made to operate with immediate effect by the Magistrate in CC809/01 were as follows:

- (a) Dispensation of Rules pertaining to notices and service of process on account of urgency.
- (b) Release by the Respondents to the Applicants of a motor vehicle BMW 525i Chassis No. OBL 75564, engine No. 3257727725651 which was in the hands of the Senior Clerk of Court as 1<sup>st</sup> Respondent.

It has been the Applicants' case that though in a form of a *rule nisi*, their submission is that the order of the Magistrate's Court had a final effect. According to the *rule nisi* which issued, Applicants were supposed to appear in Court on the 19<sup>th</sup> September, 2001 and show cause why the order should not be made final. According

to the Applicants there was no cause to be shown as even before they were heard the Court had already ordered the release of the vehicle to the first Respondent herein.

It was said in the case of **Republic Motors vs Lytton Road service Station 1971 (2) S.A.516**, that the Court cannot grant a final order without affording the other party an opportunity to make representation. I wouldn't therefore agree more with the Applicants that in this case there was a negation of the fundamental precept of *audi alteram partem* as the order that the Magistrate granted though in a form of a *rule nisi* but had a final effect. It was a clear denial of that fundamental right.

In the case of '**Masechele Khaketla vs Mamohau Malahleha and Others C of A (CIV) No.18 of 1991**', the Court of Appeal showed that, "the fundamental principles of procedural justice should only be departed from in exceptional cases as where there is a reasonable likelihood that notice to the other party would enable him to defeat or render nugatory the relief sought or precipitate the very harm which the Applicant seeks to avoid". The exceptional circumstances were never shown by the first Respondent and can therefore be taken that in fact they never existed. The vehicle was safely in the hands of the Clerk of Court.

The case of **Lehlohonono Khoboko vs Nthoko Khoboko and 2 others 1985-90 LLR 115**, was an Application which was moved *ex-parte* for return of custody of the minor children to their father, the Applicant, who had been staying with them when the mother was overseas. In that case the Court held that if notice was given to the Respondent, their mother, she might defeat the very purpose of the order by removing the children beyond Applicant's reach. The Court took this as an exceptional circumstance warranting an immediate relief without notice to the other side.

First Respondent is saying that the Applicants have not established a clear right which has been adversely affected by the granting of the Rule. The Applicants on the other side are saying that they have been denied the opportunity to be heard before the order adversely affecting them was granted. They are not claiming any right to the vehicle but the fundamental right to be heard before a final order was granted. Because the Applicants were denied the right to be heard before the vehicle was released to first Respondent this was prejudicial to them because the order that was granted had the final effect. It would have just been an academic exercise to oppose the Application when in fact the vehicle subject matter of the Application was already released to the 1<sup>st</sup> Respondent.

In the results, the Application to set aside the proceeding of the Maseru Magistrate's Court in CC809/01 succeeds with costs.

  
**A.M. HLAJOANE**  
**ACTING JUDGE**

For Applicants: Mr Motsieloa

For Respondents: Mr Putsoane