C of A (CRI) No. 7 of 2005

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

and

KELEBONE MOKHOPI **RESPONDENT**

Held at Maseru on the 6th of October 2005

CORAM
Steyn, P
Smalberger, JA
Kumleben, JA

JUDGMENT

Appeal by the Crown against the reasons given by the High Court – such an appeal cannot be considered or adjudicated upon by the Court of Appeal – its powers are limited to those conferred on it by the Court of Appeal Act 1978 as amended by the Court of Appeal Amendment Act 8 of 1985 – such appeal can only be considered if it is directed against "the judgment" of the High Court not against its reasons for judgment – Appeal struck from the Roll – however comments by the court a quo complained of insupportable.

STEYN, P

In this matter the Director of Public Prosecutions (the appellant) has noted an appeal to this Court arising from proceedings in the High Court. The grounds of appeal read as follows:

"1.

> The trial court erred and misdirected itself in holding that a Magistrate is not expected to depose to any affidavit in a review application where he or she is cited as one of the respondents.
>
> 2.
>
> The trial court erred and misdirected itself in holding that a Magistrate does not have to defend anything as he shall be *functus officio* in a review application where he or she is cited as one of the respondents."

It is to be noted that the appellant does not challenge the decision of the High Court. This was to set aside the proceedings in the lower court as irregular and to refer "the matter to start de novo before a different magistrate".

The nature of the challenge levelled by the appellant is clarified by the heads of argument filed on his behalf. The relevant passage reads as follows:

> "The basis of the present appeal is not whether the Learned Judge *a quo* was right or wrong in setting aside the proceedings as irregular. The basis of the appeal is the reasoning that "**a magistrate is not expected to depose to any affidavit, that he does not have to defend anything as he shall be *functus officio.***"
>
> We advised Counsel for the Crown at the roll call that we would

wish to hear argument as to whether the Court could hear an appeal which was not directed at the decision of the court a quo but against its reasons.

In her argument Ms. Dlangamandla submitted that the appeal was noted because the judgment of the High Court made "a blanket ruling on the position of magistrates in applications of this nature". Such an approach could have a serious and destructive impact on future review proceedings.

In order to understand the nature of the Crown's complaint it is necessary to summarise the relevant proceedings.

The appellant had indicted the respondent (Mokhopi) in the Magistrate's Court on a charge of attempted murder. He was convicted and sentenced to 4 years' imprisonment on the 7th of August 2003. On the 10th of December 2004 he filed a notice of motion in the High Court seeking to review the proceedings in the Magistrate's Court on the grounds that an irregularity had been committed inasmuch as there had been no interpreter present and that he had not understood the charge. Despite opposition by the

Crown the High Court upheld the respondent's complaint and granted the order set out above.

In motivating the Court's decision the learned Judge (Hlajoane J) said the following:

> "This is one of those unfortunate cases where Applicant is applying for review on the basis that there was no interpreter during the proceedings in CR 118/2000. The Applicant was charged and convicted of attempted murder and sentenced to four (4) years Imprisonment.
>
> The Respondents have only filed a notice of intention to oppose but never filed any opposing affidavits. On the face of the charge sheet one M. Makara appears to have been the interpreter, but the Applicant says as a fact that there was no interpreter. I do not see why the Prosecutor or the same interpreter has not filed any affidavit to show that in fact M. Makara was there in Court and was interpreting the proceedings."

She is then recorded as making the comment referred to above; i.e "We cannot expect a magistrate to depose to any affidavit, he does not have to defend anything as he shall be *functus officio*."

The decision by the High Court to make the order setting aside the proceedings is not challenged by the Crown and this Court is therefore not asked to make any order granting definitive relief. What the Court has been asked to do is to adjudicate upon the correctness of the reasoning of the court *a quo* and not upon its

decision.

The question is, does the Court have jurisdiction to do this? i.e. can it hear an appeal which does not call upon it to make any order granting "some definite and distinct relief." See Dickinson and Another v Fisher's Executors 1914 AD 424 at p.427.

The powers of the Court of Appeal are contained in the Court of Appeal Act 1978 as amended by Act No. 8 of 1985.

The relevant empowering provision is set out in section 2 of the Court of Appeal Amendment Act 1985 which reads as follows:

> "(2) If the Director of Public Prosecutions is dissatisfied with any judgment of the High Court on any matter of fact or law, he may appeal against such judgment to the court."

The right of appeal is authorised by this provision if it is directed "against such judgment."

It is, in my view, clear that there can be no appeal against the reasons for a decision of the High Court. See in this regard the reasoning in Constantia Insurance Co Ltd v Nohamba 1986 (3) SA

27(A) at pp. 42-43 where the authorities in support of this approach are collected by Nicholas AJA (as he then was). See more particularly the decision in Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd 1948 SA 353(A) the head-note of which reads as follows:

> "The Court, having *mero motu* raised the point that the notice of appeal was not against the Court's order but against that part of the reasons for judgment in which the Court *a quo* had held that the appellants had acted arbitrarily, struck the appeal off the roll with costs."

See also the reasoning on p. 355 op. cit.

The comment made by Hlajoane J that the magistrate was "*functus officio*" and accordingly not competent to depose to an affidavit was clearly misguided and insupportable and should not serve as a precedent. However, it is not competent for this Court to grant relief in an appeal when the decision of the court *a quo* is not challenged. It follows that the appeal must be struck from the roll.

It is ordered accordingly.

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J.H. STEYN
PRESIDENT

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J.W. SMALBERGER
JUDGE OF APPEAL

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M.E. KUMLEBEN
JUDGE OF APPEAL

Delivered at Maseru on the 20th day of October 2005

For Appellant : Ms. T. Dlangamandla

No appearance for the Respondent.