IN THE COURT OF APPEAL OF LESOTHO

**C of A (CRI) No. 14 of 2005**

In the matter between:

| | |
|---|---|
| T. MAHLAKENG | First Appellant |
| BOKANG LETELE | Second Appellant |
| and | |
| LETŠABISA MAKAMANE | First Respondent |
| LEHLOHONOLO NEPO | Second Respondent |

**C of A (CRI) No.2 of 2006**

In the matter between:

| | |
|---|---|
| T. MAHLAKENG & CO | First Appellant |
| BOKANG LETELE | Second Appellant |
| and | |
| LETŠABISA MAKAMANE | First Respondent |
| LEHLOHONOLO NEPO | Second Respondent |

**C of A (CRI) No.8 of 2006**

In the matter between:

| | |
|---|---|
| T. MAHLAKENG & CO. | First Appellant |
| BOKANG LETELE | Second Appellant |
| and | |
| LEHLOHONOLO NEPO | First Respondent |
| LETŠABISA MAKAMANE | Second Respondent |

**CORAM:**

Ramodibedi, JA
Melunsky, JA
KUMLEBEN, JA

JUDGMENT

*Private prosecution – Section 16 of the Criminal Procedure and Evidence Act 1981 – Provisions thereof mandatory – Failure to comply with the section rendering proceedings a nullity – Guidelines furnished.*

**RAMODIBEDI JA**

[1] What was apparently intended to expose an alleged cover up by police, thus necessitating a private prosecution, has turned into a comedy of errors from the beginning to the end. In this regard it proves convenient to begin this judgment with a chronology of relevant events. But before doing so I desire only to point out that the three appeals in this matter were heard together since they essentially emanate from the same course of events and concern the same parties and generally the same subject matter.

[2] On 30 November 2001, right through to 1 – 4 December 2001, the second appellant who is himself a policeman in the Lesotho Police Service was allegedly assaulted by his colleagues at Police Headquarters and at a place called Mphorosane on an allegation of having committed robbery.

[3] On 3 January 2002, Mr. Mahlakeng for the second appellant wrote to the Commissioner of Police giving a horrific account of the alleged assaults on his client. That letter reads as follows:

> *"RE: HUMILIATION, BRUTAL ASSAULT, INHUMAN TREATMENT AND ATTEMPTED MURDER OF TROOPER BOKANG LETELE IN POLICE CUSTODY*
>
> *With reference to the above-mentioned matter, we are pleased to inform you that we act for and on behalf of Bokang Letele.*
>
> *Our client is a Police Officer presently stationed at the Thetsane Police Station. He was arrested (without warrant) and detained by members of the Lesotho Mounted Police Service Counter Crime Unit on Friday, 30th November, 2001. Whilst in police custody our client was subjected to unheard of humiliation, inhuman treatment and brutal assault. The Police Officers who kept him in detention even attempted to murder him.*

*According to our instructions our client's ordeal in police custody may not have come to your attention, Mr. Commissioner Sir. This belief is based on the following factors and surrounding circumstances:*

> *1) Almost a month later, the culprits have neither been disciplinarily charged nor arrested for these sordid acts of brutal assaults, inhuman treatment and attempted murder.*

*2) All the people who are possible witnesses in these horrifying acts have not been interviewed. Seemingly no investigations have been put in motion.*

*3) One inspector Letšabisa Makamane, (who apparently masterminded the sad episode) is now confronting our client in the street and threatening him with death, should he contemplate initiating Court proceedings in respect of the unlawful assaults meted out to him.*

*We strongly feel, Mr. Commissioner Sir, that this sordid episode should be fully brought to your attention if only to stop inspector Letsabisa Makamane from threatening our client with death. This is not only harassment but unlawful interference.*

*Now, this is what happened to our client whilst in police custody:*

*1. On Friday 30th November 2001 at around 11:00 a.m. he was arrested by members of the Counter Crime Unit (CCU) from his station at Ha Thetsane Police Station and taken to the Police Headquarters. He was detained in the police cell until 5:40 p.m.*

*2. At 5:40 p.m. he was taken out of the police cell and taken to the CCU office within the Headquarters building. In the CCU office he was ordered to put off all his clothes and left stark naked. Then they tied his hands to the back, tied his feet to the hands and started suffocating him with the tyre (sic) tube. When he was dizzy from the repeated suffocation they started assaulting him with a hard object constantly on the kidneys. According to our client, a police officer called Tahleho actually took an effort to establish or locate the exact area of the kidneys and started assaulting him non stop on the kidneys.*

*Mr. Commissioner, surely a kidney is a vital organ and a deliberate and calculated brutal assault on the man's kidneys is nothing short of killing that man! Our client was so humiliated, ill-treated and assaulted until 5:00 a.m. when they decided to take him back to the police cell.*

*These are the police officers and/or people who perpetrated these acts of assault and inhuman treatment:*

*i) Inspector Lets'abisa Makamane*

*ii) Police officer Tahleho*
*iii) A Soldier named Tota*
*iv) A Trooper Nepo*

*3. On Saturday 1st December, 2001 at around 8:00 a.m. they took him to Mphorosane Ha 'Mikia in the Katse Dam Area. On the Mphorosane Bridge they took him out of the vehicle, fastened a rope all over his body in such a manner that he was sort of rolled into a ball. They threw him in the back of the vehicle and drove to one of the highest cliffs in the area. They then rolled him down a tallest cliff and kept him suspended mid air in the rolled up position. They left him suspended there for over half an hour and when he had lost hope of surviving they came and pulled him up.*

*4. After the Katse dam ordeal he was taken back to Maseru amidst intolerable torture and ill-treatment. Back in the CCU he was tortured in the same manner for the whole night.*

*5. In the morning of the 2nd December, 2001 (Sunday) they took him back to the cell. He was kept without food or water since his arrest. He was assaulted again throughout the Sunday night until 4:00 a.m. 3rd December when he was taken back to the cell.*

*6. On Monday, 3rd December 2001 at around 17:00 hrs he was driven to Butha-Buthe.*

*7. He was released on Tuesday 4th December 2001 without any charge having been preferred against him.*

*This is the ordeal of our client Mr. Commissioner, Sir. This is what has been done to a human being by a police service in a democratic country. The Police Service that is supposed to respect and safeguard the constitutional rights of Bokang Letele has instead violated such rights in the most heinous and atrocious of ways! As if this was not enough, Inspector Makamane goes about threatening him with death.*

*On the 4th December, when Bokang Letele was going*

*through his ordeal, the Honourable Mr. Justice Lehohla was delivering a judgment in CIV/T/433/96 a matter in which three Plaintiffs were assaulted by Police while in detention. Little did the Honourable Judge of the High Court know that even when he was delivering judgment, citizens of this Kingdom are (sic) still subjected to such inhuman treatment.*

*On the 5th December, 2001 our client was taken for medical attention. The examinations revealed that:*

*1. His kidneys were badly damaged.*
*2. He was urinating blood.*
*3. His jaw was injured.*

*4. His left arm was broken. He had to be treated with plaster of paris (POP) and even as we address this letter to you he is still wearing P.O.P.*

*Now that Mr. Commissioner you know about our client's ordeal, this is a legitimate demand and expectation of our client:*

*a) That Inspector Lets'abisa Makamane and his group be arrested immediately and be placed before Courts of Law.*

*b) That Inspector Makamane be instructed and ordered in the strongest terms possible not to interfere with Bokang Letele in any manner whatsoever.*

*It may be appropriate at this juncture to refer again to the judgment of Lehohla J. in* ***CIV/T/433/96*** *where he said,*

> "***I would therefore strongly recommend to the Attorney General working in conjunction with the Director of Public Prosecutions to set in motion the machinery of investigation into possible attempted murder of the three Plaintiffs before this Court or assault with intent to do grievous bodily harm. The object of that investigation would best be focused on the so-called investigation team and their Leader."***

*Mr. Commissioner Sir, the recommendations of the Learned Judge would apply with equal force here.*

*Thank you.*
*Yours faithfully,*

*Signed*
*T. MAHLAKENG & CO".*

[4] On 1 March 2002, the Assistant Commissioner of Police wrote to T. Mahlakeng & Co:

"***RE: THREATS TO TROOPER BOKANG LETELE***

*Your letters dated 3rd January, 2002 and 22nd February 2002 bear reference.*

*We are sorry that your first letter was not replied at an earliest opportunity. The reason is that we wanted to meet the complainant as the story was news to the Office of Commissioner of Police. We failed to meet him because he was on sick leave and thereafter took another leave.*

*We are still looking forward to meeting him in order to hear from him what actually happened so that an appropriate action may be taken.*

*The Office of the Commissioner of Police does not in an iota condone assaults that may be committed by Police upon any person. The Officer concerned has been instructed to cease to threaten the complainant if ever he is doing it. We shall as soon as possible revert to you to update you about the progress.*

*Thank you.*

*Yours faithfully,*

***ASSISTANT COMMISSIONER***
***OF POLICE CRIME."***

[5] On 13 May 2005, which was 3½ years after the

alleged assault, the Director of Public Prosecutions issued a *nolle prosequi* certificate thus paving the way for the second appellant to launch a private prosecution against the alleged culprits. Because of the allegation of a police cover up in the matter, it is important to reproduce the certificate of the learned Director of Public Prosecutions as it tells the whole story about the police refusal to cooperate in bringing the alleged culprits to book. The certificate reads:

> "***NOLLE PROSEQUI CERTIFICATE***
>
> ***WHEREAS***
>
> *On 3rd January 2002, Bokang Letele, through his attorneys, T. Mahlakeng & Co., has written to the Commissioner of Police demanding and expecting, inter alia,*
>
> > "***(a) That Inspector Letšabisa Makamane and his group be arrested immediately and be placed before courts of Law,"***
>
> *This demand and expectation found on the contents of the above letter.*

***AND WHEREAS***

*On 25th September, 2002, Bokang Letele, through his said attorneys, directly wrote to me requesting that I indicate whether I decline to prosecute.*

***WHEREAS***

*On 14th October 2002, I had written to Assistant Commissioner of Police requesting to be briefed about Bokang Letele's matter above, copying the savingram to Bokang Letele's attorneys hoping that it would be apparent to them as lawyers that I needed either a police docket in the matter and/or statements of witnesses and/or affidavits and/or other documentary information on which a charge is ordinarily based.*

***WHEREAS***

*After having been served with CIV/APN/548/2004 seeking to compel me to file a* ***nolle prosequi*** *certificate in the above matter, I was still in the same position as before that the documentary information referred to above was not available to me to enable me to decide whether or not to prosecute, and Bokang Letele's attorneys were again accordingly informed of the* ***status quo****.*

***AND WHEREAS***

*To-date I have no information whatsoever of the nature above, save contents of the said letter of 3rd January, 2002, written by Bokang Letele's attorneys.*

***NOW THEREFORE***

*Pursuant to absence of any information whatsoever, in the form of docket/s, witnesses' statements and/or affidavits and/or any other documentary information on the basis of which I could validly exercise a discretion whether or not to prosecute; and further, pursuant to the final order of the court in CIV/APN/548/2004, ordering me to issue a* ***nolle***

***prosequi*** *certificate,*

*I, LEABA LINUS THETSANE, Director of Public Prosecutions acting in terms of section 99 (2) (a) read with subsection (4) thereof and section 98 (1) (b), and further acting in terms of section 5 (a), section 12 and section 15 (2) of the Criminal Procedure and Evidence Act No.7 of 1981*

*Do hereby, as it is done, decline to prosecute at the public instance, thereby enabling Bokang Letele and/or his attorneys to prosecute in any court competent to try the alleged offence against him, the persons alleged to have committed it.*

*THUS GRANTED UNDER MY HAND AT MASERU THIS 13th DAY OF MAY, 2005.*

*L.L. THETSANE*
*DIRECTOR OF PUBLIC PROSECUTIONS".*

[6] On 1 July 2005, two of the suspects, Letšabisa Makamane and Lehlohonolo Nepo, appeared before Maseru Magistrate's Court on summons. The learned Magistrate immediately remanded them in custody notwithstanding their written application for release on bail filed on the same day. I pause there to observe that the first comedy of errors committed by the respondents was to cite Mahlakeng & Co as the respondent in the bail application despite the fact that that firm of attorneys was not the private

prosecutor and therefore had no *locus standi* in the matter. Quite clearly, the private prosecutor was the appellant represented by Mr. Mahlakeng. Incredibly, the courts below failed to pick up this gross irregularity.

[7] On 25 July 2005, a charge sheet was filed with the Clerk of Court for Maseru Magistrate Court in which Letšabisa Makamane, Tebello Mohau Tahleho, Sehloho Paul Tota and Lehlohonolo Nepo were formally charged with four counts relating to the alleged assault on the second appellant. These counts were two of attempted murder, two of assault with intent to do grievous bodily harm and one of assault common.

[8] On the same date, namely, 25 July 2005,

Lehlohonolo Nepo and Letšabisa Makamane filed an application in the High Court for review to set aside their criminal proceedings in question on the ground of “illegality”. The respondents cited therein were T. Mahlakeng, Bokang Letele and His Worship, Magistrate Kolobe. I pause again to observe that T. Mahlakeng was, in perpetuation of the comedy of errors referred to above, incorrectly cited as a party. The alleged illegality complained of on the other hand was that the suspects had been remanded in custody despite the fact that they had honoured a summons and that the private prosecutor had not filed security in terms of Section 16 of the Criminal Procedure and Evidence Act 1981. A further complaint by the respondents was that the charge sheet contained the words such as “the King versus…” thus suggesting a public prosecution.

There is, in my view, substance in this complaint. It will be observed, however, that the very first paragraph of the charge sheet contains the following statement: “The Private Prosecutor in this matter who is prosecuting for and/or on behalf of Bokang Letele pursuant to a Nolle Prosequi certificate issued by the Director of Prosecutions presents and informs the court…” The names of the accused, including the respondents, are then recorded as well as the counts they are charged with. Be that as it may, the charge sheet is incorrectly signed by Mahlakeng & Co as “Private Prosecutors for the Complainant”.

[9] Counsel submitted that there is no precedent for private prosecutions in this country. My own researches could not reveal any. It is therefore appropriate to pause there to lay down the following

guidelines:-

(1) the prosecution must be in the name of the private prosecutor. Accordingly, the word “Rex” or “King” must not be used in the charge sheet.

(2) The charge sheet must be signed by the private prosecutor or his attorney on behalf of the private prosecutor himself.

(3) Before proceeding with the prosecution, the private prosecutor must –

(a) apply to the appropriate court for directions as to security within the provisions of section 16(b) of the Act;

(b) if the prosecution is in the High Court, deposit the sum of one hundred maloti or enter into a recognizance in that amount with sufficient sureties in the sum of fifty maloti each (to be approved by the High Court) as security that he will prosecute the charge against the accused to its conclusion without delay.

[10] To return to the chronology of events, on 28 July 2005, the appellants duly filed a notice of intention to oppose without an answering affidavit. I should add that the appellants' failure to file an affidavit weighed heavily with the High Court in ultimately ruling against them. Hence on 3 October 2005, that court granted the respondents' review application by default.

[11] I have already pointed to the impropriety of citing Mr. Mahlakeng as a party both in the bail application and in the review application respectively. It is indeed elementary practice that, generally speaking, a legal representative has no *locus standi* to be sued in the place of his client. He is simply not a party to the proceedings. This is more so since a suit such as in *casu* has cost implications. Indeed it

is important to note that in the process the court *a quo* saddled Mr. Mahlakeng with 80% of the costs "*de bonis propriis*".

[12] On 1 August 2005, the respondents were released on bail. On 13 January 2006, they were excused by the High Court from attending remands. This is the subject matter of the appeal in C of A (CRI) No.2 of 2006.

[13] On 7 October 2005, the appellants filed an application in the High Court for rescission of the review order by "default". This is the subject matter of the appeal in C of A (CRI) No. 8 of 2006.

[14] Yet on 11 October 2005, and while the rescission application referred to in the preceding paragraph

was still pending, the appellants filed a notice of appeal, C of A (CRI) No. 14 of 2005, against the review order in question. Undoubtedly, the "appeal" in question would ordinarily be irregular and fall to be struck off the roll. We cannot have subsisting side by side an appeal and an application for rescission between the same parties and on virtually the same subject matter. In the light of the conclusion reached hereunder it is, however, not necessary to follow this route.

**Section 16 of the Criminal Procedure and Evidence Act 1981**

[15] In my view, the appeals before us turn upon a proper construction of Section 16 of the Criminal Procedure and Evidence Act 1981 ("the Act"). It reads as follows:

"16. No private party shall take any criminal proceedings under this Part until he –

(a) has, if the prosecution is in the High Court, deposited the sum of 100 maloti or entered into a recognizance in the sum of 100 with sufficient sureties in the sum of 50 maloti each (to be approved by the High Court) as security that he will prosecute the charge against the accused to a conclusion without delay and

(b) has in any prosecution given security in such amount and in such manner as the court may direct that he will pay the accused such costs incurred by him in respect of his defence to the charge, as the court before which the case is tried may order him to pay."

[16] At the outset, Mr. Mahlakeng very fairly and properly conceded that no security for costs had been given in terms of Section 16 (b). However, he did produce a receipt dated 25 November 2005 which indicated that "security for costs in CRI/T/194/05" had been paid in an amount of one hundred maloti. The question that immediately arises then is whether this was proper compliance with

Section 16. As is evident from the chronology of events set out above, by November 2005 a lot of water had already flowed under the bridge. The respondents had by that date already been (1) summonsed to appear before the Magistrate's court, (2) charged with various counts, (3) remanded in custody, (4) granted bail by the High Court leading up to C of A (CRI) No.2 of 2006 and (5) proceedings up to that stage had already been reviewed and set aside by the High Court.

[17] Mr. Mahlakeng sought to meet the problem posed in the preceding paragraph by submitting, as he did, that proceedings only commence when a plea is taken and that this would only occur when the respondents appeared in the High Court for that purpose. He emphasized that it had always been

the intention of the private prosecutor to commence the trial in the High Court and not before the Magistrate's court. I should say that I find the latter submission rather puzzling when one has regard to Section 59 of the Subordinate Courts Order 1988. That section confers jurisdiction on subordinate courts in the following terms:

> *"59. The court shall have jurisdiction over all offences except treason, murder and sedition."*

As I read the section, attempted murder is not one of the offences excluded from the Subordinate Courts' jurisdiction.

[18] As I see it, Mr. Mahlakeng's submission is untenable for at least three reasons:

(1) Section 92 of the Act provides in no uncertain terms that, except as provided for by Section 144 (which in

turn deals with summary trials), *"no person shall be tried in the High Court for any offence unless he has been previously committed for trial by a Magistrate, whether or not the committal was on the direction of the Director of Public Prosecutions under the powers conferred by section 90 (1) (c), for or in respect of the offence charged in the indictment, but in any case in which the Director of Public Prosecutions has declined to prosecute, the High Court may, upon the application of any private prosecutor referred to in sections 12 and 13, direct any magistrate to take a preparatory examination against the person accused".*

It is common cause that respondents were not committed by a Magistrate to the High Court for trial.

(2) Secondly, as is evident from Section 16 (b) of the Act, security for costs is directed by the court before which the case is tried. This admittedly did not happen. No application was ever made to court to give directions as to security.

(3) The third difficulty concerns the words "criminal proceedings" appearing in Section 16 of the Act. At what stage do such proceedings commence? At the outset, I am bound to say that to give these words the restrictive meaning suggested by Mr. Mahlakeng in paragraph [17] above would no doubt work injustice. Such a meaning would fail to protect accused persons affected by pretrial proceedings such as those mentioned in paragraph [16] above. In this regard, it requires to be stressed

> that the whole scheme and object of Section 16 of the Act is to ensure that accused persons are able to recoup their costs in the event of an unsuccessful private prosecution and to guard against busybodies who bring vexatious and unfounded prosecutions. It is for that reason that security for costs is a mandatory requirement as the section in question shows. Viewed in this context, the words "criminal proceedings" in Section 16 of the Act must, in my view, be construed to include pretrial proceedings such as those mentioned in paragraph [16] above. See S v Thomas and Another 1978 (1) SA 329 (A) at 334.

[19] Now, the conclusion that security for costs is a mandatory requirement in terms of Section 16 of the Act disposes of the matter. What it boils down to is that the proceedings in all of the appeals before us were a nullity right from the outset.

[20] It remains then to deal with the question of costs. In this regard I approach the matter on the

basis that each party was at fault in pursuing proceedings which were a nullity from the outset. The appellants, on the one hand, should have filed security as provided for in Section 16 (b) of the Act but they did not. The respondents, on the other hand, did not demand security. Furthermore, they wrongfully cited Mr. Mahlakeng as a party in their review application yet he is admittedly not a party. It seems fair in these circumstances that each party bears its own costs in this Court and in the courts below.

[21] In the result the following order is made:

(1) The proceedings leading up to all the three appeals before this Court in C of A (CRI) No. 14, C of A (CRI) No. 2/06 and C of A (CRI) No. 8/06 are hereby declared a nullity.

(2) The private prosecutor is free to institute fresh criminal proceedings against the surviving suspects, if he so wishes.

(3) All the orders of the High Court are set aside.

(4) Each party shall bear its own costs both in this Court and in the courts below.

_____

M.M. Ramodibedi
JUSTICE OF APPEAL

I agree: _____
L. Melunsky
JUSTICE OF APPEAL

I agree: _____
M. Kumleben
JUSTICE OF APPEAL

Delivered at Maseru this 20th day of October 2006

**For Appellants in**
**C of A (CRI) Nos. 2/06 and 8/06: Mr. T. Mahlakeng**

**For Appellants in**
**C of A (CRI) No. 14/05 : Mr. S.I. Qobolo**

**For Respondents : Mr. E.H. Phoofolo**