IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.14/2014

In the matter between

MONYANE MOLELEKI	**1ST APPELLANT**
NTLHOI MOTSAMAI	**2ND APPELLANT**

And

THE MAGISTRATE, MASERU	**1ST RESPONDENT**
PUBLIC PROSECUTOR – MR KHAILE	**2ND RESPONDENT**
COMMISSIONER OF POLICE	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4THRESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS	**5TH RESPONDENT**

CORAM : SCOTT, AP
HOWIE, JA
THRING, JA

HEARD : 13 OCTOBER 2014

DELIVERED : 24 OCTOBER 2014

SUMMARY

Issue of warrant of arrest in terms of section 110 of the Criminal Procedure and Evidence Act – interpretation of section – no need to afford accused a hearing before issue of warrant.

JUDGMENT

SCOTT AP

[1] The first appellant is a Member of Parliament and former Cabinet Minister. On 21 June 2013 he appeared in the Magistrates' Court, Maseru, together with four co-accused, charged with one count of fraud involving M15 000 000 one count of corruption involving the same amount and one count, preferred against him alone, of corruption, alternatively contravening sections 36 (1) and 36 (2) of the Finance order 1988. His appearance had not been preceded by an arrest. He and his co-accused had been telephonically warned by the police to appear on that day for a formal remand. His counsel applied for

bail which was not opposed. Bail was fixed by the presiding magistrate, the first respondent, at M100 000. She directed, however, that the bail could be met by the first appellant finding a person to stand surety for that amount. The second appellant, also a Member of Parliament, stood surety and pledged her motor car, a 2003 model Mercedez Benz E240 Compressor, as security. Its value was determined at M117 500 on the strength of an insurance policy produced by the second appellant which reflected that amount to be the sum for which the vehicle was insured.

[2] A week later, on 1 July 2013, the prosecutor, the second respondent, approached the magistrate in chambers contending that the security was insufficient. The record of the proceedings kept by the magistrate indicates that the prosecutor disclosed that he had documentary evidence to the effect that the true value of the vehicle was M4000, not M117 500 as supposed. The magistrate authorised warrants of arrest for both appellants. She recorded her reasons for doing so as follows.

"The Court is quite aware that where it mero motu considers or where there is objection submitted before it as to insufficiency of surety, a warrant of arrest has to be issued against the accused so as to find sufficient surety.

The court believes that the right procedure is to issue a warrant against both accused and his surety so as to give them an opportunity to answer the objection before it makes its decision as to sufficiency or otherwise."

[3] The warrants were completed in ink on printed forms. The forms were largely inappropriate for the situation in question. They spoke, for example, of a reasonable suspicion of the appellants having on *"1 July 2013"* committed the crime of *"insufficiency of surety"*, the latter words being inserted in ink. There is, of course, no such crime, nor, if there were, could it have been committed on 1 July 2013. Similarly, the peace officers to whom the warrants were addressed were commanded *"immediately"*, on sight of the named person to bring that person before the Magistrate's Court.

However, at the foot of the page in what appears to be the handwriting of the magistrate is an endorsement in large block letters reading: *"TO BE BROUGHT TO COURT ON 4TH JULY 2013"*.

[4] In the event, the appellants were not arrested. On the morning of 3 July 2013 Inspector Mafatle went to the home of the first appellant, showed him the warrant, and informed him that he was required to come to court the next day. The second appellant made affidavits in support of both the first appellant's founding and replying affidavits. In neither does she say that she was arrested, which she would most certainly have said had that been the case. It may safely be assumed, therefore, that the second appellant was told to come to court in the same way as the first appellant.

[5] The reaction of the appellants was not to go to the Magistrates' Court the next day but instead on the same day, i.e. 3 July 2013, to approach the High Court as a matter of urgency for an order reviewing and correcting the *"proceedings and the order/warrant"* of 1 July 2013 in the Magistrates' Court, together with immediate

interim relief. A rule nisi was granted returnable on 12 August 2013. Answering affidavits were filed and in due course the application was heard by **Monapathi J** who dismissed it with no order as to costs. Regrettably, yet again, no written judgment has been forthcoming.

[6] The principal ground of review relied upon by the appellants was that the proceedings before the magistrate on 1 July 2013 and the issue of the warrants of arrest had taken place behind their backs in breach of the *audi alteram partem* rule and accordingly amounted to a violation of their constitutional right to a hearing. In this Court we were referred to numerous authorities going back as far as the Bible in support of this basic rule. However, as pointed out by the magistrate in her answering affidavit, no adverse decision regarding the sufficiency or otherwise of the security was made on 1 July 2013 and the purpose of issuing the warrants of arrest was to give the appellants the opportunity of answering the prosecutor's objection to the security provided, not to deny them that opportunity. She noted that summoning them by means of warrants of arrest for this purpose was standard practice as outlined by law. In this regard she clearly had in mind the provisions of

section 110 of the Criminal Procedure and Evidence Act 1981 which read:-

> *"If-*
>
> *(a) through mistake, fraud or otherwise insufficient sureties have been accepted; or*
>
> *(b) sureties afterwards become insufficient, the judicial officer granting the bail may issue a warrant of arrest directing that the accused be brought before him and may order him to find sufficient sureties and on his failing to do so, may commit him to prison."*

[7] The section is clumsily drafted. In the first place only the words *"surety afterwards become insufficient"* should have been included in paragraph (b) as the remainder applies equally to paragraph (a). More importantly, it seems to me that unless the words *"reasonable grounds for believing"* are read into the section following the word *"if"*, as the magistrate apparently did, the section makes no sense. What is clearly contemplated is that the accused be afforded a hearing before being ordered to *"find sufficient sureties"*.

That is the reason why the accused is to be brought before the magistrate following the issue of a warrant. But if a hearing were afforded to the accused before the issue of the warrant (and there would have to be a hearing if at that stage a final decision as to insufficiency were made) there would be no need to issue the warrant as the accused would already be before the magistrate who could then make an appropriate order. The sole object of the warrant is therefore to bring the accused before the magistrate to be heard on the issue of the sufficiency or otherwise of the sureties provided. Indeed, warrants of arrest/apprehension are habitually issued on the grounds of *"reasonable suspicion"* or *"reasonable belief"* without the person whose arrest is sought being given a hearing. In my view this is how section 110 must be construed. It follows that the warrant for the arrest of the first appellant was lawfully issued.

[8] The position of the second appellant is different. She is not an accused and the section is not applicable to her. A warrant should accordingly not have been issued against her. Admittedly, her attendance at court would have been necessary given the nature of the inquiry but it would have been up to the first appellant to procure

her attendance so as to avoid an unnecessary postponement. Accepting, as I have, that the warrant for the second appellant's arrest was not executed and she was simply warned to come to court on 4 July 2013, she nonetheless remained notionally in jeopardy of arrest until such time as the warrant was set aside. In the circumstances, she was entitled, in my view, to seek an order, as she did, for the setting aside of the warrant.

[9] The appellants also sought to place a sinister interpretation on the magistrate's endorsement on the warrants that they be brought to court on 4 July 2013. It was suggested that her motive was to have them immediately arrested and then kept in custody until 4 July 2013 when they would be brought before court. The magistrate denied that this is what was intended. She explained that 4 July was the only day on which she would be available. The date of hearing is not normally stated on a warrant. It is usually determined only after the accused has been arrested. There was accordingly no need for the magistrate in the present case to have specified the date on which she would hear the matter. Her reason for doing so was obvious; it was to inform the peace officers tasked with executing the warrants of the

day on which the appellants were required to be in court so that, if it was considered unnecessary to arrest them, they could be informed accordingly. Significantly, this is how the warrants were understand by the police. Neither appellant was arrested; both were merely told to come to court on 4 July 2013. The suggestion of mala fides on the part of the magistrate is without substance.

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

(1) The appeal of the first appellant is dismissed with costs.

(2) The appeal of the second appellant is upheld with costs. The order of the Court a quo insofar as it relates to the second appellant is set aside and the following substituted in its stead:

"The warrant for the arrest of the second applicant dated 1 July 2013, if still capable of being executed, is set aside"

D.G. SCOTT
ACTING PRESIDENT

I agree:

C.T. HOWIE
JUSTICE OF APPEAL

I agree:

W.G. THRING
JUSTICE OF APPEAL

For the appellants : S. Phafane KC and D. Setlojoane

For the first respondent : K.J. Nthontho