IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO 60/2015**
CIV/ANP/128/2014

IN THE MATTER BETWEEN**:**

PS 2031 INVESTMENT CC t/a KALEMA TECH & HIRE **APPELLANT**

AND

METSI A PULA FLEET MANAGEMENT AGENCY (PTY) LTD t/a METSI A PULA CIVIL PLANT HIRE RENTALS **RESPONDENT**

CORAM: FARLAM - AP
MOKGORO AJA
CHINHENGO AJA

Date of Hearing: 9 April 2016
Date of Judgment: 29 April 2016

SUMMARY

Interim order with final effect - whether reviewable before proceedings in court of first instance terminated; Citation of Attorney General and Clerk of Court where decision of Magistrate acting in judicial capacity under review – not necessary. Denial of costs to successful party for disobeying court order against which party succeeded on appeal.

CHINHENGO AJA

1. The appellant is a South African company and therefore a *peregrinus* in this jurisdiction. The respondent is a Lesotho company and therefore an *incola*. The two companies entered into a contract of hire of plant and equipment ("the Contract") sometime in 2013, it seems. The conclusion of the Contract is common cause between the parties but the Contract itself does not bear the date of its execution. The earliest tax invoice attached to the appellant's originating papers is dated 29 July 2013.

2. Pursuant to the Contract the respondent hired the appellant's CAT 320 CXL Excavator, CATTERPILLAR 422 BACKHOE LOADER and CATTERPILLAR BACKHOE LOADER ("the equipment"). In terms of clause 18 of the Contract the parties submitted to the jurisdiction of the magistrate's court for the resolution of any claim that might arise out of the Contract even if the amount thereof

exceeded the monetary jurisdiction of that court. By way of an urgent *ex parte* application lodged on 20 March 2014, the appellant obtained a rule *nisi* from the magistrate's court on the same day. The rule *nisi* is in the following terms –

> " 1. The Rules of this honourable Court pertaining to service and notice to be dispensed with and the matter be heard as of urgency.
>
> 2. That Rule nisi be and is hereby issued returnable on 02nd day of April 2014 at 9. 30 am in the forenoon or soon thereafter calling upon the Respondent to show cause, if any, why:-
>
> a) The Applicant cannot be ordered to attach and remove the following vehicles from the Respondent's site on the 20th March 2014 pending the final determination of these proceedings.
>
> (aa) CATTERPILLAR, 422E BACKHOE LOADER
> (bb) CATTERPILLAR, BACKHOE
> (cc) CAT 320 CXL EXCAVATOR
>
> b) Respondent shall not be ordered to desist from unlawfully interfering with the applicant's removal

of the property mentioned in prayer 2(a) above pending the determination of these proceedings.

c) Respondent herein shall not be ordered to pay the Respondent (sic) an outstanding amount of M 580,748.40 due and payable as rentals.

3. The Respondent herein shall not be directed to pay the costs of this application.

4. Granting the applicant such further and/or alternative relief

5. That prayers 1, 2 and 2(a) and (b) operate with immediate effect as interim orders pending the final determination of this matter."

3. The rule *nisi* has three aspects that have given rise to this appeal. It was issued *ex parte* i.e., without notice to the other party. It was heard as an urgent application. And it authorised the removal of the equipment without the other party being heard.

4. In the founding affidavit the appellant alleged that the respondent was in arrears on rentals of the equipment in the sum of M 580 784.40 and had refused or neglected to

pay the said sum despite demand. At paragraph 7 of the affidavit the appellant complained:

> "I respectfully submit that the respondents are in wilful default of payments as agreed, thus the said leased properties are unlawfully and wrongfully in possession of the Respondents herein. Consequently, the applicant experiences loss of business while the Respondents are failing to give back my properties now that they have failed dismally to pay rentals owed to the applicant."

5. The reasons that the appellant put forward for proceeding on urgency were that the respondent was likely to remove the equipment to some place unknown to it or to sell or otherwise dispose of the equipment. This, it averred, had been confirmed at a meeting held between the parties on 14 March 2014. At that meeting, so the appellant alleged, the respondent advised that it had declared to the Lesotho Revenue Authority that the equipment was its own and further that removal of the equipment would embarrass its management because they had given the neighbourhood to believe that the respondent owned the equipment. The appellant did not give any reason for proceeding without notice to the respondent. I assume that it was of the view that the reasons for urgency also explained the *ex parte*

procedure adopted. Noticeably the appellant did not allege that it had terminated the Contract.

6. The appellant served the order upon the respondent on 21 March 2014 and attempted to execute it on the same day. It met strong resistance from the respondent's officers, in particular its director, Mothopula Emile Seala. This prompted the appellant to apply to the court, again on an urgent basis and without notice to the respondent for a rule *nisi* calling upon Seala, now cited as the 2nd respondent "to purge his contemptuous act of unlawfully preventing the removal (of the equipment) on 20th March 2014"; directing police officers at Pitso Ground Police station to render assistance to the appellant in removing the equipment; declaring that any further resistance by Seala to the removal of the equipment constituted contempt of court; and calling upon Seala to show cause why he should not be arrested and committed to prison for six months for contempt of court.

7. Upon receipt of the first order the respondent lodged an urgent application to the court for a rule *nisi* coupled with interim relief for a stay of execution of the order and for leave to file opposing papers. In the founding affidavit the respondent pointed out that the order issued by the court was wrong in that it had final effect in respect of the

removal of the equipment; that the appellant, a *peregrinus*, had not furnished security for costs; that the order should not have been granted on urgency; and that although the appellant had been authorised to execute the order only on a particular day, it attempted and continued to attempt to do so on later dates. The respondent also alleged that the court did not have the monetary jurisdiction to entertain the claim in the sum claimed by the appellants. The magistrate refused to hear the respondent's application on the ground that he had to purge his contempt first. It however heard the appellant's second application lodged about the same time that the respondent applied for a stay of the first order and granted another rule *nisi* returnable on 2 April 2014, as detailed in paragraph 6 above.

8. Faced with these difficulties the respondent applied to the High Court on urgency for a stay of execution of the orders issued by the magistrate's court and for a review of the decision of that court in that regard. It cited the magistrate, the appellant and the messenger of court as 1st, 2nd and 3rd respondents, respectively. This application for stay and review came before Peete J who issued a rule *nisi* calling upon the respondents to show cause on the return day why the execution of the magistrate's decisions of 20 and 24 March 2014 should not be stayed and the

decision of 20 March should not be reviewed and set aside. He granted interim relief staying the magistrate's decisions and ordered the magistrate to submit the record of proceedings to the High Court within 14 days of the order. Hlajoane J finally heard the matter on 27 October 2014 and handed down her decision just over a year later on 5 September 2015. The learned judge set aside the magistrate's decision as irregular and ordered the appellant to pay the costs of the review application. It is against that decision of Hlajoane J that the appellant has now appealed to this Court.

9. The respondent raised six issues before the High Court. These are – (a) the order authorising the appellant to attach and remove the equipment was final in effect and should not have been granted as interim relief; (b) the appellant had not furnished security for costs, it being a *peregrinus*; (c) the application was not urgent and should not have been made *ex parte*; (d) the order required the appellant to execute it only on 20 March 2014 and yet it attempted to execute it after that day; (e) the magistrate had no jurisdiction because the amount of the claim exceeded its monetary jurisdiction, and (f) the magistrate acted improperly by refusing to hear the respondent's application for a stay of execution on the ground that the respondent was in contempt of court when the respondent

had not, as a matter of fact, been found to be in contempt. In this connection the respondent also complained that the magistrate had misdirected himself in entertaining the appellant's application pursuant to which he granted the second order requiring the respondent to purge his contempt.

10. In May 2014, long before the review application was heard, the respondent applied to the High Court for an order that the appellant should furnish security for costs in the sum of R 100 000.00. To be noted is that no such application had been made in the magistrate's court even though the Subordinate Court rules provide for a request for security of costs to be made to that court.

11. The appellant contested all the issues raised by the respondent. It averred that the issue of jurisdiction was covered by clause 18 of the Contract. On this point the appellant was correct because clause 18 provides that-

> "The parties consent to the jurisdiction of the Magistrate's Court in regard to any claim arising out of this AGREEMENT, notwithstanding that the amount in question may exceed the jurisdiction of the Magistrate's Court."

12. The appellant's grounds of appeal against the High Court judgment are that the court erred in dismissing preliminary objections raised by the respondent in regard to the respondent's failure to cite the clerk of the magistrate's court and the Attorney-General in the review application, in holding that there was nothing wrong in bringing the review application before the rule *nisi* was confirmed or discharged, as the case may be; in holding that the interim relief granted by the magistrate had a final effect; in allowing the respondent's application in default of providing security for costs and, finally, in granting an order of costs against the respondent.

13. Another of the appellant's contentions in the High Court was that the respondent had taken a piecemeal approach to the proceedings by lodging the review application before the applications in the magistrate's court had been finalised. In this connection it contended that the respondent should have anticipated the return day of the rule *nisi* instead of lodging the review application.

14. Hlajoane J dealt short shrift with some of the issues before her on appeal. For instance the failure by appellant to cite the clerk of court and the Attorney General as

parties to the review application and the provision of security for costs.

15. In respect of the non-joinder of the clerk of court she stated that the magistrate and not the clerk of court, had been ordered to submit the record of proceedings and that since the record had been submitted by the time of the hearing anyway, there was no need to deal with the matter.

16. In respect of the non-joinder of the Attorney General she expressed her agreement with the appellant's position that the Attorney General should have been cited as a representative of the Government in civil proceedings but shied away from deciding what, in the circumstances of the case before her, should be the effect of that omission.

17. On security for costs she merely stated that the court had the discretion whether to stay the proceedings until security for costs is provided or to dismiss the case. She fell short of indicating in what manner she was exercising her discretion. It can be assumed that she exercised her discretion and neither stayed the proceedings nor dismissed them because she went ahead and decided the matter on its merits. The learned judge was, no doubt, alive to the fact that the appellant had raised a number of

issues but she, nonetheless, decided to deal only with two of them. At paragraph [16] of the judgment she said-

> "I chose to pick one or two issues to be decided, in particular the ones for interim order having final effect and 2nd respondent having failed to pay security for costs."

She however dealt exhaustively with the first issue only and did not come to any definitive conclusion on the second.

18. In regard to the alleged piecemeal approach, the judge referred with approval to local authorities dealing with interim orders and appeals and applications for review therefrom before the matters in the court below are finalised. She accepted the principle in *Director of Public Prosecutions v Her Worship Mrs Taole & Others C of A (CRI) No 9 of 2011 and Director of Public Prosecutions v Moliehi Nthunya & 26 Others CRI/APN/122/2004***,** that proceedings in lower courts should not be taken on review or appeal in a piecemeal fashion unless the particular circumstances of the case justify such a course. She held that "the order granted by the magistrate in the interim had a final effect as the machinery had to be removed from the court's jurisdiction" and that that constituted special

circumstances justifying an approach to the High Court before the applications in the magistrate's court were finalised and further justifying a departure from the generally accepted principle set out in *Her Worship Mrs Taole*, *supra*.

19. In *Her Worship Mrs Taole* Farlam JA (as he then was) had this to say about appeals from uncompleted proceedings, albeit he was dealing with a criminal matter:

> "This Court has on at least two occasions given its approval to the principle that criminal trials should not as a general rule be disposed of piecemeal. In *Mda and Another v DPP* LAC (2000-2004) the Court said (at 957 C-E):
>
> > '*Wahlhaus* [*Wahlhaus and Others v Additional Magistrate Johannesburg and Another* 1959 (3) SA 113(A) and *Adams* [*R v Adams and Others* 1959 (3) SA 753 (A)] and numerous subsequent decisions in the South African courts have held that it is not in the interests of justice to exercise any power 'upon the unterminated course of criminal proceedings' except 'in rare cases where grave injustice might otherwise result or when justice might not by other means

be attained' (*Wahlhaus*). In *Adams* the Court of Appeal held that as a matter of policy the courts have acted upon the general principle that it would be both inconvenient and undesirable to hear appeals piecemeal and have declined to do so except where unusual circumstances called for such a procedure (per Steyn CJ at p 763). The authorities on this point are legion'.

See also *Millenium Travel and Tours and Others v DPP* C of A (CRI) no 15 of 2006 (as yet unreported) at p 10 (paragraph 12) [now reported LAC (2007-2008) 27 at 32]."

20. Hlajoane J then examined the law in regard to interim orders having final effect. She correctly held that interim orders with final effect may be taken on review or on appeal even before the main proceedings are terminated. In this connection she referred to *Private Sector Foundation v Thabo Qhesi* C of A (CIV) no 6 of 2013 and *BP Lesotho (Pty) Ltd v Moloi & Another* LAC (2005-2006) 429 as relevant and applicable authorities. Consequently she came to the decision that the magistrate was wrong to grant an order with final effect as interim relief.

21. In *Qhesi* a party with a direct and substantial interest in the proceedings had not been joined as a respondent in the proceedings in the court below despite protestation that that party be joined. The matter was taken on appeal and the Court of Appeal held that the party concerned should have been joined and set aside the order of the court *a quo*, the joinder of the party concerned and that the proceedings be commenced *de novo* before a different judge. *Qhesi*, without directly addressing the point, held in essence that the decision not to join a necessary party had final effect and is therefore appealable even before the termination of the proceedings in the court below.

22. The question as to the appeallability of interim orders with final effect was dealt with more extensively in *BP Lesotho (Pty) Ltd v Moloi & Another, supra* in which *Metlika Trading Ltd and Others v Commissioner, South African Revenue Services* 2005 (3) SA 1 (SCA) was referred to with approval. In *Metlika* it was held that "an interim interdict need not necessarily have to have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings before it can be regarded in effect as a final order" (per Grosskopf JA in *BP Lesotho*) but that "In determining whether an order is final, it is important to bear in mind that 'not merely the form of the order must be considered but also, predominantly, its

effect' (*South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H, and *Zweni* at 532I [*Zweni v Minister of Law and Order* 1993 (1) SA 523(A) at 532J-533A]," (per Streicher JA in *Metlika*).

23. Recently in *Mathale v Linda* 2016 (2) SA 461 the Constitutional Court of South Africa considered a similar issue in the light of s 83 (b) of the Magistrates' Court Act of that country which provides that –

> "(A) party to any civil suit or proceeding in a court may appeal to the provincial or local division of the court having jurisdiction to hear the appeal, against – (b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs…".

The Constitutional Court stated that this provision was an exception to the general rule, which the court set out in these words at 468F:

> "Ordinarily, interim execution orders are considered interlocutory in that they provide parties with interim relief, pending the finalisation of legal action.

Generally, it is not in the interests of justice for interlocutory relief to be subjected to appeal as this would defeat the very purpose of that relief."

24. The learned judge's finding that it was proper to bring the interim order on review before the proceedings in the court below had been finalised, cannot be faulted. The appellant contended that the interim order for the attachment and removal of its equipment did not have final effect. Nothing can be further from the truth. The appellant, as previously noted, is a South African company. It had complained that the respondent was using its equipment without paying rent as agreed in the Contract and was likely to dispose of the equipment if the attachment and removal order was not issued. It had expressed its disappointment that while the respondent continued to use its equipment and was not at the same time paying the rental, let alone the arrears, it was losing business arising from the fact that it could not lease the equipment to third parties. The release of the equipment into the appellant's hands meant that the appellant was placed in a position in which it could remove the equipment from Lesotho and the respondent would no longer be able to use it. Once the equipment was removed, that issue was not to be reconsidered by the court *a quo*

at the hearing in due course. Thus the removal order was in effect a final order and therefore appealable.

25. The making of the order was attended by at least two other irregularities, which were raised on appeal and, in fairness to both parties who had made submissions in that regard, the judge should have dealt with them rather than choose not to. The order was granted pursuant to an urgent application when on all the facts there was no urgency to justify that course of action. The Contract had not been terminated and the parties had had a long history of dealing with each other. In the absence of a termination of the Contract the respondent was lawfully possessed of the equipment contrary to the appellant's contention. The order was obtained *ex parte* when there was not good enough reason for not giving notice to the respondent. Whatever the respondent may have said at the meeting on 14 March 2014 obviously had no substance. Those irregularities also justified an appeal or a review application. Although the learned judge *a quo* in my view came to the correct conclusion that the interim order with final relief was irregular and had to be set aside, she would not have been wrong also to find that the order should not have been made *ex parte* and on urgency. Support for this

is again to be found in *BP Lesotho (Pty) Ltd v Moloi & Another,* where at 433 G-H (paragraph [8]) this Court said-

> "The application in this matter was brought as an urgent *ex parte* application in the Court *a quo* without notice to the respondents. This Court and the High Court have warned time and again against the launching of such applications without notice to respondents …"

The court cited Court of Appeal and High Court decisions on this point and then went on to show why the matter should not have been commenced on urgency and on an *ex parte* basis.

26. The rationale for this position of the law is simply this. In order to obtain a provisional order an applicant therefor is required to establish a *prima facie* case and, once he does so, he discharges the onus on him for obtaining such relief. The situation is however different with respect of a final order. To obtain such an order the applicant therefor must prove his entitlement to the order on a balance of probabilities. This point was made with clarity in a Zimbabwean case, *Kuvarega v Registrar General & Another* 1998 (1) ZLR 188 (H), where the court said-

> "The practice of seeking interim relief, which is exactly the same as substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on the proof merely of a *prima facie* case. This to my mind is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return date." (per Chatikobo J at 193 A-C)

27. The decision of the High Court is unassailable as a whole. It was based on the court's finding that the order granted had final effect and should not have been given an interim relief. The court properly set aside the magistrate's decision and ordered the appellant to pay the costs of the review application.

28. In my opinion the appellant's submissions on the other grounds of appeal could not have altered the result in so far as the High Court decision was concerned. The non-joinder of the clerk of court was not a matter of any moment. The order of the court directed the magistrate to submit the record of proceedings to the High Court. The magistrate as the functionary whose decision was under review duly submitted the record to the court. That was as it should be. Rule 50 (1) (b) of the High Court Rules (Legal Notice 9 of 1980) provides that in a case such as the present, the notice of motion shall call upon the magistrate, within fourteen days of receipt of the notice, to despatch to the Registrar the record of proceedings. The rule does not mention the clerk of court at all. There was no merit in the criticism of the decision of the judge *a quo* on this point. The cases referred to by appellant's counsel, *Educational Secretary ACL Church Schools* LAC (2009-2010) 523 and *Lesotho National Olympic Committee & Others v Morolong* LAC (2000-2004) 449, do not assist the appellant.

29. The non-joinder of the Attorney General was accepted as a flaw in the proceedings but, having done so, the judge reasoned that "in the interest of justice and based on the facts of this Application and the possible decision in this matter" it was proper for her to deal with

the merits of the application notwithstanding the non-joinder. She thus did not pronounce herself on the legal consequences of the non-joinder. Where a necessary party is not joined a court may dismiss a matter on that basis (*Educational Secretary ACL Church Schools* case *supra*) or it may postpone the matter in order to allow the necessary party to be joined. A person may be joined for convenience or because it is necessary to do so. I do not think that, on the facts of this case the joinder of the Attorney General would have been a joinder of necessity but perhaps merely of convenience. Joinder of necessity is where a party has or may have a direct and substantial interest in any order the court might make in the proceedings or if the order cannot be sustained or carried into effect without prejudicing that party. A necessary party must be joined unless he or she waives his or her right. Such person can demand to be joined as of right and the court will not deal with the matter without joinder. In this situation no question of discretion or convenience arises. It is trite that the Attorney General represents the Government in civil proceedings and he must be joined as a party when a civil servant is sued. However a magistrate is a member of the judiciary and although he is a public officer he is not a civil servant. When exercising his judicial function he is not under the control of any person or authority. I therefore do not think that the Attorney General should be joined as a

party where a magistrate's judgment is taken on review. The Attorney General has no role or remit to defend a judgment of a magistrate. For this reason I am satisfied that there was no need to join the Attorney General. He was not a necessary party nor would his joinder have served any practical purpose in the circumstances of this case. Contrary to the appellant's submissions, the judge *a quo* did not dismiss this point *in limine*: she accepted the objection but then side stepped it. The preliminary point does not justify the setting aside of the court's decision.

30. The last point raised in this appeal is that the appellant did not provide security for costs. The request for security was made for the first time after the review application was lodged. The learned judge below addressed this issue at paragraph [26] of her judgment and all she said was –

> "There has been no dispute that security for costs has not been paid despite a formal request for payment of same. It would be in the Court's discretion whether to allow for the stay of proceedings until such request has been complied with."

She did not say that she was exercising her discretion in favour of the request for security for costs. But it seems that this is what she did.

31. The question of security for costs is one of practice and not substantive law hence the court has a discretion to grant or refuse an order for security for costs. That discretion must be exercised judicially, however. The underlying principle is that in proceedings initiated by a *peregrinus*, the court is entitled to protect the *incola* to the fullest possible extent before it will assist the *peregrinus* and allow him to use the process of the court, but it must also see to it that justice is not denied by unreasonable obstacles placed in the way of persons seeking redress - *Magida v Minister of Police* 1987 (1) SA 1 (A); *Saker & Co. Ltd v Granger* 1937 A D 223.

32. The *peregrine* appellant in this case was the successful party in the magistrate's court. The question arises as to whether it was proper to require it to provide security for costs in the review application initiated in the High Court by the *incola* respondent. At first blush it would seem that the *perigrinus* in these circumstances should not be required to furnish security for costs. I am however persuaded by the view expressed in *Africair (Rhodesia) Ltd*

v Interocean Airways SA 1964 (3) 114 (SR) in which it was held that the practice was to order a peregrine defendant who has counter-claimed to furnish security for costs both in convention and reconvention. That in my opinion is consistent with the principle that an *incola* must be protected to the fullest extent possible. This view received some sympathy in *Vanda v Mbuqe; Nomoyi v Mbuqe 1993 (4) SA 93 (TK) at 94 E – G 6 D*.

33. I have said that the question of security for costs is not one of substantive law but a matter in the discretion of the court. The judge *a quo* neither stayed nor dismissed the application before her. To the contrary, she proceeded to deal with the review application on the merits without making any order in regard to the application for security. Although I am of the view that she should have directed the appellant to furnish security for costs, her failure to do so cannot be fatal to the proceedings. To take a different view would mean that this Court should have declined to hear this appeal until the appellant pays the security. The respondent did not make such a request and as such it was not for this Court to raise the matter *mero motu*. In the result the failure to order the appellant to furnish security for costs cannot be a ground for impeaching the decision of the court below nor is it what the respondent seeks. The respondent was alive to this and merely noted

that "the appellant should have been ordered to pay the security bond to the satisfaction of the Registrar in the Court *a quo* and even in this Honourable Court before hearing this Appeal." So, whilst the appellant contended, albeit wrongly, that it should not have been required to provide security for costs, the respondent was fully aware that it was not in its interest that an adverse finding should be made on this issue. I have dealt with the issue only for the purpose of giving guidance in future proceedings. The decision of the court *a quo* therefore cannot be set aside at this stage for the reason that the appellant should have been ordered to provide security for costs.

34. The parties canvassed the issue of costs in both the court below and in this Court. The appellant's contention was that the court below should not have made an adverse costs order against it because the proceedings in the magistrate court were occasioned by the respondent's failure to pay the rental for the equipment, and that, instead of the respondent anticipating the return date of the rule *nisi* it chose to institute the review application. Additionally it defied the interim order and was therefore in contempt of court. The respondent, on the other hand, contended that the general rule that the successful party is entitled to its costs had to be applied and for that reason

the order of costs against the appellant was justified. It went further and asked for costs of the appeal to be on a punitive scale.

35. There is some merit in the appellant's argument that, because the respondent was in contempt of court, the High Court should have taken that into account in deciding the issue of costs. Indeed the respondent was in contempt of court when he frustrated and successfully resisted the execution of the order of attachment and removal of the equipment. An order of court must be obeyed even if the person against whom it is made believes that the order is wrong. It would set a very dangerous precedent if litigants were permitted to disobey a court merely because they are of the opinion that the order is wrong. The judge should have marked her displeasure at the conduct of the appellant by denying it costs even though it was the successful party in the review proceedings.

36. In regard to the respondent's submission that an order of punitive costs should be made against the appellant if it fails in this appeal, I consider that the respondent has not made a good and convincing case for such an order. The appellant was the successful party in the magistrate court. When it lost the case in the High

Court and decided to appeal it can hardly be said that it acted unreasonably or reprehensibly. It may have been wrong to hold the view that the High Court decision would be set aside on appeal, as it turns out to be, but that alone cannot constitute a basis for awarding costs at any scale other than the ordinary scale of costs. Costs on the legal attorney and client scale or any punitive scale are awarded where the party concerned has conducted itself in a reprehensible or some other unbecoming manner. This was not the case here.

37. For the reasons that I have given above the appeal fails but the order of costs in the High Court must be altered as a mark of the Court's displeasure at the defiance of the order issued by the magistrate court. The respondent, as the successful party on appeal, is entitled to its costs of the appeal.

38. In the result the order of this Court is that:

1. Subject to para 2 the appeal is dismissed with costs.

2. The order in the High Court is altered and substituted with the following order-

"The Application for review of the decision of Magistrate succeeds, in that the decision of the Magistrate is set aside as irregular. Each party shall bear its own costs."

M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree.

I G FARLAM –
ACTING PRESIDENT

I agree.

Y MOKGORO
ACTING JUSTICE OF APPEAL

For Appellant : *Adv. MM Rakharebe*, instructed by Mosuoe & Associates
For Respondent : *Adv. LMA Lephatsa*, instructed by Tau-Thabane & Co.