

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO. 82/2022**

**CIV/APN/37/2021**

In the matter between-

**PLATINUM CREDIT LTD NO 1<sup>st</sup>**  
**APPELLANT**

**MOTENA LISHEA NO 2<sup>nd</sup>**  
**APPELLANT**

**NTHABISENG NTHAKO NO**  
**3<sup>RD</sup> APPELLANT**

**ADVOCATE KHATI ENEST MAHASE NO 4<sup>TH</sup>**  
**APPELLANT**

**MHO MONYANE NO**

**LITEBOHO LISHEA NO 5<sup>TH</sup> APPELLANT**

**NTHATI KHUTLISI NO 6<sup>TH</sup> APPELLANT**

**LINDIWE ATONTŠI NO 7<sup>TH</sup>**  
**APPELLANT**

**MATŠELISO PETRUS NO 8<sup>TH</sup>**  
**APPELLANT**

And

**PLATCORP HOLDINGS LIMITED 1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF CORRECTIONAL**

**CORAM:** K E MOSITO P

**HEARD:** 15 NOVEMBER 2022

**DELIVERED:** 17 NOVEMBER 2022

***SUMMARY***

*Contempt of court - Failure to comply with court order - Application for committal for contempt of High Court order - Applicants incarcerated without an opportunity to mitigate on sentence - Contemnor entitled to mitigate before the sentence can be imposed - Right to mitigate is a sub-right of the section 12(8) right to a fair hearing.*

*Applicants be released from prison as there had been a mistrial pending finalization of the appeal against incarceration.*

**JUDGMENT**

**K E MOSITO PA**

**Factual background**

[1] In this application, the applicants approached this Court on an urgent basis for an order staying the execution of a High Court judgment by Mokhesi J imposing a sentence of six months, imprisonment without an option of a fine, on the 2<sup>nd</sup> to the 8<sup>th</sup>

applicants. The order was given on 10 November 2022. The order was a sequel to a judgment of the High Court in CCA/0057/2022.

[2] This matter was placed before me on 15 November 2022. At the commencement of the hearing, the court enquired from Counsel for the parties whether this Court had constituted by a single judge, had jurisdiction to hear the matter.

[3] This question was posed regard being had to s129 (3) of the Constitution; s6 of the Court of Appeal Act 1978; Rule 18 of the Rules of this Court as well as the Court of Appeal (Amendment) Rules 2009, a single judge of this Court has the competence in law, to entertain the application for stay of execution pending finalisation of the appeal. Counsel for the applicant said I do while Counsel for the 1<sup>st</sup> respondent said I did not. My view is that regard being had to those provisions of the law, I do. The reason is that this is an application for stay under Rule v18 of the Court of Appeal Rules 2006.

## **Law**

[4] In terms of section 12(8) of the Constitution, any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation established by law shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time. The right to be afforded an opportunity to say something in mitigation of sentence flows from

the residual fair trial right contained in section 12 of the Constitution. Under the Constitution, being afforded an opportunity to say something on an appropriate sentence or in mitigation of sentence is a right, and not merely a privilege extended to an accused person upon request.<sup>1</sup> This was captured thus by Williamson JA in Bresler:

“[I]f a request is properly made by the defence to lead evidence or to address in mitigation a court should accede thereto. In order to avoid possible misunderstanding between the bench and the accused or his representative, the most desirable practice would be for a criminal court always to ask the defence after verdict whether it is desired to say anything in regard to sentence, even if there be no actual obligation on the court to make such an enquiry.”<sup>2</sup>

### **Issue for determination**

[5] The issue for determination before me was a restricted one, viz whether a person convicted of civil contempt is entitled to mitigation of sentence before they could be sentenced to imprisonment.

### **Consideration of the application**

[6] It was common cause before me that the learned judge a quo did hear the 2<sup>nd</sup> to 8<sup>th</sup> applicants on a previous occasion. On the

<sup>1</sup> Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others 2021 (5) SA 327 (CC) at 64.

<sup>2</sup> S v Bresler 1967 (2) SA 451 (A) (Bresler) at 456D-F. See also S v Lesotho 1975 (3) SA 694 (A) (Leso) at 695H, where Van Blerk JA, held that “[a]lthough a convicted person does not have a statutory right to address the Court on sentence, through usage such a right has been afforded to [her or] him in practice”. As was the case in Bresler, in Lesothe Court proceeded from the premise that it was incumbent upon an accused person to make a request to say something on sentence. Two things are worth mentioning. First, the Court in Bresler held that a desirable practice was that an accused must always be invited to say something on sentence, if she or he so wished. Second, courts adopted this practice even before there was any constitutional obligation on them so to do.

date of incarceration, the learned Judge called the contemnors and enquired from them as to why they had not purged their contempt. The 4<sup>th</sup> respondent started explaining and criticizing the order, but before he could come to mitigation, he was stopped and all of them were sent to prison for contempt. At the hearing hereof, I asked both Counsel for the parties whether they were aware of an authority that a contemnor in the position of the applicants would be entitled to a right to mitigate before incarceration. Both Counsel informed me they were not.

[7] In my opinion, however, the right to be afforded an opportunity to say something in mitigation of sentence very arguably, flows from the residual fair trial right contained in section 12(8) of the Constitution. It is a sub-right to the right to a fair trial. So, a fair hearing contemplated in section 12(8) trial entails a right to be afforded the opportunity to mitigate. I accept that, this is not a conventional criminal trial. However, as the Supreme Court of Appeal of south Africa said:

*“[I]n interpreting the ambit of the right’s procedural aspect, it seems to me entirely appropriate to regard the position of a respondent in punitive committal proceedings as closely analogous to that of an accused person; and therefore, in determining whether the relief can be granted without violating section 12 [of the Bill of Rights], to afford the respondent such substantially similar protections as are appropriate to motion proceedings . . . .*

*I follow this path because the civil process for a contempt committal is an oddity that is distinctive in its combination of civil and criminal elements, and it*

*seems undesirable to straitjacket it into the protections expressly designed for a criminal accused under section 35. Certainly, not all of the rights under that provision will be appropriate to or could easily be grafted onto the hybrid process.”<sup>3</sup>*

[8] I therefore hold that very debatably, a person convicted of civil contempt is entitled to mitigation of sentence before they could be sentenced to imprisonment. Taking away the liberty of an individual is a drastic step. Affording her or him an opportunity to say something in mitigation of sentence, as is the case under the residual fair trial right, is the least that a court can do before taking that drastic step. This means that there are prospects of success in this matter on appeal.

## **Disposal**

[9] It is obvious from the foregoing reasoning that this application ought to succeed on the basis that, the applicants ought to have been afforded an opportunity to say something in mitigation. This application must therefore succeed. The 1<sup>st</sup> respondent opposed this application where in applicants were imprisoned without an opportunity to mitigate. Costs will have to follow the event.

## **Order**

[10] In the result:

- (1)The order of the High Court incarcerating the applicants is stayed (suspended) as having been a result of a mistrial, pending finalization of the appeal against the order.

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<sup>3</sup> Id at paras 25-6.

- (2)The applicants must be released from prison forthwith.  
(3)The first respondent is to pay costs of this application.



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**K E MOSITO**  
**PRESIDENT OF THE COURT OF APPEAL**

**For the Applicants:** ADV TŠENASE  
**For the Respondent:** ADV J. ROUX SC