

**CRI/APN/652/2012**

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**THABANG MOKHIBO**

**1<sup>st</sup> Applicant**

**MOALOSI MOHLOMI**

**2<sup>nd</sup> Applicant**

**BERENTE MAFOEA**

**3<sup>rd</sup> Applicant**

**MOLETE MATJOI**

**4<sup>th</sup> Applicant**

**Vs**

**THE MAGISTRATE THABA-TSEKA**

**1<sup>st</sup> Respondent**

**THE CLERK OF COURT**

**2<sup>nd</sup> Respondent**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**3<sup>rd</sup> Respondent**

**JUDGMENT**

**Coram: Hon. Hlajoane J**

**Date of Hearing 18<sup>th</sup> December, 2012**

**Date of Judgment: 4<sup>th</sup> February, 2013**

### Summary

*Application for review on refusal by the Magistrate to grant bail-  
Application dismissed on points of law raised as Applicants ought to  
have approached Court by way of Appeal not review – section 108 of the  
Criminal Procedure and Evidence Act applicable.*

### Annotations

### Statutes

- 1. Criminal Procedure and Evidence Act 7 of 1981**
- 2. African Criminal Procedure Act No.5 of 1977**

### Books

- 1. Principles of Criminal Law by Burchell and Milton**
- 2. Criminal Law through Cases 1985**

### Cases

- [1] The Applicants have approached this Court by way of review, to ask this Court to review the proceedings of Thaba-Tseka Magistrate's Court which refused to grant Applicants bail.
- [2] The matter has been opposed and some points of law were raised in the answering affidavit. They are the following:

- (a) Wrong Procedure
- (b) Lack of urgency
- (c) Non-Joinder
- (d) Appeal vs Review.

[3] On wrong procedure, it was argued that **Rule 8<sup>1</sup> of the High Court Rules** has not been followed as the matter was to be treated as urgent yet it was filed in the ordinary way.

[4] The Application was filed as follows:-

“Notice of Motion”

Bail review Application”.

Looking at prayer 2 of that Notice of Motion, it has been framed thus:-

“That prayers 1(a), (b) and (c) operate with immediate effect as interim Court Order”.

[5] Prayer 1(a) reads:-

“The ruling that accused persons were denied bail in **CR175/12** shall not be reviewed, corrected and set aside on the ground of irregularities and irrational”.

[6] Prayer 1(b) reads:-

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<sup>1</sup> High Court Rules No.9 of 1980

“That the clerk of Court be directed to produce and dispatch the record of proceedings in CR 175/12 within 14 days of the receipt of the Interim Court Order.”

[7] Prayer © reads:-

“That accused persons shall not be granted bail”.

[8] Respondents argued that Applicants could not be allowed to apply for an Interim Court Order without having applied for a *rule nisi*. That the interim order would not be allowed to operate indefinitely without a mention of a return date. Again that review could not operate in the interim before the Court could have applied its mind to the application as a whole and having heard both sides. It would not be proper to have asked the Court to grant a review in contravention of the Rules of Natural Justice.

[9] On urgency the argument has been that the Applicants have failed in their papers to show any urgency that would have warranted the granting of an interim order.

[10] The point of non-joinder. Here it was argued that the Applicants have failed to join the Attorney general as the representative of the 1<sup>st</sup> Respondent in all suits arising out of 1<sup>st</sup> Respondent’s official dispensation of his duties.

[11] Appeal vs Review, argument being that **section 108<sup>2</sup> of the Criminal Procedure and Evidence Act** being the law applicable does not provide that refusal to grant bail is reviewed but says may appeal against such decision.

[12] In response to the point on wrong procedure, it was submitted that **Rule 50<sup>3</sup> of the High Court Rules** was the one relied on for the dispatch of the record. But the Rule has shown that such Application has to be by way of Notice of Motion and shown steps to be followed.

[13] That **Rule 50** does not just end there. It also covers instances where the matter may be considered as urgent at sub **Rule (7)** to say:

“The provisions of **Rule 8** as to set down of applications and all other relevant matters not specifically referred to in this Rule shall *mutatis mutandis* apply to review proceedings”.

[14] The above point when it makes reference to **Rule 8 of the High Court Rules**, also takes care of the point on urgency. Applicants had argued that bail in itself is urgent, so that there was no need to have alleged urgency. But here we are dealing not only with bail but refusal by the lower Court to grant bail. The Rule applicable being **Rule 50 of the High Court Rules** has made reference to

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<sup>2</sup> Criminal Procedure and Evidence Act 7 of 1981

<sup>3</sup> See 1 *supra*

**Rule 8** of the same **Rules** so that urgency ought to have been alleged and a certificate of urgency must have been filed.

[15] On non joinder of Attorney General, the response has been that there was no need to have joined the Attorney General as he has no direct and substantial interest in the matter.

There could not be any other truth than that as there has to be a distinction in dealing with civil and criminal matters for the servants of the state.

[16] On Appeal vs Review, **section 104<sup>4</sup> of the Criminal Procedure and Evidence Act** has given direction as to how to approach the Court when one feels aggrieved by refusal to grant bail. The correct route would be to go by way of appeal not review.

[17] Respondents have succeeded in most of the points that were raised as Applicants have followed the wrong procedure by not showing any urgency and yet prayed for interim relief without a return date in contravention of **Rule 8 of the High Court Rules** as referred to under **Rule 50 (7)** of the same Rules.

[18] Applicants have also approached the Court for review instead of Appeal in terms of **section 108 of the Criminal Procedure and Evidence Act**.

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<sup>4</sup> See 2 *supra*

[19] Having succeeded on the points in *limine* raised safe for one, there would be no need to go into the merits but to dismiss the Application. The matter was argued in the absence of the record from the Magistrate due to the fact that the record was not going to be relevant.

**A.M. HLAJOANE**  
**JUDGE**

For Applicants: Mr. Seantlo

For Respondents: Ms Ranthithi