IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CONSTITUTIONAL CASE NO. 10/2010**

In the matter between:

BOFIHLA LETUKA **APPLICANT**

AND

MINISTER OF JUSTICE AND HUMAN RIGHTS **1ST RESPONDENT**

MINISTER OF LAW, CONSTITUTIONAL AND

PARLIAMENTARY AFFAIRS **2ND RESPONDENT**

DIRECTOR OF PUBLIC PROSECUTIONS **3RD RESPONDENT**

THE ATTORNEY GENERAL **4TH RESPONDENT**

CLERK OF THE MAGISTRATE`S COURT,

MASERU **5TH RESPONDENT**

JUDGMENT

CORAM: HON. JUSTICE MONAPATHI ACJ

HON. JUSTICE N. MAJARA J

HON. JUSTICE K.E. MOSITO AJ

Date of Hearing: 07 MAY, 2014

Date of Judgment: 19 MAY, 2014

SUMMARY

Constitutional challenge – infringement of the constitutional right to a fair trial - Failure by the Clerk of the Subordinate Court to provide a record of criminal proceedings to a convicted person intending to appeal against his conviction and sentence - Applicant's conviction and sentence quashed.

Application by Respondent for leave to file a supplementary affidavit in reaction to issues raised in the Applicant's heads of argument – such application not competent.

Costs – This being a constitutional matter – no order as to costs.

ANNOTATIONS

CASES

(a) Attorney General 1982 (2) BLR 124 (CA)
(b) Alexander v. Williams (1984) 34 WIR, 340
(c) Bernard Coard et al v The Attorney General, *Privy Council Appeal No 10 of 2006.*
(d) *Forbes v. Chandrabhan Maharai (1997) 52 WIR, 487.*
(e) Hermina Griffith Vs Gerald Niewenkirk, Criminal Appeal No. 1/2004.
(f) *James Brown & Hammer (Pty) Ltd v Simmons, N.O.* 1963 (4) 656
(g) Pretoria Portland Cement Co. Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (A) at 401 I to 402
(h) Teaching Service Commission and others v The Learned Judge of Labour Appeal Court and others LAC (2007 – 2008) 284.
(i) *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599
(j) Sandile Francis Xavier Dlamini *v Protronics Networking Corporation Case No. 14/2012*

MOSITO AJ:

INTRODUCTION

1. On 17 August 2012, the Applicant launched an application in Constitutional Case No. 10/2010 for an order in the following terms:

    1. Directing 5th Respondent to file the record of the Criminal proceedings in CR 1066/98 in

this Honourable Court and to furnish Applicant with a copy of the said proceedings.

ALTERNATIVELY

2. Quashing the conviction and sentence of the Applicant on account of the violation of the Applicant`s right to fair trial in terms of section 12 of the Constitution.
3. That this Honourable Court make directions as to how this matter [should be dealt with].
4. Granting Applicant further and/or alternative relief.

2. Pleadings were ultimately closed in the case until the matter found its way before us sitting as a panel of three judges by reason of the fact that the matter is a constitutional case. On 11 December 2012, the learned Counsel for the parties requested to see us in Chambers and the learned Counsel for the present Respondents brought it to our attention that his instructions were to apply for my recusal from the case. The respondents were directed to file a substantive application for my recusal and that was done in due course. The Applicant as Respondent in that matter also filed his opposing affidavits. The matter was ultimately heard and a separate judgment dismissing the recusal application was handed down on 14 June 2013.

THE FACTS

3. This judgement deals with the main application only. The facts that led to the institution of the present main application are not in dispute. They are that, on 20 November 2000, the Applicant appeared before the Subordinate Court for the District of Maseru on 13 charges allegedly committed during the 1998 political disturbances in Lesotho. The charges ranged from attempted murder, armed robbery, assault with intent to do grievous bodily harm as well as malicious damage to property. The said

trial was completed on 4 March 2002. The Applicant was convicted and sentenced to seven (7) years imprisonment without an option of a fine. Both the Magistrate and the Prosecutor were white South Africans [and therefore not resident and available in Lesotho].

4. Dissatisfied with the conviction and sentence on the same day the Applicant noted an appeal to the High Court. Applicant has annexed a copy of the notice and grounds of appeal which clearly indicate that he noted his appeal on time. He also applied for bail pending appeal from the High Court in the matter. That application was apparently not granted.

5. The Applicant's appeal was however not prosecuted until he finished his sentence for the reasons that I will later revert to in this judgment. Sufficeth to say it is common cause that, during the period of his imprisonment and after his release, the Applicant pursued the question of the hearing of his appeal but to no avail. He deposes that his attorney kept on telling him that the Subordinate Court officials had told the attorney that they knew nothing about the case. The Applicant was kept in prison despite the noting of his appeal until he finished serving his sentence and was released from prison.

6. Upon his release from prison, he went straight from there to the Chief Magistrate's Office to enquire about his appeal. He still did not get any help until the Chief Magistrate eventually directed him to the Justice Ministry Principal Secretary with his memo dated 4 September 2007. The gist of the memo confirmed what Applicant explained earlier with the addition that, the proceedings were especially recorded on the audio tapes, which went missing for some time until the tapes in his case were found in 2007, but that they could not be transcribed in view of the cost thereof involved in their transcription. According to the Applicant, the

Principal Secretary told him that an amount of M60, 000.00 which was required for transcription of the record was not available.

7. He went further to communicate through his attorneys with other officers such as the Ombudsman, the Chief Magistrate and the Principal Secretary for the Ministry of Justice about the matter all in vain.

8. On 30 January 2009 he filed a constitutional case No. 1/09 in this Court which he later withdrew after the Respondents objected to the non-joinder of the clerk of Court. It appears that the Applicant was still pursuing the issue of the provision of the record to him when he filed the said constitutional case.

9. During February 2010, the Applicant wrote to the clerk of the Subordinate Court requesting the trial record from his office. On 18 March 2010 the Clerk of Court replied to the Applicant's earlier letter stating that he had the recorded cassettes of his trial, but that the Magistrate Court was unable to transcribe the record by reason of the insufficiency of funds.

10. Against the above background, Applicant contends that he has a constitutional right to appeal against both the conviction and sentence handed down by the Subordinate Court. He avers that the responsibility for preparation of the record of the proceedings appealed against is on the Clerk of Court. He further complains that the fifth Respondent's failure to carry out his duty in this regard does not only amount to a denial of the Applicant's right to prosecute his appeal, but also a denial of the Applicant's right to a fair trial as guaranteed in section 12 of the Constitution.

11. The record of proceedings in CR: 1066/98 was neither attached to the application by the Applicant nor dispatched to this Court by the Respondents. The Applicant avers that he was unable to attach a copy of

the said record because it was not available as it had not been provided by the 5th Respondent.

12. The Respondents relied on two affidavits in opposition to this application. The first affidavit is that of Advocate Leaba L. Thetsane KC who is the Director of Public Prosecutions and who is cited as the 3rd Respondent in this application. Adv. Thetsane does not deny the factual background detailed out above. He points out that he does not oppose the granting of the first prayer because the same had already been granted by Mr. Justice Maqutu as long ago as 15(sic) April 2005. He also attaches a copy of the order handed down by Maqutu J. on 11 April 2005 in which the learned Judge gave an order as follows;

> "IT IS ORDERED THAT:
>
> a. The 1st Respondent [5th Respondent *in casu*]is hereby directed to transcribe and certify within 40 days the record of proceedings in CR: 1066/98.
> b. The 2nd Respondent [the presiding magistrate] is hereby directed to file his reasons for judgement in the above mentioned proceedings within 30 days.
> c. This matter is postponed to the 15 June 2005 for the hearing of the bail application and/or an appeal itself."

13. It is common cause that that order was never complied with by the respondents to whom it had been directed. It is clear therefore that the 3rd Respondent seems to be of the opinion that the Court should consider granting the application in terms of a prayer which the High Court had already granted and which would be *res judicata*. He however does not say why the order was not complied with. I will return to this aspect of the case later on in this judgment.

14. The Learned Director of Public Prosecutions further indicates in his affidavit that he is unaware of any basis or procedure which would

permit this Court to interfere in the conviction and sentence of the Applicant at this stage. He further avers that there is no support whatsoever for the averment by the Applicant that his right to a fair trial was infringed.

15. Mr. Thetsane further deposes that the Applicant has been somewhat dilatory in prosecuting this appeal. He avers, for example, that Applicant had been in possession of an order dated 11 April 2005 by the High Court ordering the Clerk of the Subordinate Court Maseru to transcribe and certify the record of proceedings in this matter. He avers that the Applicant's failure to act upon this order is not dealt with in his application nor are there any indications that the Applicant filed contempt of Court proceedings against the clerk of the Court for the District of Maseru, or took any further steps to enforce the order. The learned Director deposes that there is furthermore no justification for a re-trial of the Applicant and hence, in the DPP's view, this is not an option which could properly be explored.

16. The deponent avers that the Applicant's right to a fair trial have not been infringed and that the Applicant had been correctly convicted. He also avers that the sentence imposed on the Applicant was lenient and that he may well give consideration to applying for an increase in the sentence imposed. We are however not seized with this issue *in casu* and we can not determine whether or not the Applicant had been correctly convicted and sentenced. It is however clear that there is no dispute as to the facts presented by the Applicant.

17. The 5th Respondent Ms Tokelo Moremoholo does not dispute the facts as deposed to by the Applicant either. She however indicates that the relief that Applicant is seeking in prayer 1 of his Notice of Motion was granted

on 15 April 2005 by Maqutu J. She avers that lack of funds prevented this order from being complied with. She goes on to say that the tapes are available and have now been locked in the office of the Senior Resident Magistrate Mokhoro for safekeeping. She avers that she has been advised that the Chief Magistrate intends to renew his application for funding to cover the transcription of the said tapes, and in those circumstances, she will take whatever steps are necessary to comply with the aforementioned order. The Chief Magistrate has however not filed an affidavit to confirm the truthfulness of what this deponent is saying. From the depositions of this witness, it is clear that the transcribed record is not available.

INTERLOCUTORY APPLICATION

18. Before considering and evaluating the application on the main issues as presented before us and, as disclosed by the facts outlined above, it is necessary to comment on a preliminary interlocutory application filed by the Respondents for leave to file a supplementary affidavit. It seems that in the presentation of his heads of argument, the Applicant through his Counsel raised certain issues which had not been pleaded by the parties in their respective affidavits filed before this Court. That fact notwithstanding, the Respondents made an application to file a supplementary affidavit whose purpose was said to be to answer to the alleged allegations of fact or certain of the issues raised in the heads of argument.

19. Mr Mothibeli for the Applicant objected to the leave sought by Respondents to file the said supplementary affidavit on the basis that, it is not permissible or appropriate for a litigant to seek to file a supplementary affidavit in reaction to issues raised in the heads of

argument. Mr. Leppan for the Respondents argued that it was permissible to file an affidavit in reaction to the content of heads of argument and that this was the only way in which the Respondents could contest the alleged issues raised in the heads of argument.

20. At first when I heard the Applicant's objection, it sounded like wind rattling in the reeds. However, on a more mature reflection, I am of the view that there is substance in this objection. The issue that falls to be decided at this stage is whether or not the Court should admit, as part of the record, a fourth set of affidavits tendered by the Respondent in reaction to a matter contained in the Applicant's heads of arguments. It is settled law that in deciding whether or not to allow a fourth set of affidavits, the Court has a discretion which is exercisable judicially. In ***James Brown & Hammer (Pty) Ltd v Simmons, N.O.*** **1963 (4) 656** the Appellate Division made the following comments at 660E-G:

> "It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly observed: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received."

21. And, in an earlier case of ***Transvaal Racing Club v Jockey Club of South Africa*** **1958 (3) SA 599**, Williamson, J., had this to say at 604A-E:

> "It was contended in argument that I really have no discretion on the question of the admission of these further affidavits because authority had decided that a further set of affidavits can only be admitted, firstly, if they are necessary to answer new matter raised in the Applicant's affidavits, or secondly, if the information or evidence was not available to the respondent when the first set of affidavits was filed. No new matter was raised in the answering affidavits of the respondent nor was it sought to answer only alleged new matter. Secondly, it was contended, the information or evidence was at all times available to the respondent in its records. The fact that it was not present to the minds or known to the officials presently dealing with the matter, did not constitute a compliance with the second or alternative requirement to be satisfied before fresh affidavits could be filed. In my view the authorities do not restrict the discretion of the Court in the manner suggested. I think that if there is an explanation which negatives *mala fides* or culpable remissness as the cause of the facts or information being put before the Court at an earlier stage, the Court should incline towards allowing the affidavits to be filed. As in the analogous cases of the late amendment of pleadings or the leading of further evidence in a trial, the Court tends to that course which will allow a party to put his full case before the Court. But there must be a proper and satisfactory explanation as to why it was not done earlier, and, what is also important, the Court must be satisfied that no prejudice is caused to the opposite party which cannot be remedied by an appropriate order as to costs. In the present instance there is a completely satisfactory explanation as to why the affidavits containing new facts were not filed earlier; there is no suspicion of *mala fides* and I find no culpable remissness. No prejudice to the applicant which cannot be remedied by wasted costs being awarded it, has been suggested."

22. The observations expressed in the cases above are salutary and I associate myself with them. In my view, from the foregoing authorities, the following principles are perceptible: Firstly, the benchmark rule is

that three sets of affidavits are allowed, namely: founding/supporting affidavits, answering affidavits, and replying affidavits. Secondly, however, the Court may, in its judicial discretion, allow the filing of further affidavits, for instance, in application or motion proceedings. Thirdly, leave to file further affidavits, out of sequence, may be allowed, for example, where there was something unexpected in the Applicant's replying affidavits or where a new matter was raised, or where the information /evidence was not available to the Respondent (or could not be made available) when the founding affidavits were filed and before the answering affidavits could be filed. Fourthly, the Applicant must give a satisfactory explanation which negatives *mala fides* or culpable remissness as to why the information/evidence could not be put before the Court at an earlier stage; and fifthly the Court must be satisfied that no prejudice is caused to the opposite party which cannot be remedied by an appropriate order as to costs.

23. I am with respect unable to agree with the argument by Mr. Leppan that, it is permissible to file an affidavit in reaction to the content of heads of argument and that this was the only way by which the Respondents could contest the alleged issues raised in the heads of argument. The reason for my view in this regard is that, the content of heads of argument does not constitute facts, pleadings or evidence. A supplementary affidavit has a purpose. It cannot just be filed simply because another party has raised an issue in the heads of argument. This Court should therefore exercise its discretion against allowing such an affidavit. I accordingly so do.

CAN THIS COURT NOW ENTERTAIN A REQUEST TO DIRECT THE 5TH RESPONDENT TO FILE THE RECORD OF THE CRIMINAL PROCEEDINGS IN CR 1066/98?

24. The issue before us is not whether it is the duty of the 5th Respondent to file the record of the Criminal proceedings in CR 1066/98. The issue is whether we should order the 5th Respondent to file that record. This is what the Applicant sought before us. The Respondents' position is that they have no opposition. The Applicant's prayer was that we should direct the 5th Respondent to file the record of the Criminal proceedings in CR 1066/98.

25. In my opinion, this Court should not accede to this request for the following reasons: Firstly, Rule 62(1)(a) of the **Subordinate Court Rules 1996** provides that, 'a convicted person desiring to appeal against any conviction, sentence or order in a criminal case shall, within fourteen days after the date of conviction, sentence or order in question lodge with the clerk of the Court a notice of appeal in writing in which he shall set out clearly and specifically the ground, whether of fact or law or both fact and law, on which the appeal is based.' This section is akin to Article 144(3) of the Constitution of Gayana in respect of which the Court held that the record of proceedings referred to therein, would include the reasons for decision of a magistrate and had be read with the section 8 of the Summary Jurisdiction (Appeals) Act, Cap. 3:04 which stipulated that upon receipt of a notice of appeal a magistrate shall draw up a formal conviction or order and a statement of the reasons for decision. The Section also provided that the clerk shall within twenty-one days of the receipt of statement of reasons, prepare a copy of the proceedings

including the reasons for the decision and notify the Appellant in writing. These provisions of the law had not been not complied with.

26. The section 8 of the Summary Jurisdiction (Appeals) Act, Cap. 3:04 referred to above is similar in terms to our Rule 62(3) of the **Subordinate Court Rules 1996** goes further to provide that, 'upon an appeal being noted, the clerk of the Court shall cause to be prepared a copy of the record of the case including a transcript thereof if it was recorded in accordance with the provisions of rule 61(2) and then deliver such copy to the appellant.' Mr. Leppan argued strenuously before us that, the law is not clear on who bears the duty to prepare the record and asked this Court to clarify the position as it is not clear whether it is the Crown or the Clerk of Court who bears such a duty. In my view, there is no need to clarify anything here. The provisions of the law as quoted above are very clear.

27. *A fortiori,* section 12 of the **Constitution of Lesotho 1993** provides in clear terms that, 'when a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the Court.' This section has to be understood in the light of the provisions of Rule 62(3) of the **Subordinate Court Rules 1996** quoted above.

28. Secondly, it was common cause that, on 11 April 2005, Maqutu J directed the 5th Respondent to transcribe and certify within 40 days the record of proceedings in CR: 1066/98. He also ordered the presiding Magistrate to file his reasons for judgement in the above-mentioned proceedings within

30 days. Neither the 5th Respondent nor the presiding Magistrate complied with that order to date. It is clear from the affidavit of the 5th Respondent that no transcribed and prepared record of proceedings in CR: 1066/98 exists to date. This Court cannot grant the same prayer again and again and again. There is an underlying public policy principle in *res judicata* that there should be finality to litigation.

THE RIGHT TO A FAIR TRIAL

29. Section 4(h) of the Constitution of Lesotho 1993 provides that every person in Lesotho has the right to a fair trial of criminal charges against him and to a fair determination of his civil rights and obligations. Section 12 of the Constitution provides the various respects in which the right to a fair trial should consist. At common law, the right is broader than those few respects provided for in this section. A detailed discussion of all the other respects of this right is not necessary for the determination of this case before us.

30. Section 12(3) of the Constitution provides that '[w]hen a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the Court.' It is this section which needs to be considered.

31. This section is identical in terms to that of section 8(3) of the Constitution of Grenada 1973. That section was considered by the *Privy Council in* Bernard **Coard et al v The Attorney General, Privy *Council Appeal No 10 of 2006.*** In that case, ***t***he appellants had on several times asked for copies of the Court of Appeal judgments but they had never

been the subject of a specific application to the Court. It appears that no transcript was made of the oral judgments, probably because the judges read from a text which they had prepared and which it was contemplated would be made available as an authorised record of the judgments. But this had never happened. For one reason or another (there was a suggestion of a dispute between the judges and the Grenada government over payment of their fees) the judges had retained whatever text they used. So the question was whether these documents constituted a "record of the proceedings made by or on behalf of the Court". In considering whether it was such a record, the Court remarked that:

> It is possible to imagine circumstances in which failure to *create* a written record of some parts at least of the proceedings may infringe the general right to a fair trial (including an appeal)... A right of appeal may be incapable of practical exercise without one.... Furthermore, if there was no further appeal from the judgment of the Court of Appeal, it is not easy to see how the appellants have been prejudiced by the absence of a written record of the judgments.

32. It will be realised from the above quotation that the Court accepted that there are circumstances in which failure to comply with the section 8 (3) of the Constitution that the Court was considering may lead on the facts, to the quashing of the proceedings and decision. In the particular circumstances of the case that was before Court, the Court found that there was no evidence that the hand notes which the judges had withheld amounted to part of the proceedings. I consider that the case can be cited as an authority for holding that in appropriate cases where the facts establish that the material withheld by the judicial officer

constitutes the record or part thereof, then the Court may go ahead and find that the right to a fair trial has been infringed.

33. A case directly in point with our present case is the judgment of the Court of Appeal of the Supreme Court of Judicature (Appellate Jurisdiction) of the Republic of Guyana, in **Hermina Griffith Vs Gerald Niewenkirk, Criminal Appeal No. 1/2004**. In that case, on 11 October 1995, the Appellant was charged indictably with three counts of embezzlement by a Public Officer contrary to Section 191 of the Criminal Law (Offences) Act, Cap. 8:01. the charges were later taken summarily and came on for hearing before a Magistrate on several occasions. Finally on 8 June, 2001 the said Magistrate found the Appellant guilty as charged, and imposed a two year non-custodial sentence. On 12 June, 2001 the Appellant filed a notice of appeal.

34. As in the instant case in **Hermina Griffith Vs Gerald Niewenkirk** (supra), there are no records which this Court can review to ascertain whether the magistrate had arrived at the right conclusion. Both his/her notes of evidence and reasons for decision are unavailable. The Court in the **Griffith**'s decision was faced with a situation in which the learned Magistrate had failed to write her reasons for decision and in fact had emigrated from Guyana.

35. As in the case before us, the first issue that was argued in the **Griffith**'s case was that, it is quite permissible to proceed to hear an appeal in the absence of both the transcript of evidence and the Judge's (Magistrate) summing-up if the interests of justice so demands.

36. In the case before us, a similar argument was presented that this Court could not quash the conviction in the absence of the record. However, in line with the case of **Alexander v. Williams (1984) 34 WIR, 340** the

conviction and sentence of the Appellant was quashed by the Supreme Court of Judicature (Appellate Jurisdiction) of the Republic of Guyana, in **Hermina Griffith Vs Gerald Niewenkirk** *(supra).* In the case of **Alexander v. Williams (1984) 34 WIR, 340** before the Court of Appeal of Trinidad and Tobago, the Magistrate who had convicted the Appellant and imposed a sentence had failed to supply the reasons for decision. The Court held that it was a rule of law that in criminal proceedings a magistrate must provide his reasons when the defendant has lodged an appeal; furthermore, in cases involving the liberty of the subject, the furnishing of reasons by a Magistrate in cases against which appeals had been lodged was an indispensible requirement of "due process" under the relevant section of the Constitution of Trinidad and Tobago. I align myself with the remarks of the Court in the above case.

37. In fact, the effect of failure of a magistrate to give reasons for a decision came up for consideration before the Privy Council from another decision of the Court of Appeal of Trinidad and Tobago in the case of **Forbes v. Chandrabhan Maharai (1997) 52 WIR, 487**.

38. **Lord Clyde** who delivered the reasons of the Board made reference to **Alexander v. Williams** (supra), and expressed the view that "the judgments in that case clearly recognise the fundamental importance of the furnishing of reasons particularly in circumstances where the deprivation of liberty is at stake". I pause here to point out that in the case before us, the same reasoning should apply where section 12(3) of the Constitution of Lesotho read with Rule 62(3) of the **Subordinate Court Rules 1996** were not complied with.

39. In a nutshell, without the statement of reasons it would be impossible to know whether the magistrate had misdirected himself on the law or misunderstood or misapplied the evidence.

40. I refer again to dicta of Bernard, J.A. in **Alexander v. Williams** (supra), p. 349 to this effect;

> "....a convicted person today is entitled to know the basis upon which a magistrate has arrived at the conclusion that the case against him has been proved and that thereby he should be deprived of his liberty. A convicted person who has been sentenced to a term of peremptory imprisonment cannot, in my view, repose any confidence in or have any respect for a system of justice which today allows a magistrate to deprive him of his liberty without the necessity for a statement of the reasons for this to be given by that magistrate, if that person should later choose to challenge the latter's decision by way of appeal."

41. It is clear from the quotation above that in determining the question whether the failure by the Magistrate to provide the reasons as part of the record required, as well as failure by the Clerk of Court to file the record of proceedings, one has to determine whether it is permissible for the High Court to proceed to hear an appeal in the absence of a record of proceedings. Put differently, the question would be whether the interests of justice would so demand that such an appeal be proceeded with without a record of proceedings.

42. In the matter before us, one has to ask whether the same criterion ought not to be applied in order to determine whether the record of proceedings was indeed necessary for the Appellant/Applicant to appeal against the decision of the Magistrate.

43. In paragraph 5 of his founding affidavit, the Applicant makes a point that he has a constitutional right to appeal against both a conviction and

sentence handed down by any inferior Court. In my opinion, there can be no doubt that the Applicant has such a right. Appeals from the Subordinate Courts in this Kingdom in criminal matters generally lie to the High Court in terms of section 130 of the Constitution. The Applicant is therefore entitled as of right to appeal to the High Court against conviction and sentence handed down by the Subordinate Court.

44. It follows that the terms of section 12 (3) of the Constitution are meant to permit a convicted person to lodge an appeal and pursue it with the High Court within a reasonable time after judgment. A refusal to provide a record of proceedings as well as a copy of the judgment definitely infringes an accused person's right to a fair trial within the context of Section 12 (3) of the Constitution.

45. As the Applicant correctly points out, the fifth Respondent's failure to carry out his duty in this regard amounts to a denial of the Applicant's right to prosecute his appeal. It is obviously a denial of the Applicant's right to a fair trial. As I indicated above, Maqutu J. ordered the Clerk of Court to prepare the record as long ago as April 2005. To date nothing has happened. The Applicant has had to serve his term of imprisonment to a finish without being afforded an opportunity to prosecute his appeal despite the fact that he had noted his appeal on time. In my opinion, this is a clear violation of the principles of the rule of law which practice should not be allowed to become part of the culture of our legal system.

46. It is common cause that the Applicant does not have the money for the record. But even if he had it, it would still be the responsibility of the 5th Respondent to have it prepared not on his expense, but on the 5th Respondent's expense. I agree with the Applicant that in view of the

above-mentioned reasons he cannot be held responsible for failure to prosecute his appeal.

47. It is apparent and not disputed that the Applicant has already lost his job in the Defence Force because of his conviction and sentence and in respect of which he was denied an opportunity to appeal to the High Court against the Subordinate Court's conviction and sentence. This shows how prejudicial the failure by the 5th Respondent has been to the Applicant in as much as he has had to serve his sentence to a finish in circumstances where he may have probably, successfully appealed against such conviction and sentence.

48. It is clear that it would be inappropriate in this case to order a re-trial of a man who has already served his sentence despite his attempt to have it overturned. In all the circumstances, I find that the Applicant's right to a fair trial has been infringed by not only the 5th Respondent refusing to comply with the order given by Maqutu J., but also the presiding Magistrate having failed to provide his judgment in writing within the ambit of Section 12(3) of the Constitution of Lesotho 1993.

49. In the circumstances, I have no hesitation in finding that the interests of justice demand that the application should be granted and an appropriate relief be made.

WHAT RELIF MUST THE COURT NOW GIVE

50. The Applicant is praying for an order quashing his conviction and sentence on account of the violation of his right to a fair trial guaranteed in terms of section 12 of the Constitution. When this case was argued before us, I was at some stage of the view that, there was no way in which this Court could give an order quashing Applicant's conviction and sentence on account of the violation of his right to a fair trial guaranteed

in terms of section 12 of the Constitution in the absence of the record of proceedings, hence the debate on that issue in Court.

51. On a closer consideration of the matter, the Applicant is not challenging the irrationality, procedural impropriety, irregularity and/or the illegality of the proceedings before the Subordinate Court. He is questioning the constitutionality of denying him an appeal to the High Court on the basis that the 5th Respondent has failed to furnish the record so as to enable him to prosecute his appeal. He is in essence asking this Court to *review* the conduct of the 5th Respondent in denying him the record so as to enable him to prosecute his appeal.

52. The distinction between an appeal and a review is well-known and hardly requires elaboration. Appeal is the appropriate procedure where a litigant contends that a Court came to an incorrect decision whether on the law or on the facts. Review, however, as Schutz JA emphasized in **Pretoria Portland Cement Co. Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (A) at 401 I to 402** C (pars [34] and [35]), is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality, being a means by which those in authority may be compelled to behave lawfully. It only needs to be added that in an appeal the Court is bound by the record of proceedings, whereas in review proceedings facts and information not appearing on the record may be placed before the reviewing Court(See **Teaching Service Commission and others v The Learned Judge of Labour Appeal Court and others LAC (2007 – 2008) 284**. Viewed from this perspective, it is competent to quash the conviction and sentence on the basis that there was an infringement of the Applicant's right to a fair trial as guaranteed by section 12(3) of the Constitution.

53. Indeed this was the approach adopted in the judgment of the Court of Appeal of the Supreme Court of Judicature (Appellate Jurisdiction) of the Republic of Guyana, in **Hermina Griffith Vs Gerald Niewenkirk, Criminal Appeal No. 1/2004**. I find myself in respectful agreement with that decision.

CONCLUSION

54. In the result, I hold that it is in the interests of justice that the application be granted in terms of prayer 2 of the notice of motion. I consequently make the following order:

(a) The application by the Respondent for leave to file a supplementary affidavit is refused.

(b) The application to quash the Applicant's conviction and sentence on account of the violation of the Applicant`s right to a fair trial in terms of section 12 of the Constitution is granted.

(c) This being a constitutional case, there will be no order as to costs.

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K.E. MOSITO AJ

I concur _____

T. MONAPATHI ACJ

I concur _____

N. MAJARA J.

For Applicant: Adv T. Mothibeli & Adv M Rasekoai

For 1st to 5th Respondents: Adv G J Leppan