

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

Constitutional Case No.19/2017

In the matter between:

TSELISO MOTLOHELOA

APPLICANT

And

COMMISSIONER OF POLICE

1ST RESPONDENT

**THE DIRECTOR OF PUBLIC
PROSECUTIONS**

2ND RESPONDENT

**DIRECTORATE ON CORRUPTION
AND ECONOMIC OFFENCES**

3RD RESPONDENT

**MINISTER OF
CONSTITUTIONAL AFFAIRS**

4TH RESPONDENT

THE ATTORNEY GENERAL

5TH RESPONDENT

JUDGMENT

Coram : Hon. Acting Chief Justice Mahase
Hon. Justice T.E. Monaphathi
Hon. Justice E.F.M. Makara

Date of Judgment : 21st March 2019

SUMMARY

A genesis of this case is that the Applicant appeared before a Magistrate Court charged of contravening Section 58(1) read with section 109 of the Penal Code Act. At the commencement of the trial he instead of pleading to the charge applied for the matter to be referred to the High Court due to the constitutional dimensions it had taken. A foundation of the move was that the charge originated from the information that the 3rd respondent and police had unlawfully secured from his wife. He maintained that this violated his marital rights and privileges under the Criminal Procedure & Evidence Act (CP&EA). This according to him incidentally transcended into a violation of his constitutional *rights of freedom from arbitrary search or entry, respect for private family life and fair trial*. The trial court ruled that the case be referred to the High Court sitting in its constitutional jurisdiction. Thus, the Applicant asked this court to order in the light of the identified transgressions that the proceedings before the trial court be permanently stayed pending finalization of this case. Further, he prayed that upon a granting of that relief, it be logically ordered that the vehicle held by the 3rd respondent per a preservation order made by the High Court sitting in its ordinary capacity be restored into his custody. The Court found that the Applicant has contrary to Section 22 (3) of the Constitution failed to demonstrate that relieves he is seeking for, could not be adequately obtained from another qualified court other than the High Court and that the same would not be so if other laws other than the Constitution were applied. It emerged that the trial court had the jurisdiction to resolve the issues involved and that the CP&EA adequately provides for a remedy through objecting the admissibility of any evidence connected with the impugned information from the wife.

Eventually, application was dismissed without costs because it was made in good faith and for the sake that citizens should not be discouraged from instituting constitutional cases for the enhancement of our jurisprudence.

ANNOTATIONS

CITED CASES

1. CR:0911/2016 Rex v T Motloheloa
2. CRI/APN/515/2007 Ntaote v Director of Public Prosecutions
3. 1999-2001 LLR 106 Khalapa v Commissioner of Police and Another
4. 2009-2010) 465 Mthobi and Another v The Crown LAC

5. 1995 (3) SA 867 S v Mhlungu
6. (C. OF A. (CIV) NO. 13/1999 Khalapa v Commissioner of Police and Another
7. (2009-2010) 465 Mthobi and Another v The Crown LAC
8. 624/2004 [2005] ZASCA National Director of Public Prosecutions v Magdalena Elizabeth Parker
- 9.

STATUTES & SUBSIDIARY LEGISLATION

1. The constitution of Lesotho
2. Penal Code Act
3. Act No. 4 of 2008 Money Laundering and Proceeds of Crime Act
4. Act No.9 of 1981 Criminal Procedure and Evidence Act
5. High Court rules 1980

BOOKS & ARTICLES

MAKARA J

INTRODUCTION

[1] This is a constitutional case in which the applicant has approached this honourable court for in the main, an order in the following terms:

- (a) That criminal case number CR:0911/2016 and property forfeiture proceedings per case number CIV/APN/413/2016 against applicant be permanently stayed due to conduct of the police, prosecution and the directorate on corruption and economic offences of violating applicant's marital privileges, privacy and right to fair trial envisaged by sections 10, 11, and 12 read with section 22 of the Constitution of Lesotho 1993;
- (b) That upon granting of the order in (a) above, the 3rd respondent be order to release applicant's vehicle described as Toyota Runx, 2004 model, bearing engine number INZA983318 and chassis number NZE121-5072486 be released to the applicant forthwith;

(c) The respondents pay costs of this application on a scale to be determined by the court.

1. It is only the 3rd Respondent who filed the intention to oppose and the apposite responsive affidavits.

It should be recorded that an early completion of the matter was for months compromised by the emergence of logistical challenges which confronted the court and the counsel. There were amicably discussed and appreciated by all. One specific obstacle was that it had taken months for heads to be submitted in a soft copy format for ease of writing of judgment. This obtained in the mist of many other Constitutional cases scheduled for hearing around the same time.

Common Cause Facts

[2] Fortunately, for the conciseness of this judgement, the parties agree upon common facts which have occasioned the constitutional questions to be addressed by this Court. An *imprimatur* of the assignment commences from the proceedings in **Rex v T Motloheloa**¹. In that case, the Applicant appeared before a Magistrate Court for the district of Mafeteng charged of contravening Section 58(1) read with section 109 of the Penal Code Act².

¹ CR:0911/2016

² No. 6 of 2010

[3] A supportive allegation was that he committed theft of M106 778.70 which the World Chess Federation (FIDE) had donated to the Lesotho Chess Organization to finance certain operational activities. In the same breath, it was alleged that the money was instead deposited into the account of the wife of the Applicant Khoboso Marambe. The police had initiated the investigations after the Vice President of FIDE Lewis Ncube, had complained to the Ministry of Sports Gender and Recreation about the theft. The latter then reported the complaint to the police who, acting in collaboration with the 3rd Respondent, investigated the matter and took incidental measures.

[4] It is further not in dispute that the 3rd Respondent had *inter alia* charged the Applicant upon the information it received from the interview it had with his wife. The Applicant has even annexed to his affidavit a fair translation of a document authored and signed by his wife as evidence of that. Subsequently, the 3rd Respondent acting in terms of Section 87 (1) of the Money Laundering and Proceeds of Crime Act³ (MLPCA), brought *an ex parte* application to the High Court seeking an interim preservation order in relation to a vehicle which the investigators suspected to be a proceed of the theft. This followed a disclosure made to them by the wife that this was so. The application was not opposed and the order applied for was granted in *rule nisi* terms. However, when the 3rd Respondent

³ Act No. 4 of 2008

applied for a forfeiture order, the Applicant opposed it. *Hitherto*, the impasse remains in limbo pending finalization of this case.

[5] Trial proceeding before the Magistrate took a different turn when after the charge was read to the Applicant, he declined to plead as to whether he is guilty or not. Instead, he firstly employed Section 162 (e) of the Criminal Procedure and Evidence Act⁴ (CP&EA) to take an exception against the jurisdiction of the trial court. His grounds were that this was occasioned by the emergence of constitutional issues which rendered the case to be referred to the Constitutional Court for its determination.

[6] The incompetency of the trial court was attributed to the fact that his charge was founded upon the information obtained from his wife. This according to him, violated his procedural marital rights and privileges under Sections 217 (1) and 250 (1) of the CP&EA. He then introduced a more sounding lamentation that by so doing, the 3rd Respondent and police consequently infringed his constitutional rights under sections 10, 11 and 12 of the Constitution read with Section 22 (1) of same. These are in sequence *rights of freedom from arbitrary search or entry, respect for private family life and fair trial*. They

⁴ Act No.9 of 1981

are to be considered with *Section 22* (1) (2) (a) (b) (c) (3) (4) (5) and (6) of the Constitution which provides for both substantive and procedures towards the enforcement of those protective provisions.

[7] At the end of the conflicting deliberations between the parties on whether the Applicant has satisfied legal requirements for the case to be referred to the Constitutional Court, the trial court ruled in terms of Section 22 (3) that he has. It accordingly stayed the proceedings and ordered that the matter be referred to this Court for its determination of the suddenly raised constitutional issues.

Issue for Determination

[8] A preliminary assignment before this Court hinges on the question of the legal correctness of the Magistrate to have ruled that the exception and the constitutional issues raised before the *court aquo* warranted a referral of the original matter before the Constitutional Court.

[9] Then consequential questions would be whether a permanent stay of the main proceedings would, given the factual and legal scenarios, be legally justifiable and if it would

be correct in law for this Court to order that the vehicle involved, should be restored into the hands of the Applicant.

Submissions by Parties

[10] The Applicant motivated his case through a very short and precise representation. It begins with a reiteration of a trite principle of law that violation of marital privilege is unacceptable since it transgresses even the constitutional right to privacy⁵. From there, he pointed out that where there is such a violation of rights, the Court has jurisdiction to intervene. In support of this proposition of the law, he made reference to a decision by Mofolo J (as he then was) in **Ntaote v Director of Public Prosecutions**⁶ stated that:

In *Connolly v DPP* (1964) N.C. 1254, H.L. at pp. 1354-1355 it has been said power to stay proceedings for abuse of process includes power to safeguard an accused person from oppression and prejudice; that the guidelines have been developed by the common law to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so (*Attorney-General of Trinidad and Tobago v Phillip* 1955 1 AC, 396 P.C). An abuse of process was defined in *Hui Chi-Ming v R* (1992) A.C 34 P, C. as Something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects is a regular proceeding⁷.

[11] The Applicant submitted that he has on the balance of probabilities made a case for the Court to realize the

⁵ Section 4 (g) of the Constitution

⁶ CRI/APN/515/2007

⁷ @ para 18

constitutional infringement of his rights and, therefore, grant the relief he is seeking for. It was specifically in this background that he heavily relied upon **Ntaote v Director of Public Prosecutions**⁸ where a decision in **Connolly v DPP**⁹ that courts should not allow abuse of its processes, was cited with approval.

[12] In response the 3rd Respondent raised a point in limine that the Applicant had in applying for a referral of the case wrongly relied upon Section 22 (3) of the Constitution instead of Section 128 (1) of same which specifically provides for that avenue. A second legal point was that he has even misapplied Section 22 (3) since he prematurely applied for a referral of the case before evidence on the information given to the 3rd Respondent and police was heard. So, a submission was made that the decision on referral lacked legal basis. Thirdly, it was contended that the Section 22 (3) requirements had not all been satisfied. This was in particularly related to a condition that a party that desires reference of a case to this Court, must demonstrate that there is no other forum or means of asking for the intervention other than from this Court and reliance upon the Constitution.

[13] Besides, it was pointed out that the Applicant ought to have allowed the controversial evidence to be tendered and then

⁸ (supra)

⁹ Supra

challenged its admissibility especially when that court was competent to rule on that question with reference to Sections 217 (1) and 250 (1) of the CP&EA. The case of **Khalapa v Commissioner of Police and Another**¹⁰ and the cases cited therein were heavily relied upon for the elucidation of the jurisprudence around Section 22 (3).

[14] The 3rd Respondent further raised another legal argument that the Applicant ought to have applied for the matter to be referred to this Court through the Section 128 (1) constitutional avenue but not by way of Section 22 (3). Emphasis was made on the fact that the section specifically creates a procedure for a subordinate court or tribunal to consider referring a matter to the High Court for interpretation of the Constitution where it involves a substantial question of law.

[15] On the same topic, it was also contended that Section 22 (3) upon which the Applicant purported to apply for the reference of the case to this Court did not accommodate an exception for him to apply so contrary to Section 128 (1) which is the appropriate provision for doing so. The proposition was reinforced with direction detailed in **Mothobi and Another v The Crown LAC**¹¹. Here it was held that once a question is referred to the High Court, it must decide, first, whether the

¹⁰ 1999-2001 LLR 106 at 111

¹¹ (2009-2010) 465

question is one properly referred within the meaning of section 128(1) and second, if so it must decide the question itself.

[16] On the merits, the 3rd Respondent argued that it was legally justified to have taken all the impugned measures against the Applicant. It reasoned that there was at the material time, a *prima facie* information for its operatives to have formed a reasonable suspicion that the Applicant had committed an offence and then acted in the described manner. To illustrate the point, it was highlighted that this constituted of the information gathered from the complainant and his wife which were suggestive that he had stolen the said moneys which he used to pay bohali and bought a vehicle.

[17] In conclusion the 3rd Respondent asked the Court to dismiss the application with costs. However, it did not justify its basis for asking for costs in a constitutional case where there is no proposition that the litigation was vexatious.

Decision

[18] It appears that the 3rd Respondent recognizes Section 128 (1) of the Constitution as the only source for the application for a matter before a subordinate court or tribunal to be referred to the High Court where it assumes a constitutional dimension. To appreciate basis of the thinking the section reads:

Where any question as to the interpretation of this Constitution arises in any proceedings in any **subordinate**

court or tribunal and the court or tribunal is of the opinion that the question involves a substantial question of law, the court or tribunal may, and shall, if any party to the proceedings so requests, refer the question to the High Court. (Court's highlight)

[19] The Court holds a contrary view to a suggestion by the 3rd Respondent that it is only through Section 128 (1) that a party could apply to the subordinate court or tribunal for a case to be referred to this Court on account of constitutional related issues. It actually appears that the 3rd Respondent miscomprehends the basis of the application for the case to be referred to the High Court. Equally, it does not appreciate the logic he used for connecting the issue of the information it secured from his wife with the transgressions against his constitutional rights under consideration.

[20] The application made before the Magistrate was comprehensive, logical and had its relative grounds. In the understanding of the Court it commences from a complaint that the 3rd Respondent including police unlawfully secured the information from the wife, used it to arrest and charge him. Resultantly, on the same basis, he was confronted with an application for a preservation of his property which was suspected to be a proceed of theft and finally an application for a forfeiture of same. He specifically charged that the procedural transgressions upon him constituted of a failure by the said law

enforcement agencies to respect his marital rights and privileges provided for in the CP&EA.

[21] Now, there should be a turn towards exploring Sections 250 (1) and 216 (1) respectively. This is on account of their material significance for the determination of the issue on the procedural correctness of the timing of the application under consideration and the ruling thereon. The approach is followed well conscious that at the time it was moved and the ruling made that the case be referred to this Court, there was no iota of evidence presented before it. So, the two sections would individually be quoted in extenso to demonstrate the significance of evidence before the application and ruling were each made.

[22] The main relevant provision is Section 250 (1) which reads:

A husband shall not be compelled to disclose any communication made to him by his wife during the marriage, and a wife shall not be compelled to disclose any communication made to her during the marriage;

[23] The next one that harmonizes and complements

Section 250 (1) is Section 216 (1) of the CP&EA that reads:

The wife or husband of an accused shall not be competent to give evidence for the prosecution in a criminal case but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with;

(a) Any offence committed against the person of either of them.

(b)

- (c)
- (d) Any offence under the Deserted Wives and Children's Proclamation 60 of 1959.
- (e) Bigamy
- (f) Incest
- (g) Abduction
- (h) Any offence under Section 2 of Concealment of Child birth Proclamation 3 of 1949.
- (i) Perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other in connection with or for the purpose of criminal proceedings in respect of any offences in this sub-section.
- (j) The statutory offence of making false statements in any affidavit or any affirmed, attested declaration if is made in connection.....
- (k)

[24] In essence the above provisions are all dedicated to uphold mutuality of outmost trust, confidentiality, sanctity of marriage and a sense of oneness between a husband and wife. The edifice applies specifically to the arena of criminal justice where a husband or wife is accorded a privilege of not testifying against each other and a freedom from either of them being legally compelled to do so.

[25] It is precisely against background of mainly the two sections that the Applicant lamented that the transgressions of his marital rights and protections therein, transcended into a violation of his already stated constitutional rights. Resultantly, he through the instrumentality of Section 22 of the Constitution applied for the matter to be referred to this Court for a determination of the constitutionality of the manner in

which the information was secured from the wife. The section is configured:

(1) Any person who alleges that any of the provisions of section 4 to 21(inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him(or in the case of a person who is detained, if any other person alleges such contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, the person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction-

(a) to hear and determine any application made by any person which is referred to it in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3),

[26] And may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution;

Provided that the High Court may decline to exercise its powers under this subsection **if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.** (Court's emphasis).

(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of section 4 to 21(inclusive) of this Constitution, the person presiding in that court **may, and shall** if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the questions is merely frivolous or vexatious (Court's emphasis).

(4) Where any question is referred to the High Court in pursuance of subsection (3), the High Court shall give its

decision upon the question and the court in which the question arose shall dispose of the case in accordance with a decision or, if that decision is the subject of an appeal under section 129 of this Constitution to the Court of Appeal, in accordance with the decision of the Court of Appeal.

[27] The right to apply for a matter before a subordinate court to be referred to the High Court on constitutional ground is besides under Section 128 (1) also clearly sanctioned under Section 22 (1) read in conjunction with (3).

[28] A trivial difference between Section 128 (1) and 22 (1) and (3) is that the former emphasizes on the application for reference of the matter to the High Court for the interpretation of a constitutional provision relevant to the case. On the contrary, the latter sanctions the same procedure in general terms. A common feature is that substantively both avenues are intended to ascertain that at the end of the day, proceedings shall have been administered in accordance with the Constitution.

[29] The Applicant has satisfied an elementary pre condition under Section 22 (1). He demonstrated how the infringement of his CP&EA based marital rights and privileges has in the final analysis undermined his constitutional *rights of freedom from*

arbitrary search or entry, respect for private family life and fair trial. These are some of the rights within the sections 4 to 21 constitutional rights. It is precisely in that context that he sought to protect his affected rights through the section.

[30] On a different discourse, however, the Applicant has fatally failed to satisfy the Section 22 (3) critical requirement that **there were no adequate means of redress for the contravention alleged that are or were available to him under any other law.** He failed to realize that a proper procedure was for the Crown to firstly present its evidence. If that would include a dimension concerning its reliance upon the information given to the 3rd Respondent and police, he could then challenge its admissibility against Sections 217 (1) and 250 (1) of CP&EA. The trial court commanded jurisdiction to rule upon that controversy.

[31] In the event that the trial court did not uphold his objection, he could have appealed against the decision or resorted to this Court for a reviewing of the procedure followed. In a nutshell, in the present scenario, the CP&EA adequately establishes an avenue for the exclusion of inadmissible evidence for a protection of the constitutional rights complained about.

[32] There is a catalogue of long standing decisions directing that a subordinate court or tribunal shall not be referred to the High Court where there are besides the Constitution, adequately existing legal ways of addressing an issue before any one of those forums. A complementary qualification is that a concerned forum must be competent to decide the matter. In the instant case, the trial court possessed the requisite jurisdiction. This jurisprudence was propounded in a plethora of decisions. To attest to that in **S v Mhlungu**¹² Kentridge AJ asserted:

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without leaching a constitutional issue that is the course that should be followed¹³.

[33] The same approach was advocated for in **Khalapa v Commissioner of Police and Another**¹⁴ and in **Mothobi and Another v The Crown LAC**¹⁵. Though in those cases the question was reference based upon the Section 128 (1), the applicable principle is the same as under Section 22(1) and (3). This is that the High Court must firstly determine if such matter has been properly referred to it within the meaning of the section. Secondly, if so, it must decide that. The principle leads to a conclusion that the application before the trial court to refer

¹² 1995 (3) SA 867 (CC)

¹³ @ 895 E

¹⁴ (C. OF A. (CIV) NO. 13/1999) (NULL) [2000] LSHC 143

¹⁵ (2009-2010) 465

this case to this Court was procedurally and substantially incorrect and so the decision allowing that.

[34] A dispensation from this principle would only apply in exceptional circumstances tabulated under Section 216 (1) (a) to (j). In the main, these apply where one of the spouse or their child is a victim of the offence charged. To demonstrate the seriousness with which the legislature recognizes marriage and seeks to protect its sanctity, the privilege would persist into the post marriage phase of a married couple.

[35] The fact that in the instant matter, the wife had relayed to the 3rd Respondent and police the information which she got from the Applicant during the subsistence of their marriage, *ex lege* subjects evidence based upon same, objectionable for its inadmissibility. Reference has already been made to Section 250 (1) that directs that the wife or husband cannot be compellable to disclose any information shared between them during the subsistence of their marriage. This is suggestive that such conversation would for the purpose of evidence be inconsequential since it would never translate into evidence for its inadmissibility. Resultantly, it would present a serious challenge for the 3rd Respondent and police to justify the lawfulness of all connected transactions including seizure of the vehicle.

[36] It would be remiss for the judgment not to specifically address the prayer for a permanent stay of the proceedings due to what the Applicant perceives as a procedural transgression of his constitutional rights by the police, prosecution and the 3rd Respondent. In approaching the question, it emerges that it is common cause that the 3rd Respondent and police did not exclusively base their investigations upon the information they received from the wife of the Applicant. This is found to be the truth irrespective of a *prima facie* indication of its recognizable significance in the matter.

[37] It transpires to be a reality that the law enforcement agencies had initially received information from different sources before mounting their investigations. They had for instance, received information from the concerned Ministry of Government. It would be inconceivable that they did not have an interview with the Vice President of FIDE or read some relevant papers authored by him or on his behalf over the subject. A mere discovery by the 3rd Respondent and police of M106 778.70 deposited in the account of the wife, could be indicative of documentary evidence upon which they *inter alia* took the measures against the Applicant. The amount coincidentally corresponds to the one which the Vice President of FIDE complained about. Here, it should be remembered that the discovery preceded their interview with the wife. There could also be circumstantial evidence around the alleged incidence.

[38] It would have been wise and prudent for the Applicant to have allowed the Crown to firstly lead its evidence. This would have presented him with an opportunity to timeously take an exception against any testimony connected with the information under scrutiny. In the circumstances, it would be premature for the Court to conclude that the operatives concerned founded their actions exclusively upon the information from the wife.

[39] The Court has dedicatedly addressed its minds to a conditional prayer that upon granting of the order for permanent stay, the 3rd respondent be ordered to forthwith release applicant's vehicle in its possession. This resulted from the interim preservation order made by Peete J on 23 November 2016 and published in the Government Gazette in terms of sections 88 and 89 of the MLPCA respectively. It was thereafter, that the 3rd Respondent applied for a forfeiture order. The Applicant reciprocated by opposing the application but never filed an opposing affidavit and hitherto, hearing of its merits remains pending.

[40] The civil case application under the MLPCA is indicative that whoever, seeks to oppose it, must proceed in accordance with the civil procedure rules in particular Rule 8 (10)¹⁶ by firstly filing a notice of intention to oppose and, thereafter, an

¹⁶ Of the High Court rules 1980

opposing affidavit. Subsequently, the merits would be traversed on the appointed day for a determination of whether the rule should be confirmed or discharged. In the circumstances, it is inconceivable that the matter could be taken away from the judge who granted the interim order and be referred to the High Court exercising its constitutional jurisdiction.

[41] The civil character of MPLA based case, was affirmed by the Supreme Court of Appeal in **National Director of Public Prosecutions v Magdalena Elizabeth Parker**¹⁷ thus:

The ... Chapter 6 provides for the forfeiture in the circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence.. even where no criminal proceedings in respect of the relevant crime have been instituted. ... Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore not primarily relevant to the proceedings....

[42] Chapter 6¹⁸ is inscribed in *pari materia* terms with our Part V of the MLPCA and the sentiments expressed in **National Director of Public Prosecutions v Magdalena Elizabeth Parker (supra)** would *mutatis mutandis* apply to similarly.

[43] Chapter V is as suggested by the 3rd Respondent intended to prevent criminal suspects from benefitting from the proceeds of crime. This demonstrates that preservation and forfeiture

¹⁷ 624/2004 [2005] ZASCA

¹⁸Prevention of Organised Crime Act No.121 of 1998(POCA).

applications respectively are in *rem* since they target property that is either instrumentality or proceeds of crime. This is in contrast to criminal cases where the focus is on the *personam* of the suspect.

[44] The expectation would be that during the deliberations on the interim order, the 3rd Respondent or police would on the balance of probabilities, demonstrate that they had reasonable grounds to believe that a suspect is benefiting from proceeds of an offence¹⁹. The background idea for a preservation order and ultimately its forfeiture dimension is to discourage suspects from risking committing the offence not necessarily to punish them²⁰. This highlights the civil nature of the encounter.

[45] In the premises, we conclude as follows:

- 1 Prayer (a) asking the Court to permanently stay the pending criminal case and the property forfeiture proceedings due to the said conduct of the police, prosecution and the 3rd Respondent of violating applicant's marital privileges, privacy and right to fair trial envisaged by sections 10, 11, and 12 read with section 22 of the Constitution is refused;
- 2 A conditional prayer that upon the granting of the order staying both proceedings, the 3rd respondent be ordered

¹⁹ Section 88(2) *supra*.

²⁰Jonathan Burchell & Adele Erasmus, *Criminal Justice in a New Society*. 2003. Page 314 at page 344.

to release applicant's vehicle under consideration forthwith is also refused.

- 3 Prayer (c) that the respondents pay costs of this application on a scale to be determined by the court is equally refused;
- 4 This being found to be a *bona fide* constitutional case and an enhancement of our jurisprudence, there is no order on costs.

Hon. E.F.M Makara
(Judge of the High Court)

I concur,

Hon. M. Mahase
(Acting Chief Justice)

I concur,

Hon. T.E Monapathi
(Judge of the High Court)

For Applicant : Adv. Molati instructed by Mukhawana Attorneys

For Respondent : Adv. Tsutsubi instructed from Attorney

General's Office