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IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/305/2019**

CRI/T/001/18;

CRI/T/002/18;

CRI/T/ 003/18;

CRI/T/004/18;

CRI/T/008/18;

CRI/T/0010/18;

CRI/T/0032/18.

In the matter between:

(1) THE ATTORNEY-GENERAL

versus

THE REGISTRAR, HIGH COURT & THIRTY-TWO OTHERS

(2) LITEKANYO NYAKANE & TWENTY SIX OTHERS

versus

DIRECTOR OF PUBLIC PROSECUTIONS

and

ATTRORNEY-GENERAL

CORAM: **HUNGWE AJ**

DATE OF HEARING: **16 SEPTEMBER 2019**

DATE OF JUDGMENT: **17 SEPTEMBER 2019**

JUDGMENT

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HUNGWE AJ On 5 September 2019 at the instance of the Applicant in the first matter, the Attorney-General, this court issued the following *rule nisi*:

1. Dispensing with the forms and service and time limits provided for in the Rules and hearing the matter as one of urgency at such time and in such manner and in accordance with such procedure as this Honourable Court may deem fit.
2. Calling upon the Respondents to appear and show cause on a date as determined by this Honourable Court why an order in the following terms should not be made:
    a. That the 1st respondent (Registrar of the High Court) be directed to dispatch the record of all documents and or correspondence which formed the basis of her decision for the grant of *pro deo* facility to all the other Respondents forthwith upon grant of this order or any other suitable time as the court may deem necessary.
    b. That the application for deviation from the prescribed *pro deo* rates per legal notice no. 183 of 2011 in line with Regulation 5 be stayed pending finalization of this application.
    c. ALTERNATIVELY TO PRAYER 2 (b) above: That leave be granted for the application for deviation from the prescribed *pro deo* rates per Legal Notice No. 183 of 2011 be consolidated and heard together with the present application and the present application be staged as a counter-application thereto.
3. The impugned decision of the 1st Respondent (Registrar of the High Court) dated 15th July 2019 and addressed to the legal representatives of all the accused persons who are Respondents herewith be reviewed and set aside on grounds of being irregular and hence unlawful.
4. Costs of suit in the event of opposition hereof.

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5. Further and/or alternative relief as the Court may deem fit.
6. Prayers 1 and 2 (a) (b) and (c) must operate with immediate effect as an interim relief and shall remain in force until it may be discharged or set aside by this Court on the return day or thereafter.

[1] This is the return day of the *rule nisi*. This is a composite judgment of the two matters argued before me involving the same parties over similar issues arising from the pending criminal trial.

[2] The Attorney-General deposed to the founding affidavit in which he makes the following averments. He exercises authority over the Director of Public Prosecutions and takes the necessary legal steps in the protection and upholding of the Constitution and other laws of the Kingdom of Lesotho. He seeks a review of the decision of the 1st respondent, the Registrar of the High Court's decision through which she approved the payment of *pro deo* fees to the legal representatives of all the other respondents who are accused persons in a number of criminal cases bearing the following reference numbers:

(a) Rex v Kamoli and three others	CRI/T/001/18;
(b) Rex v Kamoli and four others	CRI/T/002/18;
(c) Rex v Nyakane and four others	CRI/T/ 003/18
(d) Rex v Nyakane and nine others	CRI/T/004/18;
(e) Rex v Mphaki and nine others	CRI/T/008/18;
(f) Rex v Letsoepa and others	CRI/T/0010/18;
(g) Rex V Ramoepana	CRI/T/0032/18.

Background

[3] This application is an offshoot of the main criminal matter *Rex v Litekanyo Nyakane* **CRI/T/004/18**. On 13 June 2019 in this matter this court was faced with a situation wherein counsel for the accused chose not to appear. *Adv Nku,* for the Crown, reminded the court that it had warned the accused that should counsel

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again fail to appear on an appointed day, the court will be left with no option but to decide on the best way to push the matter forward. When the accused were asked on the possible reasons why their legal practitioners were not in court, all those appearing indicated that they were unable to explain why their counsel of choice were not in court. The court then explained, on that day the fair trial rights enshrined in the Constitution of Lesotho. The court went on to explain that the law enjoins that an accused who is charged with a criminal offence be afforded a fair trial within a reasonable time. The court also explained that the right to counsel entitles an accused who is charged with a criminal offence to a legal representative of his own choice or a legal representative appointed by the State for him without payment by him of such costs, if substantial injustice would otherwise occur. In that respect therefore the court again warned the accused that a stage may soon be reached where the court might have to instruct the Registrar to appoint *pro deo* counsel for each accused. Therefore, it was up to them to impress upon their respective counsel to avail themselves on behalf of their clients in line with their duty to court and to clients.

[4] On 13 June 2019 I ordered as follows:

1. That each accused indicates to the Registrar, individually or through counsel, whether he wishes to be represented by counsel of record before 20 June 2019.
2. That the Registrar be and is hereby directed to choose from the register of legal practitioners holding the right of audience with this Court any such person to act for the accused in the event of an approach by the accused as contemplated in paragraph 1 above.
3. That in his brief to such *pro deo* counsel, the Registrar shall direct the legal practitioners to take instructions in respect of the matters in which the accused persons are appearing in court with a view to prepare for a pre-trial management hearing set for 6 August 2019.

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4. That in the event that any of the accused deciding to retire the court-appointed legal practitioner, the retiring legal practitioner be and is hereby directed to explain the consequences of such retirement to the accused.
5. That the usual rules of renunciation of agency by legal practitioners are applicable in this matter.
6. That the matter be and is hereby postponed to 6 August 2019 for the purposes of conducting a pre-trial management meeting.

[5] On 6 August 2019, the date of the scheduled pre-trial management meeting, the counsel for the accused appeared. The matter was due to proceed to pre-trial management hearing. *Mr Abrams* indicated that those matters which the court had drawn counsel's attention to in the interim had been attended to and the Crown was ready to discover every such document the defence were entitled to. In short, the Crown was ready to proceed with the management meeting. *Mr Mda*, for the accused, indicated that there was an outstanding matter of fees. This matter arose from the fact that the Registrar had indicated to counsel that they needed to apply to the trial judge. She had no power to allow fees outside the statutory rates set out in the Legal Notice. *Mr Teele* associated himself with *Mr Mda* on this issue. He pointed out that counsel had had to forgo other matters in order to attend to the present clients. They felt that they were entitled to an appropriate compensatory fee for their effort. This had been done before. There was no reason why it could not be done in this case. I expressed my difficulty in dealing with the issue off-hand as it was a novelty that private counsel drawing fees from a client could still be granted *pro deo* status and further ask a court for an upward review of the publicly funded compensation. I needed argument to be presented on the issue before I could decide the issue.

[6] The matter was postponed to 21 August 2019 to enable argument to be presented in respect of higher fees for *pro deo* counsel. Thereafter, counsel approached me in chambers and asked for postponement of the matter as they

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were both unable to make filings before the agreed date. I obliged, but that was not the end of these requests. The matter was finally set down for hearing on 16 September 2019. I must point out that the reason why there were further postponements was that my request for argument was acted upon by counsel by filing heads of argument without having made a formal application supported by a founding affidavit. I had assumed, wrongly I must say, that once a court requests that argument be presented it must follow that this is an invitation for a formal application with all that goes with it.

[7] As a matter of practice, generally, a court can only hear a matter on the basis of an application supported by facts presented in a founding affidavit. There may be situations where the relevant facts are already part of the record. In such a situation argument can be made out on the basis of the facts on the record. In other words, the foundational basis of any argument at law must exist on the record. An issue is then identified for argument in resolution of that issue. In that application the issue for which a decision of the court is required is clearly identified. The absence of a founding affidavit meant further delays as it was necessary that it be filed.

[7] The matter took another twist when the Director of Public Prosecutions indicated her unhappiness with the decision of the Registrar granting the accused *pro deo* facility. She wished to file a review application seeking the setting aside of the Registrar's decision. In order to do so she indicated, through counsel, her desire to file an application of stay of the accused's application for an upward review of the *pro deo* fees allowable to their counsel under a certificate of urgency.

[8] On 4 September 2019 the Attorney-General filed an urgent chamber application with various prayers which in effect asked the court to dispense with forms, service and time limits set out in the Rules and further asked the Court to

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give directions, as a matter of urgency, in respect of the hearing of the proposed review application. I agreed that the matter be heard the following day.

[9] On 5 September 2019 I gave the following order in open court in the presence of both counsel and their clients by consent:

> "By consent it is ordered:
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> 1. That the applicants in respect of an application for an upward review of *pro deo* fees in case number CRI/T/004/18 file their replying affidavit in that matter on or before 11 September 2019,
> 2. In the event that counsel of record are instructed by clients to oppose the application for review in case number CRI/APN/305/19 then in that event, the respondents be and are hereby ordered to file such opposition papers on or before 11 September 2019.
> 3. That the applicants be and are hereby ordered to file their replying affidavit on or before 13 September 2019 together with their heads of argument.
> 4. That the Registrar sets down the matter for hearing in respect of both applications on 16 September 2019."

[10] As has become the norm with legal practitioners in this court, the timelines were neglected. I must take this opportunity to state that the time has come for this court to take a firm grip of the proceedings and get these matters back on the rails. A party to litigation is bound by the conduct of his or her legal practitioner. A party whose legal practitioner is sluggard bears the consequences of such conduct. Counsels are advised to heed this advice. The proceedings will follow agreed timelines henceforth.

I now turn to consider the applications.

Matter for review of 1st respondent's decision granting *pro deo* facility to respondents.

[11] The Attorney-General filed his application on 4 September 2019 at this court and served on the 1st respondent on the same day. When accused person's legal practitioners were served with the same papers, they declined service pointing out that they had no instructions to accept service or to respond to the application. The usual practice generally, is that once an accused has appointed counsel to

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represent him, all process is served through that counsel. It was therefore not only wrong but also bizarre that counsel refused to accept service of process under the guise that they had not been instructed when they in fact held a brief from the same accused persons. The applicant's legal practitioner indicated that he would have to serve the application on the individual accused who are cited in the application.

[12] The application in this matter is principally directed at the 1st respondent. The accused have a direct interest in the matter in that they have a legal interest in the right to legal counsel at State's expense that they have acquired arising from the approval of their entitlement to *pro deo* facility. On that basis alone, one would have hoped that it was in their best interest to be part of that application by insisting that counsel handled it for them. But again, where a court depends on a party-driven process, it cannot make decisions for a litigant.

The first matter therefore proceeded as an unopposed application. I proceed to consider that application.

[13] The Attorney-General makes the following averments in his founding affidavit: -

The 2nd to 32nd respondents are accused persons in various matters cited above for crimes ranging from kidnapping to murder. These respondents are law enforcement officers who are still in the active employment of the public service in their different capacities. Besides 30th, 31st and 32nd respondents who are members of the Lesotho Mounted Police Service ("LMPS"), the rest are members of the Lesotho Defence Force ("LDF"). The respondents, in the exercise of their constitutional right to legal representation of their choice at their own cost, for the purpose of the conduct of their criminal trials, engaged counsel of record.

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[14] On 28 January 2019 the applicant received correspondence from one of 2nd respondent's legal practitioners seeking to be paid fees in excess of the prescribed tariffs.

The letter, dated 23rd January 2019, states:

> **"Re: Payment of Legal Fees/ Retired Lt Gen. Tlali Kamoli/Five Million (M5, 000 000. 00 /Court Cases**
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> 1. We refer to the above caption duly instructed to act on behalf of Retired Lt Gen. Tlali Kamoli who is hereinafter referred to as client.
> 2. We kindly ask of your good offices to furnish us with a response to our correspondence dated 17th September 2018 wherein we were instructed by the client to demand that the Government pay the legal fees of the above-mentioned person in all the cases that he faces so far.
> 3. We reiterate that in the event that you are not agreeable, we shall be grateful to receive your response so that the client can exercise his judicial remedies as the cases he is facing may have to be put on hold until at least the year 2020 as we have previously stated.
> 4. We hope the above is in order.
>
> Yours Faithfully.
>
> Adv. L A Molati"

[15] The applicant avers that from the outset, the accused desired to be represented by a legal representative of their choice at the State's expense. According to the applicant, this became the obtaining situation notwithstanding the fact that no evidence of inability to pay the said fees had been presented to the Director of Public Prosecutions for consideration of the proposed avenue. Applicant avers that in any event, it was a matter of public record in the Bail Application matter number CRI/APN/529/17, that 2nd respondent had been paid an exit package of not less than three million Maloti.

[16] Applicant states that an application for *pro deo* fees is governed by Legal Notice 183 of 2011 which empowers 1st respondent to grant it to deserving accused persons who are indigent or unable to pay legal costs. As such *pro deo* fees are strictly for the indigent.

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[17] In May 2019, legal representatives for the 8th, 10th and 11th respondents addressed correspondence to 1st respondent dated 14th May 2019 seeking the grant of the provision of for *pro deo* fees. By letter dated 15 July 2019, 1st respondent granted all the accused respondents in the present matter *pro deo* status. She however pointed out that she had no power to grant *pro deo* fees in excess of what is stipulated in the **Pro Deo Fees Rules of 2011**. In that regard, she advised counsel to advise clients to invoke Rule 4 and 5 of the **Pro Deo Rules**.

[18] Applicant observes that 1st respondent yielded to the request for *pro deo* fees facility on the basis of the letter authored on behalf of only three accused persons when she approved the facility to all the accused respondents who now seek that such fees be paid on a scale higher than the statutory limits. Further, applicant avers that 1st respondent did not, before granting the blanket approval, consider the individual circumstances of each of the three accused or all the accused respondents. Clearly, their circumstances do differ and 1st respondent did not consider their individual circumstances in granting the blanket approval.

[19] Consequently, the applicant avers that the 1st respondent failed to take into account relevant considerations which she ought to have considered before arriving at her decision. This failure to bring her mind to bear on the criteria upon which a consideration of the matter rendered her decision liable to be set aside as irregular and, therefore, unlawful.

[20] In any event, the fact that she granted an order to benefit persons who had not sought such an order vitiates her administrative decision. Applicant avers that whilst the respondents are entitled to appoint legal representatives of their choice, they are not entitled to have such privately appointed representatives act for them at State's expense.

[21] Where such an application is made, the Registrar is duty bound to carry out an inquiry into the financial circumstances of any such applicant with a view to

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satisfy herself that the applicant for *pro deo* representation indeed deserves to be assisted with payment of legal fees on the basis that he cannot afford to do so. It is a "means" inquiry. There ought to be a sound basis for the administrative decision categorising an applicant as indigent. Without it, the decision is irrational and therefore irregular.

[22] There is no indication from the office of the 1st respondent that she took the decision to grant the three accused *pro deo* status after consulting the relevant government departments that handle the national purse in respect of the capacity to meet the demand for legal fees which were likely to be incurred in the litigation faced by the three accused respondents.

[23] First respondent is the Chief Accounting Officer for the Judiciary in terms of section 6(3) of the Administration of the Judiciary Act, 16 of 2011.she is duty-bound, before committing the State financially, with the relevant financial authorities before making any decision with financial implications. It is therefore clear that a decision of a financial nature must be made after consultation with the appropriate ministries for which she is the accounting officer. There is no evidence that such consultation ever took place before the decision was made. It ought therefore to be set aside.

[24] In the event that this application is successful, then the matter in which the accused sought an upward adjustment of the *pro deo* rates will be put to rest. Consequently, that this matter is one in which urgency is self-evident from its very nature. It ought to be heard first before the other application for the increased rate of *pro deo* fees.

[25] The 1st respondent was served with this application on 4 September 2019. She did not file any papers in opposition or indicate that she will abide by the judgment of this court. The office of the Registrar is a statutory one and plays a

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pivotal role in the administration of justice. This is recognized by the prominence accorded to the office in the scheme of things. Where, as here, the office is sued, the least it can do is to file a position paper, if only to protect the integrity of that office. To fail to file anything is unacceptable. Such failure does not assist the court in the discharge of its function. I will, however, assume that the Registrar will abide by the judgment of the court. It is unwise for a quasi-judicial functionary to file opposing papers in an application of this nature.

[26] The reason for this is that, as an administrative decision-maker, it must be assumed in her favour that she has no personal interest in the matter. She executed her duties in good faith. If she erred procedurally, she stands to be corrected by the judgment of this court and therefore will not seek to justify her impugned decision. By the same token, an application for review of an administrative decision ought to be considered on the basis of the law regulating the administrative decision-maker.

The Law

[27] This court is vested with the power to review the proceedings of all administrative bodies both statutory and domestic. The two main grounds upon which the High Court can interfere with an administrative tribunal's decision are, firstly that the administrative tribunal has acted beyond the powers allocated to it, that is *ultra vires,* and secondly that it did not comply with the principles of natural justice.

[28] This power is recognised under common law and is also provided in statutory form in section 2 (1) (a) of the High Court Act, 1978. Rule 50(1) of the High Court Rules sets out the powers of this court to review the administrative decision of an officer such as the 1st respondent. Rule 50(2) provides that the review proceedings shall be by way of notice of motion setting out the decision to be reviewed which shall be supported by an affidavit setting out the facts and the

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circumstances upon which applicant relies to have the proceedings set aside or corrected.

[29] Rule 50(3) requires the Registrar of this court to make available to the applicant the record of proceedings, which record of proceedings ought to be certified by the applicant as correct, which resulted in the impugned decision being made. The remaining sub-rules of Rule 50 set out the filing times for the parties.

[30] The above principles were applied in the Zimbabwean case of *Secretary for Transport & Anor v Makwavarara*.[1] In that case, the court said that administrative action is subject to control by judicial review under three heads:

- Illegality, that is where the decision-making authority is guilty of an error of law;
- Irrationality, where the decision-making authority has arrived at a decision "so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it";
- The duty to act fairly.

[31] In *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd*[2] the Zimbabwe Supreme Court spelt out in more detail the review powers of courts of law. The court said that the role of the court in reviewing decisions is to act as an umpire to ensure transparency, the court's duty is not to usurp the administrative authority's function. If the administrative authority has acted fairly and transparently, the court will not interfere with its decision simply because it does not approve of the conclusion reached. Transparency connotes openness, frankness, honesty, and absence of bias, collusion, favouritism, bribery,

[1] 1991 (1) ZLR 18
[2] 1996 (2) ZLR 15

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corruption or underhand dealings and considerations of any sort. In other words, the decision of an administrative authority cannot be interfered with in the absence of illegality, irrationality or procedural impropriety.

[32] It is trite that the requisites for an interim interdict are the following:

- Prima facie right though open to some doubt;
- A well-grounded apprehension of irreparable harm if interim relief is not granted and ultimate relief is eventually granted;
- The balance of convenience favours the granting of the interim interdict, and
- The applicant has no other remedy.[3]

***Prima facie* right**

[33] The test to be applied in deciding whether an applicant has shown a *prima facie* right in an application for an interim interdict are well-known. Having regard to the facts averred by the applicant, together with the facts put up by the respondent that are not disputed, it must be considered whether, having regard to the inherent probabilities, the applicant should obtain final relief on those facts at the trial. The facts set up by the respondent in contradiction must then be considered and, if serious doubt is cast upon the applicant's case, it cannot succeed. See *Simon NO v Air Operations of Europe AB and Others.*[4]

[34] The applicant is the legal adviser to the government of the Kingdom of Lesotho. He points out that the decision to bind the State to pay the accused legal costs is wrong at law as there is no indication that a proper assessment of the eligibility of the accused to *pro deo* facility by way of a "means" was undertaken. It is clear to me that by virtue of his office, the applicant has a *prima facie* right

[3] See Webster v Mitchell 1948 (2) SA 1186 (W).
[4] 1999 (1) SA 217 (SCA) at 228G

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to the order that he seeks in the interim. He has demonstrated that in fact the decision is liable to be set aside as it was irregularly made.

[35] As for the well-grounded apprehension of irreparable harm and the balance of convenience, I am of the view that taken together, the balance of convenience require that this matter be disposed of in order of the accused persons to arrange their affairs in such a manner as to enable the disposal of the criminal trial matter with reasonable dispatch. Therefore, although I did not find that the applicant will suffer irreparable harm if the interim relief was not granted pending the determination of the main matter, taking into account the net effect of the circumstances of this application, I come to the conclusion that the balance of convenience far outweigh the absence of irreparable harm. In any event it was not disputed by the respondents, when the matter was called, that there is no other remedy besides the grant of interim relief.

[36] Besides, I did not understand the two respondents who opposed the application to base their opposition on anything other than what they believed would be an appropriate relief. If I understood *Mr Letuka* correctly, he argued that in the event that the court is of the view that the decision of the 1st respondent ought to be set aside, then in that event, the court must direct that the Registrar be afforded an opportunity to reconsider the matter afresh taking into account those matters which she had not considered.

[37] This submission takes me to the important point of what order, at this point, the court must take. The point is this; the *rule nisi* was granted on 5 September 2019. This is the return day of that rule. No opposition had been filed until the time when the parties were literally at the door of the court. In my view, to accept such opposition filed in flagrant disregard of an extant order of court is to condone a serious breach of that order. Therefore, there is no opposition filed by any of the cited parties. In that regard, only a final order ought to be considered.

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[38] I have outlined the requirements of an interim interdict. The applicant's papers have made out a case, not just for the grant of an interim interdict, but also for the final relief sought although the papers were not as elegantly drawn as one would have expected. I am inclined to condone the lack of elegance, having listened to counsel for the applicant. I accept that what is suggested on these papers, which also came out clearly in argument, is that the decision by the first respondent ought to be set aside as irregular. That is the final relief sought by the applicant. The fact is that there is no record upon which anyone could suggest she made an inquiry into the accused's means before deciding to grant them the *pro deo* facility. No purpose would be served by granting interim relief when there is no opposition to speak of.

[39] In any event, there is no doubt in my mind that the applicant has made out an unassailable case for the setting aside, on review, of the impugned decision of the first respondent. The first respondent has not suggested that her decision is supportable by furnishing this court with the relevant paper trail which could show the basis of her decision. Had such a paper trail existed, one imagines that she could have filed the same upon being served with the present papers.

[40] Usually, in other jurisdictions in the region, a means test inquiry is antecedent to the grant of an application for *pro deo* legal assistance. An applicant for *pro deo*, like an *in forma pauperis* applicant, is required to complete a form outlining his or her monthly income and expenditure. An assessment on eligibility is then made. The expenses are funded by public funds. Transparency in how these funds are disbursed is of fundamental importance if a perception of profligacy or incompetence by the judiciary or its officers is to be avoided. Therefore, the expectation that the Registrar consults with the funding ministry is appropriate and legitimate. It in no way impinges on the independence of the judiciary.

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[41] The Registrar needed not have written a ruling. She however ought to have kept a record of a means inquiry in respect of each accused person. Such an inquiry is a necessary procedural step before a decision on whether to grant an accused the *pro deo* facility. In the absence of any such inquiry, her decision lacks legality.

Disposition

[42] In light of my findings above, it is not necessary to consider the argument advance in the matter regarding *pro deo* fees. In the event, that is not the end of the matter as they can still approach the Registrar with the same application. That, however, should not stall the progress of the main matter. Should they succeed on the second bite of the cherry, they will enjoy the benefit of the facility at any time including the costs so far incurred.

Consequently, it is ordered as follows:

1. The decision of the Registrar of the High Court communicated to the applicants for *pro deo* funding on 15 July 2019 be and is hereby set aside.
2. There will be no order for costs.

For the Crown and Attorney-General's Office:	*Adv. C. J. Lephuthing*
	Mr. M. S. Rasekoai
For the Defence:	*Mr. Q. Letsika*
	Adv. K. W. Letuka
	Adv. N. J. Mafaesa