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CRI/T/0004/18

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

MOTSAMAI FAKO	**1st APPLICANT**
MOTSOANE MACHAI	**2nd APPLICANT**
TSI'TSO RAMOHOLI	**3rd APPLICANT**

versus

DIRECTOR OF PUBLIC PROSECUTIONS	**1st RESPONDENT**
REGISTRAR OF THE HIGH COURT	**2nd RESPONDENT**
ATTORNEY-GENERAL	**3rd RESPONDENT**

JUDGMENT

Coram: **HUNGWE AJ**

Date of Hearing: **27 January 2020**

Date of Judgment: **29 January 2020**

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SUMMARY

Application for leave to appeal an interlocutory decision-test-whether the applicants enjoy reasonable prospects of success on appeal-applicants- grounds of appeal not delineating questions of law or fact-no reasonable prospects shown-leave denied.

ANNOTATIONS

Cases cited

Lesotho

Masinga & Others v Director of Public Prosecutions [2012] LSCA 28

South Africa

Malherbe v S (829/18) ZASCA 120

Moch v Nedtravel (Pty) Ltd t/a American Express 1996 (3) SA 1 (A)

National Director of Public Prosecutions v King 2010 (2) SACR 146; [2010] BCLR 656; [2010] (3) All SA 304

Nova Property Group Holdings v Julius Cobbett (20815/2014)[2016] ZASCA 63

Omotoso & Others v S (CC 15/2018) [2018] ZAECPEHC 81

Panayiotou & Others v S (CC 26/2016) [2018] ZAECPEHC 21

Philani-Ma-Africa v Mailula 2010 (2) SA 573 (SCA)

S v Smith 2012 (1) SA SACR 567

Zweni v Minister of Law and Order 1993 (1) SA 523 (A)

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Australia

GP v R (2010) 27 VR 632; [2010] VSCA 142

R v Chaouk (2013**)** 40 VR 356

Wells v R (No.2) [2010] VSCA 294

Statutes

Court of Appeals Act No. 10 of 1978

Court of Appeal Rules, Legal Notice No. 182 of 2006

Constitution of Lesotho, 1993

High Court Act, 1967

High Court Rules, 1981

International and Regional Instruments

African Charter on Human and Peoples Rights, 1981

International Covenant on Civil and Political Rights, 1966

Convention on the Protection of Human Rights and Fundamental Freedoms, 1950

Introduction

[1] This is an application for leave to appeal an interlocutory ruling dismissing an application for recusal brought against me in the main trial. The applicants are currently standing trial for murder and other charges arising from the events which occurred between 2014 and 2015.

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[2] The judgment dismissing the recusal application was delivered on 21 January 2020. The parties indicated that they would proceed with the trial on 23 January 2020. On that day, the applicants' legal practitioners intimated that they had instructions to seek leave to appeal against the judgment of 21 January 2020.

[3] The applicants, accused 4, 6 and 8, in the main criminal trial, seek an order in the following terms:

> (i) That the applicants be granted leave to appeal the decision of His Lordship, C Hungwe AJ, refusing to recuse himself in CRI/T/0004/18.
>
> (ii) That the proceedings in CRI/T/0004/18 be suspended pending a determination of the said appeal in the event that leave is granted.

Approach to appeals against interlocutory decisions

[4] The right to appeal as a separate fair trial right has been recognised by international human rights treaties and conventions. The International Covenant on Civil and Political Rights, ("ICCPR"),[1] the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly called the European Convention on Human Rights, ("ECHR")[2] and the African Charter on Human and Peoples Rights, ("ACHPR")[3] all guarantee this right in its different forms.

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[1] Article 14(5) of the ICCPR guarantees a right in broad and unequivocal terms: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

[2] Protocol No 7 to the ECHR provides: "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

[3] Article 7(1) of the ACHPR provides: "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the

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[5] Generally, under the common law, the right of appeal is exercisable only after the final determination of the suit or trial. Where this exists, for example in South Africa and Australia, it does so as a result of statutory intervention or judicial interpretation of the procedural rights where the interest of justice concept was invoked. The rationale for this in criminal matters is easy to appreciate as interlocutory appeal provisions represent a departure from the common law opposition to fragmentation of criminal proceedings. They are an exceptional process which should be reserved for unusual cases. They are not designed to allow for challenges to routine evidentiary rulings made in the course of a trial. **Wells v R**[4] (No.2); **R v Chaouk**.[5]

[6] Consistent with its treaty obligations under the ICCPR, the Kingdom of Lesotho took measures to respect, protect, promote and fulfil this right by entrenching in its supreme law, the Constitution of Lesotho, ("the Constitution") the right of an accused to be afforded a fair trial by an independent and impartial court established by law.[6] Further, the Constitution also entrenches equality of all before the law.[7] This provision requires the courts to observe fairness to both the accused and the victims of crime and, most importantly, the interests of justice.

[7] Where any of these rights appear to have been infringed, the supreme law enjoins a person to apply to the High Court for the enforcement of his or her right.[8] Any person dissatisfied by the **final** decision of the High Court

right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal."

[4] [2010] VSCA 294.

[5] (2013) 40 VR 356.

[6] Section 12(1) of the Constitution of Lesotho.

[7] Section 19 of the Constitution.

[8] Section 22(1) of the Constitution.

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in the enforcement of a right to a fair trial by an independent and impartial court has recourse by way of an appeal to the Court of Appeal.[9]

[8] The legislative framework pursuant to the constitutional imperatives indicates that the Criminal Procedure and Evidence Act, No. 9 of 1981, provides only for an appeal **after** conviction and sentence.[10] The High Court Rules only provide for civil appeals from subordinate courts.[11] The High Court Act, 1967, is silent on the procedure under discussion. The Court of Appeals Act, No. 10 of 1978, provides for criminal appeals **after** conviction and sentence.[12] Rule 3 of the Court of Appeal Rules provides for applications for leave to appeal in both civil and criminal matters.[13] Appeals in civil matters are regulated by the Court of Appeals Act.[14]

[9] An application for recusal is civil in nature and is regulated by Rule 8 of the High Court Rules.[15] In the Australian case of **GP v R**[16] the court held that a judicial officer's decision whether to recuse himself or herself is appealable if the statutory criteria set out in the Australian Criminal Procedure Act[17] is met. Adopting the same approach in **National Director of Public Prosecutions v King**[18] the Supreme Court of South Africa said:

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[9] Section 129(1) (b) as read with section 12(1) and 22(2) of the Constitution.
[10] Section 329 of the Criminal Procedure and Evidence Act, 9 of 1981.
[11] Rule 52 of the High Court Rules, Legal Notice No. 9 of 1980.
[12] Sections 7 to 15 of the Court of Appeals Act No. 10 of 1978.
[13] Court of Appeal Rules, Legal Notice No. 182 of 2006.
[14] Section 16 provides: "(1) An appeal shall lie to the court-

(a) From the final judgment of the High Court;
(b) By leave of the Court from an interlocutory order, an order made ex parte or an order as to costs only.

(2) The rights of appeal given by subsection (1) shall apply only to judgments given in the exercise of the original jurisdiction of the High Court."

[15] Legal Notice No. 9 of 1980 which deals with Application Procedure.
[16] (2010) 27 VR 632; [2010]VSCA 142.
[17] Criminal Procedure Act, 2009.
[18] 2010 (2) SACR 146 (SCA); 2010 (7) BCLR 656 [2010] (3)All SA 304 para 50-51

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> "There will be few orders that significantly affect the rights of the parties concerned that will not be susceptible to correction by a court of appeal. In Liberty Life Association of Africa Ltd v Niselow (in another court), which was cited with approval by this court in Beinash v Wixley [1997] ZASCA 32; 1997 (3) SA 721 (SCA), I observed that, when the question arises whether an order is appealable, what is most often being asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course. I said that two competing principles come into play when that question is asked. On the one hand justice would seem to require that every decision of a lower court should be capable not only of being corrected but of being corrected forthwith and before it has any consequences, while on the other hand the delay and inconvenience that might result if every decision is subject to appeal as and when it is made might itself defeat the attainment of justice.
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> In this case it was said on behalf of Mr King that the order is not appealable because it is interlocutory. Whether that is its proper classification does not seem to me to be material. I pointed out in Liberty Life that while the classification of the order might at some time have been considered to be determinative of whether it is susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle. Even the features that were said in Zweni v Minister of Law and Order to be characteristic in general, of orders that are appealable were later said by this court in Moch v Nedbank (Pty) Ltd t/a American Express Travel Services not to be exhaustive, nor to cast the relevant principles in stone. As appears from the decision in Moch, the fact that the order is not 'determinative of the rights about which the parties are contending in the main proceedings' and does not 'dispose of any relief claimed in respect thereof', which was out of the features that was said in Zweni to generally identifying an appealable order, is far from decisive."

[10] In **Masinga and Others v Director of Public Prosecutions**[19] the Court of Appeal after referring to **Moch v Nedtravel (Pty) Ltd** said:

> "The absence of a court's jurisdiction to hear a matter will vitiate the proceedings. A dismissal of a plea that the court has no jurisdiction is therefore appealable.

[19] (C of A (CRI) No. 11/2011) [2012] LSCA 28 (27 April 2012) at para [2]

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[11] It is clear to me that the question of appealability or otherwise of interlocutory relief is generally to be considered in the context of the circumstances of each particular case and bearing in mind the interests of justice. As was pointed out in the **Moch** case, the test parameters applied in **Zwane** were not exhaustive. In **Philani-Ma-Afrika v Mailula**[20] the interest of justice were paramount in deciding whether orders were appealable with each case being considered in light of its own facts. In **Nova Property Group Holdings v Julius Cobbett**[21] the court had to decide the appealability of an interim order compelling the discovery of documentation. The Supreme Court considered various conflicting decisions emanating from that court and the appealability of interim orders generally. In making its decision in **Nova,** the court found that it is well established that in deciding what is in the interest of justice, each case has to be considered in light of its own facts.

[12] In the present case those considerations include the weighing up of the parties' respective constitutional rights and the need to balance those rights with the overarching constitutional imperative of the right to trial within a reasonable time. That is not the end of the matter. In order for this court to grant the relief sought in the present matter, the applicants have to satisfy the court that they have reasonable prospects of success.

[13] The test for an application for leave to appeal is whether the applicants have reasonable prospects of success in the proposed appeal.[22] In determining whether to grant the applicants leave to appeal a dismissal of a recusal application, a further consideration is whether there are reasonable prospects of success. What this entails is stated in **S v Smith**[23]

[20] 2010 (2) SA 573 (SCA).
[21] (20815/2014) [2016 ZASCA 63
[22] Malherbe v S (829/18) ZASCA 120 (12 September 2019.
[23] 2012 (1) SA SACR 567 (SCA).

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para 7, in the following terms and quoted with approval in subsequent cases:

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[14] In **Omotoso and Others v S**[24] the court referred to the matter of **Panayiotou and Others v S**[25] in which it was stated that the grounds upon which an application for leave are predicated must clearly, succinctly and unambiguously delineate questions of fact from those of law to enable both the Crown and the Court to determine its parameters.

[15] A question of law is a question that must be answered by applying the relevant legal principles to the interpretation of the law, whereas a question of fact is one that is answered by reference to facts and weighing the strength of evidence as well as inferences arising from those facts. Answers to questions of fact are generally expressed in terms of broad legal principles and can be applied in many situations rather than be dependent on particular circumstances or factual situations.

[16] Applicants have dismally failed to demarcate and delineate their grounds of appeal. One is left wondering what the Court of Appeal is being asked to determine. In any event, the applicants have similarly failed to

[24] (CC 15/2018) [2018] ZAECPEHC 81 (30 October 2018) at para [4] and [5].
[25] Panayiotou & Others v S (CC 26/2016) [2018]ZAECPEHC 21.

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demonstrate that their proposed grounds of appeal enjoy reasonable prospects of success.

[17] In this, case the history of the matter shows that the applicants took two grounds of recusal in the application for recusal. The first ground was that I had gained prior knowledge of the facts which will be in issue at the trial by virtue of the fact that I presided over the first applicant's bail application. Reliance for this ground was placed on the statements that I made prior to that application, during the bail hearing and in the judgment in the matter. Portions of the judgment were cited and interpreted as creating, in the minds of reasonable persons, a reasonable apprehension that I was biased against the applicants.

[18] The second ground was crafted around the events of the first day of trial. It was argued that by not ensuring that the indictment read in court was the same as the one served on the applicants; that all witnesses' statements had been served on the defence; and by directing that trial proceeds despite their protests against the Crown's failure to ensure that complete sets of witnesses statements were made available to them, I exhibited such partiality as might lead a reasonable person to reasonably apprehend bias on my part. Taken cumulatively, it was argued, all this suggests that the applicants reasonably believe that the court will not bring to bear an impartial mind at the trial.

[19] In their grounds of appeal it is also suggested that I misunderstood their argument in respect of the source of "prior knowledge of the facts" which will be at issue in the trial. The point is made in the judgment that the same information in the bail application is the same information in the public domain. In any event, no clear and specific demarcation or delineation is made in the grounds of appeal on whether I committed an error on a point

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of law or on a finding of fact. Therefore it is unclear what it is the applicants are inviting the Court of Appeal to deliberate on.

[20] As pointed out above, the test in an application of this nature is whether there are reasonable prospects of success. Put differently, would an appellate court find, on the facts and in the circumstances of this case, that I ought to have recused myself? Applying the above test, I do not hold that an appellate court would have regarded that a reasonable person who had the correct facts and the circumstances surrounding the application for recusal would reasonably have concluded that there was a reasonable apprehension of bias arising from the grounds advanced by the applicants in their application.

Consequently I find that there are no reasonable prospects of success and therefore I dismiss the application for leave to appeal.

[21] However, that is not the end of the matter. As I have demonstrated above, whilst the court has found that the applicants failed to meet the requirements for this court to grant leave, I believe that it is in the interest of justice that my findings on whether this particular application has merit ought to be tested in the Court of Appeal, if the applicants so wish. I therefore will hold this trial in abeyance until such time as the applicants have duly exercised their rights in this regard. This is meant to avoid a situation where a decree of nullity would be returned after the trial has run its full course.

C HUNGWE

ACTING JUDGE

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Applicants: **Advocates Letuka & Mafaesa**

Respondents: **Advocate Abrahams,** with him **Advocates Lephuthing, Nku** & **Motsoane**.