

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**Constitutional Case No. 11/2017**

In the matter between:

**MAHELENA LEPHOTO**

**APPLICANT**

**AND**

**THE DIRECTORATE ON CORRUPTION**

**AND ECONOMIC OFFENCES**

**1<sup>ST</sup> RESPONDENT**

**THE MINISTER OF LAW AND**

**CONSTITUTIONAL AFFAIRS**

**2<sup>ND</sup> RESPONDENT**

**HER WORSHIP L. NTELANE**

**3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**5<sup>TH</sup> RESPONDENT**

**THE CLERK OF COURT MASERU**

**MAGISTRATE COURT**

**6<sup>TH</sup> RESPONDENT**

**Neutral Citation:** `Mahelena Lephoto vs Directorate on Corruption and Economic Offences and 5 others (Const. Case No. 11/2017) [2022] LSHC Const. 10 (17 MARCH 2022)

### **JUDGMENT**

**CORAM:** **Monapathi J.**  
**Mokhesi J.**  
**Moahloli J.**

**DATE OF HEARING:** **19 OCTOBER 2021**

**DATE OF JUDGMENT:** **17 MARCH 2022**

### **SUMMARY**

**CONSTITUTIONAL LAW:** *Application to have section 98(4) of the Money Laundering and Proceeds of Crime Act no.40 of 2008 declared unconstitutional for violating section 12 of the Constitution, in that it permits the concurrent running of criminal and civil proceedings in respect of the same property seized in terms of it- she had argued that, given this scenario, it forces her to disclose her defence in civil proceedings thereby forcing her to waive her right to self-incrimination with the consequence that her pending criminal trial is prejudiced- Held, this section does not force an applicant faced with forfeiture application to incriminate herself, what it rather does is to leave her with the choice between leaving forfeiture application go unchallenged and substantively responding to it, held that for this reason, this section is constitutional.*

*-The applicant had further sought to have a three-year delay to charge her with criminal offences following her suspension from work, violated her right to be tried within a reasonable time in terms of section 12 of the Constitution, Held, pre-*

*charge delay in preferring charges not protected by the right to speedy trial as provided under section 12 of the Constitution, the reckoning of time within which a person must be tried starts after charges have been read not before.*

## **ANNOTATIONS**

### **Legislation:**

*Constitution of Lesotho 1993*

*Interpretation Act No.19 of 1977*

*Money Laundering and Proceeds of Crime Act no.40 of 2008*

*Canadian Charter of Rights*

*Prevention of Organized Crime Act (POCA) No. 121 of 1998*

### **Cases:**

*Attorney-General of Lesotho v 'Mopa (C of A (CIV) 3/2002 CIV/APN/474/98)  
[2002] LSHC 3 (11 April 2002)*

*Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC);  
2009 (10) BCLR 1014 (CC) (3 June 2009)*

*Davis v Tip and Others 1996 (1) SA 1152 (W) 1157*

*Ketisi v Director of Public Prosecutions LAC (2005 – 2006) 503*

*Letuka v Minister of Justice and Human Rights and Others (Constitutional Case  
No. 10/2010) [2014] LSHC 45 (19 May 2014)*

*National Director of Public Prosecutions and Another v Mohamed N. O and others  
2002 (4) SA 843 (CC) (Mohamed 1)*

*NDPP and Another v Mahomed N. O and Others [2002] ZACC9; 2002 (4) SA 843  
(CC)*

*National Director of Public Prosecutions v Prophet (5926/01) [2003] ZAWCHC  
16 (22 May 2003)*

*Nchindo and Others v The Attorney General and Another 2010 (1) BLR 205 (CA)*

*R v Kalanj [1989] 1 S.C.R 1594*

*R v Morin (1992) 8 CRR (2d) 193*

## MOKHESI J

### [1] **Introduction**

The applicant had launched this constitutional motion on an urgent basis on 19 April 2017 in terms of Rule 12 of the Constitutional Litigation Rules seeking the following reliefs (*inter alia*);

1. *An order dispensing with the forms and service provided for in the Constitutional litigation rules and disposing of the matter at such time and place and in such manner and in accordance with such procedures as this Honourable Court may deem fit.*

2. *That a rule nisi be issued calling upon the respondents and all other interested parties to show cause, if any, to this court on the 20<sup>th</sup> day of 04/2017 at 0930 hours or as soon thereafter as the matter may be heard why final orders may not be granted as prayed.*

3. *That a criminal trial conducted by 3<sup>rd</sup> Respondent under CRI/T/0265/15 in the Maseru Magistrate Court and which scheduled to proceed on the 20<sup>th</sup> April 2017 be stayed pending finalization of the present matter.*

4. *That the 6<sup>th</sup> Respondent be directed to dispatch the record of proceedings under CRI/T/0265/15.*

5. *That 3<sup>rd</sup> Respondent be directed by this Honourable Court to furnish written reasons for the refusal to refer the matter to THE HIGH COURT sitting as Constitutional Panel pursuant to Section 128 (1) of the Constitution of Lesotho 1993 (as amended).*

ALTERNATIVE TO PRAYER 5

6. That it be declared that failure to render written reasons for the refusal to refer the matter to HIGH COURT sitting as a Constitutional panel pursuant to Section 128(1) of the Constitution of Lesotho 1993 (as amended) violates the right of the Applicant to a fair trial as guaranteed under Section 12 of the Constitution of Lesotho 1993 (as amended).

7. That it be declared that Section 98(4) of the Money Laundering and Proceeds of Crime Act No. 4 of 2008 is unconstitutional to the extent that it violates Section 12 of the Constitution of Lesotho 1993 (as amended)

8. That it be declared that the three-year delay in the formulation of charges and or prosecution of Applicant violates Section 12(1) of the Constitution of Lesotho 1993 (as amended)

9. That the prosecution of Applicant under CRI/T/0265/15 be permanently stayed pursuant to the grant of prayers 5 and or 6, 7 and 8 above.

10. In the likely event of the court declining the reliefs sought in the main, that CRI/T/MSU/10/15 it be directed that the matter be heard de novo before a different magistrate.

11. Directing Respondents to pay costs of suit at the attorney and client scale in the event of opposition.

## [2] **Background facts**

The applicant is a civil servant. On 08 November 2012, she was suspended from discharging her duties on allegations of misconduct. Disciplinary hearing which was sought to be initiated against her was torpedoed by her launching a constitutional motion in terms of which she sought a declarator

that pre-disciplinary measures which were conducted against her violated her constitutional rights.

[3] While still under suspension, on 29 October 2014, the 1<sup>st</sup> respondent lodged and was granted an *ex parte* preservation order in respect of a Mazda 3 vehicle, in terms of Section 88 of the Money Laundering and Proceeds of Crime Act No. 4 of 2008 (“MLPCA). The order was granted by the late Hlajoane J. On 19 November 2014 the applicant filed her Notice of Intention to oppose a forfeiture order in terms of s.89(5) of MLPCA, she however, never filed affidavits in terms of s.89(5) of the same Act. On 18 May 2015, she launched an application for rescission of the preservation order in terms of s.96 of the same Act. That application is yet to be heard.

[4] **Proceedings before the Magistrate Court**

On 02 June 2015, the applicant was charged in the Maseru Magistrate Court with contravening the provisions of section 21(1) and section 26(1) of the Prevention of Corruption and Economic Offences Act No.5 of 1999 (as amended) as well as section 59 (1)(a) of the Public Financial Management and Accountability Act No.51 of 2011 read with section 59 (2) of the same Act. It should, however, be stated that the Mazda 3 vehicle alluded to above, before an application for preservation was launched and granted, had already been seized by the 1<sup>st</sup> respondent in terms of a search warrant to be used as an exhibit in a criminal court.

[5] When the above criminal matter was due to proceed on the 28 August 2016, the applicant, through her counsel, made an application before the learned magistrate (3<sup>rd</sup> respondent), for referral of a question which she alleged

involved a substantial question of law warranting constitutional interpretation in terms of s.128 of the Constitution. The 3<sup>rd</sup> respondent issued an *ex tempore* ruling dismissing the application. Written reasons were never rendered to date. In a nutshell, the applicant's application for referral stemmed from her apprehension that the seizure of her vehicle under civil assets forfeiture regime of MLPCA would prejudice her criminal trial as both criminal and civil proceedings would be running concurrently. She accordingly made an application that the constitutionality of s.98 (4) of MLPCA in terms of which the preservation order was sought and granted be referred to this court. Consequent to the dismissal of her application for referral, the applicant launched the current application seeking the reliefs outlined in paragraph [1] of this judgment.

[6] **Issues for determination**

- (i) Failure to render written reasons for refusal to refer the question of law to this Court, and whether, if a declarator is issued for violation of section 12 of the Constitution of Lesotho 1993, the result should be an order of permanent stay of the applicant's prosecution;
- (ii) A three-year delay in preferring charges- whether such violates section 12 of the Constitution of Lesotho 1993. In the event it is found it does, whether a permanent stay of prosecution is the appropriate remedy.
- (iii) Constitutionality of Section 98(4) of the Money Laundering and Proceeds of Crime Act No.4 of 2008.



[7] **Failure to render written reasons.**

In terms of Section 12 (3) of the Constitution of Lesotho 1993:

*“ 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 or on behalf of the court,”*

[8] There is no question that the learned Magistrate did not render written reasons for her decision not to refer the so-called question of law involving constitutional interpretation of s. 98 (4) of MLPCA, to this court. She also did not dispatch the record of proceedings to this court as ordered. Failure to render written reasons cannot be countenanced as it prejudices the litigant’s right to take up the decision on appeal. It does not matter that perceptively, the issue raised and dismissed is unfounded or lacks merit. A litigant is entitled to exercise his/her right to have her dissatisfaction with the decision ventilated on appeal. He/she can only exercise his/her right of taking up the matter on appeal only after seeing the written reasons for the decision. In the absence of those reasons, that right is effectively rendered nugatory. Failure to render written reasons for the judgment and dispatch the record of proceedings within a reasonable time as required by s.12 (3) above amounted to a denial

of the applicant's right to prosecute her appeal, and consequently a denial of her right to a fair trial (**Letuka v Minister of Justice and Human Rights and Others (Constitutional Case No. 10/2010) [2014] LSHC 45 (19 May 2014)**).

[9] With the above conclusion in mind, the next question which should be answered is whether a stay of prosecution is an appropriate remedy in the circumstances of this case. In the case of **Ketisi v Director of Public Prosecutions LAC (2005 – 2006) 503 at 509**, the remedy of stay of prosecution was characterised as “drastic.” In the present matter, even though the non-rendering of written judgment should not be viewed lightly, it will be observed that the applicant was not hamstrung by the absence of the record of the proceedings of the court *a quo* and its written judgment, before she could approach this court. The applicant exercised the avenue which is provided by s.22 of the Constitution of Lesotho 1993 (as amended) to have the constitutionality of s. 98(4) of the MLPCA determined through the prism of the right to fair trial provisions. In the circumstances of this case, I do not see how the applicant was prejudiced in exercising her right to approach this court to the extent warranting the remedy of stay of prosecution, because even without the record and written judgment, she could still invoke the jurisdiction of this court through s.22 to achieve the same purpose she would have achieved had the written judgment been rendered. I turn now to consider the second issue whether a two-year delay in charging the applicant violates s.12 of the Constitution of Lesotho 1993.

[10] (ii) **A three-year delay to charge the applicant, whether covered by S. 12 of the Constitution of Lesotho 1993.**

S. 12(1) provides as follows under the heading “Right to fair trial etc”:

*“If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent court established by law.”*

[11] It was the argument of Mr. Rasekoai, for the applicant, that the three-year delay in preferring charges against the applicant since her suspension from work, was prejudicial to her as it affected her right to a fair trial/hearing. In support of this contention, he quoted the above provision of the Constitution. It is common ground that the applicant’s contention here is directed at pre-charge delay. The question to be answered is whether a pre-charge delay falls under the purview of s.12 of the Constitution. From the textual reading of s. 12, it is clear that the protection to which the section is directed, is the person who *is charged* with a criminal offence, with the result that the pre-charge delay is not protected by s.12 as alleged by the applicant’s counsel. The incidents of the right to a fair hearing/trial enumerated under s. 12 makes this abundantly clear. Nowhere does s.12 provides that a suspect be charged within a reasonable time. There are cogent reasons for a constitutional decree that an accused person, as against a person not yet charged with a crime, be tried within a reasonable time, as was stated in the Canadian case of **R v Morin (1992) 8 CRR (2d) 193 at 202, thus:**

*The right to security of the person in S. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is*

*protected by attempting to ensure that proceedings take place while evidence is available and fresh.*

[12] In the case of pre-charge delay, I cannot see how the applicant's right to security of person, right to liberty of the applicant are implicated when she has not been charged with a criminal offence. Prior to her being charged she enjoyed her right to security of person and liberty which are the main animating concerns behind requiring that a person who has been criminally charged be tried within a reasonable time. The only stigmatization which could arise was a result of her suspension from work, which has nothing to do with her being charged. The meaning of the word "charged" within the meaning of the right to a fair trial within a reasonable time engaged the Canadian Supreme Court in the case of **R v Kalanj [1989] 1 S.C.R 1594**. When interpreting the meaning of the word "charged" within s.11(b) of the Canadian Charter of Rights which provides, in a similar term to s.12 of our Constitution, that:

*"11. Any person charged with an offence has a right*

*(a) .....*

*(b) to be tried within a reasonable time.;*

*....."*

McIntyre J., said:

*....I would therefore hold that a person is "charged with an offence" within the meaning of S. 11 of the Charter when information is sworn alleging an offence against him, or **where a direct indictment is laid against him** when no information is sworn. It would follow, then, that the reckoning of time in*

*considering whether a person has been accorded a trial within a reasonable time under S. 11(b) will commence with the information or indictment, where no information has been laid, and will continue until the completion of the trial: See R v Rahey, [1987] 1 S.C.R 588 at p. 633 where La Forest J. said:*

***“The question of delay must be open to assessment at all stages of a criminal proceeding, from the laying of the charge to the rendering of judgment at trial. [emphasis added].”***

*.....It has been said that the purpose of S. 11 should be considered in deciding upon the extent of its application. This purpose, it has been said, is to afford protection for the liberty and security interests of persons accused of crime....(emphasis provided)*

[13] These sentiments are applicable with equal force in the present matter and I embrace them. It is therefore evident that the pre-charge delay about which the applicant is complaining is not an incident of right to a fair trial which is protected by s.12 of the Constitution. It follows that the applicant’s contention in this regard should fail. I now turn to consider the third issue of Constitutionality of s. 98 (4) of MLPCA.

[14] (iii) **Constitutionality of S. 98 (4) of MLPCA:**

It is trite that the enterprise of interpreting rights provisions of the Constitution is unlike other ordinary statutes. Constitutional interpretation should entail a purposive approach which involves “the recognition and application of constitutional values and not a search to find the literal meaning ...” (**Attorney-General of Lesotho v ‘Mopa (C of A (CIV)**

**3/2002 CIV/APN/474/98) [2002] LSHC 3 (11 April 2002)** at para. 17). S. 4 (h) of the Constitution confers on every person in Lesotho “the right to a fair trial of criminal charges against him and to a fair determination of his civil rights and obligations.” This is then fleshed out under s.12 by providing the incidents of this right. In addition to the above principle of constitutional interpretation, when interpreting other legislation, this court is enjoined by s. 15 of the Interpretation Act No.19 of 1977 that:

*“ Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”*

[15] The impugned s.98 of the MLPCA provides that:

*98. (1) The High Court shall, subject to section 103, make an order applied for under section 97 if the court finds on a balance of probabilities that the property concerned –*

- (a) is an instrumentality of an offence; or*
- (b) is the proceeds of unlawful activities.*

*(2) The High Court may when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate including orders for and with respect to facilitating the transfer to the State of property forfeited under such an order.*

*(3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the High Court from making the order.*

**(4) The validity of an order under subsection (1) is not affected by the outcome of the proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.**

(5) .....

(6) .... (emphasis added).

[16] It is with regard to s. 98(4) above that the applicant has a problem. Her main contention is that for a property seized to be dealt with both in terms of criminal procedure and civil proceedings in terms of the MLPCA has what she calls “far-reaching consequences” and she tabulates those consequences under paragraph 6.7 of her founding affidavit.

[17] I found it apposite to reproduce the contentions as they are so that their gist is not lost in paraphrasing them:

*(i) In the criminal trial of which I am charged I have a common-law right to remain silent and may refuse to answer any questions, on the other hand, in reacting to the civil case as it is, I am effectively waiving my right to remain silent and thereby exposing myself and hence jeopardizing my constitutionally entrenched I right to fair trial as encapsulated in Section 12 of the Constitution of Lesotho 1993.*

*(ii) The other challenge is that the standard of proof employed in the criminal case is proof beyond reasonable doubt, whilst in the civil case is on a balance of probabilities. If having reacted to the civil case, the court holds on that on a balance of probabilities the properties which have been seized pursuant to the Preservation Order are proceeds of a criminal act, it*

*would effectively mean the property would be forfeited to the State notwithstanding the existence of a pending criminal trial where the crown is enjoined to prove beyond reasonable doubt that I am guilty of the offence of corruption. I am therefore inclined to draw a conclusion that the position not only necessitates a legal quagmire on my part but effectively does away with the constitutionally sanctioned presumption of innocence until proven otherwise.*

*(iii) The legal absurdity is fortified by the fact that a civil court can freely conclude that property amounts to proceeds of crime notwithstanding a possibility to the effect that a criminal court could otherwise find me not guilty of any offence in relation to the charged offence*

*The concurrent running of the civil case and criminal case not only necessitates prejudice for me but also defeats logic and this is mainly because the state can still seek the avenue of forfeiture immediately after my conviction has been secured. It is clearly the forfeiture in the civil context which effectively runs concurrently with the criminal case that yields maladies in so far as the dynamics of my fair trial rights are concerned. There is absolutely no sound legal basis why the two cases should concurrently run.*

[18] Before I deal with the constitutionality of s. 98 (4) of MLPCA, it is important to appreciate the purpose of this Act in our justice system. In its preamble it is stated its purpose is to “enable the unlawful proceeds of all serious crimes to be identified, traced and to require accountable institutions to take prudential measures to help combat money laundering.” The South African Constitutional Court, when dealing with the purpose civil forfeiture procedure of Prevention of Organized Crime Act (POCA) No. 121 of 1998



(S. 38 thereof), which is similar to MLPCA, made the following apposite remarks, which are applicable with equal force in this jurisdiction:

*[15] It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organized crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our legislature. (National Director of Public Prosecutions and Another v Mohamed N. O and others 2002 (4) SA 843 (CC) (Mohamed 1) at para. 15).*

[19] The MLPCA is a revolutionary crime-combating tool which aims to achieve a strangle-hold effect on crime by removing the incentives for committing such crimes. In order to achieve this purpose, in terms of its civil forfeiture regime it targets the property which has been used to commit crime and property which is the proceeds of unlawful activities. With this purpose in mind, I revert to the location of s.98(4) within the broader scheme of MLPCA. This section is located in PART V which is titled “Civil Recovery of Property.” This part deals with civil forfeiture of property which the Directorate on Corruption and Economic Offences (DCEO) would have successfully obtained its preservation in terms of s.89 of the same Act. Forfeiture of such a property will follow where the DCEO succeeds in proving on the balance of probabilities that the property which is the subject

of a Preservation Order is an instrumentality of an offence; or is the proceeds of unlawful activities. It matters not that there are pending criminal proceedings against the owner of such property. This is provided by the impugned s. 98 (4) when it provides that:

*“The validity of an order under subsection 1 [order for forfeiture] is not affected by the outcome of the proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.”*

[20] Describing the civil nature of a similar procedure under POCA, the South African Constitutional Court in **NDPP and Another v Mahomed N. O and Others [2002] ZACC9; 2002 (4) SA 843 (CC)** said:

*.... Chapter 6 provides for forfeiture in 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 ....*

[21] It is within this stated purpose of MLPCA, especially Part V, that the importance of s. 98 (4) should be appreciated. s. 98 (4) founds the essence of civil forfeiture of property regime of the MLPCA- it is the substratum of this regime-, without it, this regime loses its character of targeting the property which is instrumental in committing crime or is proceeds of unlawful activities.

[22] Before I turn to determine constitutionality of s. 98 (4), the purview of s.12 of the Constitution as regards fair trial should be appreciated. s.12(1) guarantees fair trial to any person charged with a criminal offence. It cannot therefore, as I see it, be seriously argued that when Part V of MLPCA is activated, the same guarantees of fairness extend to the applicant in those circumstances. One of the incidences of a fair trial germane to the instant matter, is provided by s.12 (7) of the Constitution which provides that “*No person who is tried for a criminal offence shall be compelled to give evidence at the trial.*” The right of the accused against self-incrimination applies only in criminal trials. The present matter is not a criminal trial for purposes of s. 12 protection.

[23] As I understand the applicant’s case, it is anchored on a submission which has two facets to it: (i) firstly, that under common law, as the accused, she has a right to remain silent; that s. 98(4) engenders a situation where she “waive[s]” her right to remain silent thereby jeopardising her right to a fair trial; (ii) secondly, that s. 98(4) denies the courts their common law discretion to stay civil proceedings where the disclosure of a defence by the applicant may prejudice her pending criminal proceedings. All these arguments, it should be stated, are misguided. I do not read s.98(4) to be ousting the common law discretion of this court to stay civil proceedings neither do I find that the applicant who is confronted with a damaging founding affidavit of the DCEO, for forfeiture of property, is compelled to incriminate himself. What this procedure engenders on the part of the applicant is a choice between leaving damaging allegations going unchallenged and consequently an order of forfeiture and a choice to

challenging the DCEO's founding affidavit thereby disclosing information which could be potentially damaging to her defence in a pending criminal trial. All these are hard choices she has to make. She is not in any manner compelled by law to answer to the damaging allegations against herself.

- [24] Dealing with a challenge similar to present one, with regard to sections of Botswana's Proceeds of Serious Crime Act (as amended) Lord Abernethy, J.A., writing for the court in **Nchindo and Others v The Attorney General and Another 2010 (1) BLR 205 (CA)** at p. 220 B – G, said:

*....I am prepared to accept, however, that there may be circumstances in which it could be said in advance of the trial that if certain matters unfolded in a particular way, it would inevitably lead to an unfair trial. However, I am satisfied that that is not the situation in the circumstances of this case. That is because I am satisfied that the appellants are not compelled to answer the DPP's application in the way they say they are. On the contrary, whether and, if so, to what extent, the appellants respond to the application is in my opinion a matter of choice for them ..... A number of cases in the High Court of South Africa in support of that proposition were relied on by the DPP: National Director of Public Prosecutions v Brennan and Another (Case No. 06/27382 LD) unreported; ..... It is sufficient to quote the passage from Khampepe's judgment in Brennan which Wallian J. quoted:*

*'Indeed the respondent has an election whether to file an affidavit rebutting incriminating evidence or run the risk of a finding that there is evidence on a balance of probabilities that the property in question is the proceeds of unlawful activities. To my mind the exercise of such an election does not amount compelling him to speak in the criminal proceedings. As pointed*

*out in Davis v Tip what distinguishes compulsion from choice is whether “the alternative which present itself constituted a penalty, which serves to punish a person for choosing a particular route as an inducement to him not to do so.” In my view, in electing to adduce evidence to rebut incriminating evidence that the property in question is the proceeds of unlawful activities does not by any stretch of imagination – amount to compelling him to speak in the criminal proceedings. It merely requires the respondent to make a choice “hard as that choice might be” and nothing more. In the event that he elects not to file rebutting evidence he would have legitimately exercised his choice ...*

- [25] It is also not correct that s.98 (4) does not allow for an application for a stay of civil proceedings pending finalization of criminal proceedings, where civil proceedings may tend to prejudice the impending criminal trial. The common law principles which are applicable to this scenario are still applicable, contrary to what the applicant is arguing. The application for a stay of civil proceedings will only be acceded to where the accused is under compulsion to disclose incriminating evidence (**Davis v Tip and Others 1996 (1) SA 1152 (W) 1157 E – H**). In the present matter the applicant is not barred from applying for a stay of criminal proceedings, provided she can successfully demonstrate that she is under compulsion to respond to the forfeiture application, but as already said in the preceding discussion, responding to forfeiture application is a matter of choice not compulsion. Although the court was confronted with a situation where a stay of civil proceedings was unprocedurally raised in supplementary affidavit, the court nonetheless addressed apposite principles which are applicable with equal force in the present matter, in the **National Director of Public Prosecutions v Prophet (5926/01) [2003] ZAWCHC 16 (22 May 2003)** at paras 9 – 11:

[9] ....Furthermore, at no stage in his affidavit in which the stay is sought does the respondent suggest that, in order to deal with the Applicant's supplementary affidavits he will be compelled to incriminate himself before the State has produced evidence in the criminal trial. In any event, an application for the stay of civil proceedings pending the determination of related criminal proceedings will only be granted in those cases where the accused is under a legal compulsion to give evidence in the civil proceedings. A legal compulsion must be distinguished from pressure to testify in civil proceedings in order to rebut incriminating evidence.

[10] Even in cases where the accused is legally compelled to incriminate himself in civil proceedings before the State has produced its evidence in the related criminal proceedings, which is not the case in the present matter, the court have not generally suspended civil proceedings. Instead the criminal court could order that the relevant element of compulsion not be implemented. Should the accused believe he has suffered an infringement of his right against self-incrimination he can rely on Section 35(5) [S. 12(7) in our case] of the Constitution in the criminal trial. It will be up to the trial court to ensure compliance with fair criminal standards, this may involve finding that any derivative evidence is excluded because it was found as a result of compelled testimony.

[11]The third point is that the respondent cannot be allowed to rely on the potential loss of an ill-defined 'tactical advantage' at criminal trial to escape responding to matters pertaining to the civil proceedings. Thus, as was pointed out by Navsa J in the Sea point case it is a matter not of compulsion but of choice,

"hard as the choice may be, it is a legitimate one" which the respondent in this matter is called upon to make....

It is important to mention that these comments were made in the context of an application for forfeiture under s.48(1) of POCA. I find these views to be persuasive, and I adopt them in the present matter. On the conspectus of the above discussion, I therefore, find that S. 98(4) of the MLPCA is consistent with S. 12 of the Constitution of Lesotho 1993 (as amended).

[26] **Case to proceed *de novo* before a different Magistrate.**

The 3<sup>rd</sup> respondent is no longer a Magistrate but a Judicial Commissioner, and therefore, in view of the fact that witnesses have not yet testified, the matter should start *de novo* before a different magistrate.

[27] **COSTS:**

This being a constitutional case where a private litigant has lost, no order as to costs should be made against her (**Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009).**)

[28] In the result the following order is made:

- (i) The application is dismissed with no order as to costs.
- (ii) The trial should start *de novo* before a different Magistrate

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**MOKHESI J**

**I CONCUR**

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**MONAPATHI J**

**I CONCUR**

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**MOAHLOLI J.**

**For the Applicant: Mr. M. Rasekoai from Rasekoai, Rampai & Lebakeng Attorneys**

**For the Respondents: Adv. T. Tsutsubi from DCEO**