IN THE HIGH COURT OF LESOTHO

(SITTING AS THE CONSTITUTIONAL COURT)

HELD AT MASERU **CONST CASE NO/11/2021**

In the matter between:

RETHABILE SETLOJOANE	**APPLICANT**
AND	
COMMISSIONER OF POLICE	**1ST RESPONDENT**
MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

Neutral Citation: Rethabile Setlojoane v Commissioner of Police & Others [2023] LSHC 136 CONST. (14 SEPTEMBER 2023)

CORAM: **MOKHESI J**
BANYANE J
MAKHETHA J

HEARD: **12TH JUNE 2023**
DELIVERED: **14TH SEPTEMBER 2023**

SUMMARY

Constitutional Law: *A lawyer challenging on behalf of his detained client the constitutionality of the demand by the police of the files pertaining to such client and their further demand that the lawyer return the money which was paid by the third party entity, suspected of committing crimes with the client, to settle legal fees owing by client to the lawyer- Held, collateral challenge to criminal proceedings not permissible as the issue whether there was a breach of lawyer-client privilege can always be dealt competently by the trial court and if the court were to find that there is merit in the allegation, evidence obtained in consequence of infringement of this privilege will be excluded- The court declines jurisdiction on the basis of the proviso to Section 22 (2) of the Constitution- Held, further that engaging constitutional jurisdiction of this court when there are available adequate means of redress is an abuse of court process which in future will necessitate the awarding of punitive costs on errant counsel.*

ANNOTATIONS

Books:

Hoffman and Zeffert, *The South African Law of Evidence (1988)*

Legislation:

Constitution of Lesotho 1993

Money Laundering and Proceeds of Crime Act 2008 (as amended)

Cases:

Lesotho

Director of Public Prosecutions and Another v Lesupi and Another LAC (2007-2008) 403

Justice ‘Maseshophe Hlajoane and Others v Letsika and Others C of A (CIV) No.66/2018

Mofomobe and Another v Minister of Finance and Another C of A (CIV) No. 15/2017

Ntaote v Director of Public Prosecutions LAC (2007-2008) 414

Sole v Cullinan NO and Others LAC (2000-2004) 572

Namibia

Prosecutor -General of the Republic of Namibia v Gomes and Others 2013 (3) NR 806 (SC)

S v Acheson 1991 NR I (HC) at 10A – B*)*; 1991 (2) SA 805 (NM)

Trustees of the Insolvent Estate of Whitehead v Dumas and Another 2013 (3) SA 331 (SCA)

South Africa

National Director of Public Prosecutions v Zuma 2009 (4) BCLR 393 (SCA)

S v Sefatsa 1988 SA (1) (A)

Privy Council:

Brandt v Commissioner of Police [2021] UKPC 12

Marshall v Director of Public Prosecutions (Jamaica) [2007] UKPC 4 (24 January 2007)

Sharma v Brown – Antoine [2006] UKPC 57

Articles:

Daleen Millart and Viviana Vergano, *“Hung Out to Dry? Attorney – client confidentiality and Reporting Duties Imposed by the Financial Intelligence Centre Act 38 of 2001”, Obiter Vol. 34 No.3 (2013) available at obiter.mandela.ac.za/article/view/2000).*

JUDGMENT

MOKHESI J

[1] **Introduction**

The applicant is a renowned advocate of the courts in this jurisdiction. He has a client by the name of Mr Lehlohonolo Selate who is currently in prison facing a raft of charges, but relevant for present purposes, he is suspected of defrauding the Government of Lesotho an amount of M50,000,000.00 between the period October 2020 and September 2021, among others. Mr Selate has already been charged in relation to this fraud. The company by the name Sunny Penny (Pty) Ltd in which Mr Selate has some interest is also suspected of involvement in this fraud. An amount of M100,000.00 was paid by Sunny Penny into the personal bank account of the applicant following this suspected fraud, to settle the balance of the legal fees owing to the applicant by Mr Selate. The applicant was summoned to appear before the police investigators for questioning in relation to this payment. What transpired before the investigators is contentious, but what is common cause is that he was taken to the Magistrates' Court to be joined as the accused in case in which Mr Selate had already been charged.

[2] On being brought before the magistrate court to be joined, his counsel objected to his joinder by invoking the provisions of Section 128(1) of the Constitution of Lesotho 1993. It is not clear what the content of this objection was and why the learned magistrate found it to have been validly raised, because there is no written judgment. But it is common cause that the applicant was not joined as the accused. Consequent to this, the applicant lodged the current application seeking the following reliefs:

1. It is declared that the first respondent and his subordinates contravened the provisions of Section 12(2)(d) by requesting the applicant to avail to them files of clients facing criminal offences in CRI/T/MSU/0692/2021.

2. It is declared the conduct of the first respondent and his subordinates by subjecting the applicant to criminal prosecution when he refused to breach lawyer – client relationship by refusing to allow them an opportunity to peruse and copy the documents in clients' files facing criminal charges in CRI/T/MSU/0692/2021 is unlawful in that it violates the provisions of Section 32(2) of the Money Laundering and Proceeds of Crime Act of 2008.

3. It is declared that the joinder of the applicant in pending proceedings in CRI/T/MSU/0692/2021 after receiving payment from his client, whom he is representing in the same proceedings is unlawful, null and void.

4. It is declared that the applicant was entitled to receive payment from clients accused of money laundering and that the mere fact that such clients paid the applicant in circumstances where they are accused of money laundering and other crimes is not sufficient to have warranted the prosecution of the applicant in CRI/T/MSU/0692/2021 in view of the provisions of Section 12(2)(d) of the Constitution.

5. That the respondents be ordered to pay costs hereof including the costs of opposition including the costs occasioned by employment of two counsel.

[3] **Respective Parties' Cases**

Applicant's case

It is the applicant's case that he is suing on his client's behalf who is in prison to enforce the lawyer – client privilege and to seek a declarator in relation to his joinder in the case in which his client is charged. In a nutshell the applicant's case is that he was owed legal fees by Mr Selate, and the latter on being reminded that he ought to settle the outstanding fees caused Sunny Penny (Pty) Ltd to settle the fees on his behalf, and to that end this company paid into the business account Setlojoane Chambers an amount of M100,000.00. Perhaps at the risk of being repetitious this company is one of the suspects in the fraud case alluded to above.

[4] The applicant states that he was interrogated by the police on his relationship with Selate and Sunny Penny (Pty) Ltd and the payment made by the latter into his business account. He states that he was ordered to surrender all files relating to Selate. He, however, refused to surrender the files as that would breach lawyer-client privilege. He states that instead he offered to surrender invoices and receipts for the police to peruse, which offer they rejected. He avers that he was made to choose between surrendering the files and being released. He chose not to release the files. The applicant avers that he was suspected of being part of a "syndicate" which stole M50,000,000.00 of the Government of Lesotho.

[5] The applicant contends that the respondents have contravened the provisions of Section 12(2)(d) of the Constitution of Lesotho 1993 by demanding that he surrender his clients' file to them. He further contends that by demanding his client's files the police have contravened the provisions of Section 32(2) of the Money Laundering and Proceeds of Crime Act 2008 (as amended) ("the Act").

[6] **Respondents' Case**

In addition to pleading over, the respondents raised two points in *limine*, namely: (i) applicant's lack of *locus standi* to bring the application as he

does not allege that his rights are being or are likely to be violated as required by Section 22(1) of the Constitution of Lesotho 1993; (ii) This court does not have jurisdiction to hear the matter inasmuch as the applicant is seeking to protect fair trial rights of his client.

[7] On behalf of the 1st respondent, Senior Superintendent Piti Khutlang who heads a team investigating the theft of the stated M50,000,000.00 of government funds, deposed to the answering affidavit. He avers that the Government of Lesotho was defrauded of the stated amount of money, which was paid to several suppliers including Sunny Penny (Pty) Ltd for services which were never rendered. His investigations further uncovered that an amount of M100,000.00 was paid into the personal account of the applicant as legal fees for pending cases. On questioning the applicant, the latter informed them that the amount was for Selate's legal fees. He avers that he directed the applicant "to surrender the money having informed him that the said Lehlohonolo Selate was neither a director, a shareholder nor a signatory in Sunny Penny and that the investigations established that he was paid by Sunny Penny from the funds fraudulently stolen from the Government." Mr Khutlang denies that his team demanded files regarding Mr Selate. He avers that he was interested in the proof, invoices and

receipts in relation to Sunny Penny (Pty) Ltd, which the applicant failed to produce.

[8] **Issues to be determined**

(i) Whether the applicant has *locus standi* to sue to enforce lawyer-client privilege;

(ii) Whether the court should decline to exercise its Constitutional jurisdiction in this matter;

(iii) Whether the court should declare joinder of the applicant in pending proceedings in CRI/T/MSU/0692/2021 unlawful, null and void.

(iv) Whether the 1st respondent and his subordinates contravened the provisions of Section 32(2) of the Money Laundering and Proceeds of Crime Act, 2008 (as amended) by directing the applicant to surrender his client's files facing criminal charges in CRI/T/MSU/0692/2021.

[9] I propose to deal first with the threshold issue being whether this court should decline to exercise its constitutional jurisdiction in this matter. The respondents have urged this court to decline to exercise its constitutional jurisdiction to hear this case as the applicant is bringing a collateral challenge to criminal proceedings in circumstances where he has a remedy

in the form of objecting to the charges before the trial court. This is but one aspect of the applicant's case. The respondents seem to have missed an aspect in terms of which the applicant is also seeking a declarator that the conduct of the police in requesting him to surrender his clients' files in breach of lawyer-client privilege, is unconstitutional for contravening the provisions of Section 12(2) of the Constitution pertaining to a right of the accused to have legal representation.

[10] Before I deal with these arguments it is important set out that the provisions of Section 22 of the Constitution of Lesotho 1993 which spell out the circumstances under which a litigant may seek enforcement of the Bill of rights. The said Section provides that:

> *"22(1) If any person alleges that any of the provisions of sections 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 a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that 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 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)

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."

[11] The import of this section has been dealt with by the courts in **Justice 'Maseshophe Hlajoane and Others v Letsika and Others C of A (CIV) No.66/2018 (unreported – available at www.lesotholii.org); Mofomobe and Another v Minister of Finance and Another C of A (CIV) No. 15/2017 (unreported – available at www.lesotholii.org).** As a I understand it in the present matter, the applicant is suing on his own behalf and on behalf of his client who is undeniably still in detention awaiting trial. Section 22 above permits this approach. The question that remains is whether this court should decline to exercise its constitutional powers under this section on account of availability of adequate means of redress to infringement of lawyer-client privilege. As I see it, there are adequate

means available to the criminal trial court to deal with the admissibility of evidence obtained by infringing lawyer – client privilege. I find it unnecessary to determine what this principle entails because it has comprehensively been dealt with in decisions such as **S v Sefatsa 1988 SA (1) (A)** 868 at 886E. This decision recognized and endorsed the position that the doctrine of lawyer – client privilege *"…[i]s a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation …"* The trial court would be able to deal with the admissibility of evidence obtained by breaching attorney – client doctrine if indeed there was such a breach. If it is found that evidence was obtained by infringing lawyer-client privilege, it will be excluded. There is no need to mount a collateral constitutional challenge to criminal proceedings, as has happened in this case. The lodging of collateral challenge to criminal proceedings is discouraged and frowned upon by the courts. See **Sole v Cullinan NO and Others LAC (2000-2004) 572 at 593H-594I; Director of Public Prosecutions and Another v Lesupi and Another LAC (2007-2008) 403 at 411H-412C; Ntaote v Director of Public Prosecutions LAC (2007-2008) 414 at 418G-419C).** This aspect of the case being its substratum,

impels this court to decline jurisdiction in terms of the proviso to Section 22 (2) of the Constitution.

[12] I have observed over the past few years, proliferation of applications which seeks to engage the constitutional jurisdiction of this court in circumstances where there exists adequate means of redress for wrongs complained about. Counsel are urged to desist from engaging in this practice as it amounts to a serious abuse of court process. In my considered view a time has come for this court to mark its displeasure with an appropriate costs order against anyone who abuse its court processes. That this practice amounts to abuse of court process finds support in the Privy Council decision, which I fully endorse, in **Brandt v Commissioner of Police [2021] UKPC 12** at paras. [35] to [36] wherein Lord Stephens said:

> *"35. First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature "which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate". The correct approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the Board in Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328 at para 25, as follows:*

> *"…where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power."*

There are examples of the application of that approach in cases such as Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265 at 68, Jaroo v Attorney General of Trinidad and Tobago [2002] 1 AC 871 at para 39 and most recently, in Warren v The State (Pitcairn Islands) [2018] UKPC 20 at para 11. This approach prevents unacceptable interruptions in the normal court process, avoids encouraging technical points which have the tendency to divert attention from the real or central issues, and prevents the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little or no practical relevance in a case when properly viewed at the end of the process. This approach also promotes the rule of law and the finality of litigation by preventing a claim for constitutional relief from being used to mount a collateral Page 14 attack on, for example, a judge's exercise of discretion or a criminal conviction, in order to bypass restrictions in the appellate process (see eg Chokolingo v Attorney General of Trinidad and Tobago [1981] 1 WLR 106 at 111–112).

36. Second, using the process of the court for an improper motive or purpose may be an abuse of process, see Fuller v Attorney General of

> *Belize [2011] UKPC 23, 79 WIR 173 at para 5(iii). Commencing proceedings, not with the genuine object of obtaining the relief specified, but for some collateral purpose such as to delay or derail other proceedings, would amount to using the process of the court for an improper motive or purpose."*

[13] Assuming I am wrong to make the above conclusion, the applicant's case should still fail on the merits for the following reasons:

[14] **The merits and Discussion**

Section 12 of the Constitution of Lesotho 1993 provides for the right to fair trial, among other things. Under Subsection (1) (d) the section provides that if any person is charged with a criminal offence, he/she *"shall be permitted to defend himself before the court in person or by a legal representative of his own choice."* At the core of the applicant's challenge is what he considers to be a violation of this subsection when the police demanded that he turned over his clients' files to them. As stated earlier the doctrine of lawyer-client privilege is fundamental to the functioning of our adversarial system of litigation. The question to be asked is whether an infringement of this doctrine can properly be framed as a constitutional issue in the manner the applicant did in this matter? The answer should be in the affirmative.

[15] The fair trial provision in the Constitution should not be restrictively interpreted. The provision, at its core, guarantees fair-trial and provides a non-exhaustive list of rights which are covered by it. That this list is non-exhaustive is trite. See the remarks of the Supreme Court of Namibia and the authorities cited in **Prosecutor -General of the Republic of Namibia v Gomes and Others 2013 (3) NR 806 (SC)** para. 32 where it was stated (when dealing with a fair trial provision of Namibian Constitution):

> *"It appears to me that the essential content of Art 12 is the right to a fair trial in the determination of all persons' 'civil rights and obligations or any criminal charges against them' and that the rest of the subarticles, which only relates to criminal trials, expounds on the minimum procedure and substantive requirements for hearings of that nature to be fair. A closer reading of Art 12 in its entirety makes it clear that its substratum is the right to a fair trial. The list of specific rights embodied in Art. 12 (1) (b) – (f) does not, in my view, purport to be exhaustive of the requirements of the fair criminal hearing and as such it may be expanded upon by the courts in their important task to give substance to the overarching right to a fair trial. To take but one example: the right to present written and oral argument during a hearing or trial is undoubtedly an important component of a fair trial, but one searches in vain for it in Art. 12. The contrary view expressed in Van den Ber; ie that the list is exhaustive, cannot be accepted as correct and should therefore not be followed. I am fortified in this conclusion by the dictum of Kentridge AJ in S v Zuma and Others 1995 (2) SA 642 (CC); (1995 (1) SACR 568; 1995 (4) BCLR 401; [1995] ZACC1) at 651 J – 652 A relied on by Mr Botes where the learned*

acting Justice in interpreting S 25(3) of the South African Interim Constitution stated as follows:

> *"The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraph (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not equated with what might have passed muster in our criminal courts before the Constitution came into force."*

Kentridge AJ went on to observe at 652C-D that when the South African Constitution came into operation, S. 25(3) had required criminal trials to be conducted in accordance with the "notions of basic fairness and justice" and that it was then for all courts hearing criminal trials to give content to those notions."

[16] Section 12(2)(d) of the Constitution gives every accused person a right to legal assistance. This right is a critical guarantee to the accused to ensuring that he has an effective defence to prove his innocence and ultimately secure his liberty. There is nowhere in the subsection where a mention is made of the protection of lawyer-client confidentiality. I would venture to suggest that without confidentiality of lawyer-client communication being protected, bestowing on an accused person a right to have legal representation is meaningless. Confidentiality of communication between a lawyer and his client lies at the core of the right to legal representation. The learned authors **Hoffman and Zeffert,** ***The South African Law of Evidence (1988)*** at p.248 say the following about lawyer-client confidentiality:

> *"The privilege exists in order to promote the utmost freedom of disclosure by persons who need to obtain legal advice. It is impossible for an advocate or attorney to advice a client properly unless he is*

> *confident that the client is holding nothing back, but such candour would be difficult to obtain if the client thought that his advisers would be compelled to reveal everything that he had told them.”*

See also: **Daleen Millart and Viviana Vergano,** ***“Hung Out to Dry? Attorney – client confidentiality and Reporting Duties Imposed by the Financial Intelligence Centre Act 38 of 2001”, Obiter Vol. 34 No.3 (2013) available at obiter.mandela.ac.za/article/view/2000).***

This approach to constitutional interpretation accords with the general principles relating to interpretation of Constitutions (**S v Acheson 1991 NR I (HC) at 10A – B*)*; 1991 (2) SA 805 (NM).**

[17] I now revert to the facts of the case to determine whether the applicant has made out a case for the relief sought. It is the applicant’s case that he was directed by the police to hand over his client’s files and money which he was paid by Sunny Penny (Pty) Ltd, to them. It is his case further that he refused to do so. An attempt was made to charge him, and by then he was resolute in his defiance of the police directive. On the one hand, the police deny that they demanded the applicant’s clients’ files. They say they rather demanded that he hand over the money he received from Sunny Penny (Pty) Ltd. It is without doubt that there is a dispute of fact regarding whether the police demanded the applicant’s clients’ files. It is common cause that the applicant did not hand over any of his client’s file to the police. In my

considered view the respondent's version cannot be discounted on account of it being palpably implausible, bald or uncreditworthy, far-fetched or clearly untenable **(National Director of Public Prosecutions v Zuma 2009 (4) BCLR 393 (SCA)** at para. 26). If this conclusion is reached, as it should, it follows that the applicant failed to make out a case for violation of Section 12(2)(d) of the Constitution. The fact that the police demanded that the applicant hand over the money received from Sunny Penny (Pty) Ltd even though bizarre, has nothing to do with the violation of the lawyer-client confidentiality.

[18] I regard the demand by the police as bizarre because it is unfathomable on what basis the applicant would be authorising his bank to transfer the funds standing to his credit to the police. I am fortified in this view by the well-known principle of our law known as *commixtio.* This principle is articulated clearly in the case of **Trustees of the Insolvent Estate of Whitehead v Dumas and Another 2013 (3) SA 331 (SCA)** at paras. 13-14, where the court said:

> *"[13] Generally, where money is deposited into a bank account of an account-holder it mixes with other money and, by virtue of commixtio, becomes the property of the bank – regardless of the circumstances in which the deposit was made or by whom it was made. The account holder has no right of ownership of the money standing to his credit –*

but acquires a personal right to payment of that amount – from the bank, arising from their bank – customer relationship. This is also so where, as in this case, on money in its physical form is in issue, and the payment by one bank to another, on a client's instruction, is no more than an entry in the receiving bank's account. The bank's obligation, as owner of the funds credit to the customer's account, is to honour the customer's payment instructions. Where the depositor is not the account-holder he relinquishes any right to the money and cannot reverse the transfer without the account-holder's concurrence.

[14] Once ownership passes to the bank it immediately incurs the obligation to account to its customer. But a customer does not always acquire an enforceable personal right to the credit in his account merely by virtue of the deposit. A bank is entitled to reverse a credit in the account-holder's bank account if it transpires that the account had been credited in error, that the customer had acquired the money by fraud or theft, that the drawer's signature on a cheque had been forged, or that the bank notes deposited in the account were forgeries…."

[19] I am merely restating this trite position of the law that the money which the police demanded from the applicant belonged to his bank available, of course, to him on demand, not to the Government of Lesotho as they mistakenly seemed to think. All that the police was entitled to do, if they thought the funds were proceeds of money laundering activities (tainted property) was to follow the recovery procedure provided for under Part IV –

Division 6 of the Money Laundering and Proceeds of Crime Act 2008 (as amended).

[20] The aforegoing conclusion that the applicant failed to make out a case for violation of Section 12(2)(d) applies with equal measure to the allegation about violation of Section 32(2) of the Money Laundering and Proceeds of Crime Act 2008 (as amended).

[21] **Review of the Decision to Prosecute the Applicant**

The applicant is seeking to challenge his joinder in the proceedings in which his client is charged with various crimes. His basis for challenging this joinder is that the police are executing or furthering their pronounced motive of embarrassing him for his refusal to hand over the money he was paid by Sunny Penny (Pty) Ltd. Although the ground is couched as though it is directed at his joinder it is in essence a review of the Director of Public Prosecution's decision to charge the applicant together with his client. The question is whether, in law, this course is open to him?

[22] The answer to this question is in the negative. As a general rule the decision to prosecute is not administrative and therefore not susceptible of review. In

National Director of Public Prosecutions v Zuma 2009 (4) BCLR 393 (SCA) at paras. 35 – 38, the court stated the position as follows:

> *"[35]…[A] decision to prosecute … is not susceptible to review. There are policy reasons for this …*
>
> *[36]…..*
>
> *[37]…. A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same thing applies to prosecutions.*
>
> *[38] This does not, however, mean that the prosecution may use its powers for 'ulterior purpose'. To do so would breach the principle of legality…."*

[23] In **Marshall v Director of Public Prosecutions (Jamaica) [2007] UKPC 4** (24 January 2007), the court said:

> *"[17] The position and functions of the DPP are such that judicial review of his decisions, though available in principle, is a "highly exceptional remedy…."*

[24] In **Sharma v Brown – Antoine [2006] UKPC 57** at para. 14, the court listed some of the policy reasons behind the courts' reluctance to interference with prosecutorial decisions:

> *"(i) 'the great width of the DPP's discretion and the polycentric character of official decision–making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits'* ***(Matalulu, above, p.735, cited in Mohit, above, para. 17);***
>
> *(ii) "the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account" (*Counsel's argument in Mohit, above, para. 18, accepting that the threshold of a successful challenge is a "high one");
>
> *(iii) the delay inevitably caused to the criminal trial if it proceeds (Kebilene, above, p. 371, above, para.77);*
>
> *(iv) "the desirability of all challenges taking place in the criminal trial or appeal" ….*
>
> *(v) the blurring of the executive function of the prosecutor and the judicial function of the court and the distinct roles of the criminal and civil courts.*

[25] On the basis of the above dicta the applicant's quest to have the decision to prosecute him reviewed, stands on a shaky ground: the motive for charging

him is irrelevant as the authorities postulate. The police may have the motive to embarrass him, but that should be kept separate from the merits of the decision to prosecute. The prosecution might have evidence which this court is not privy to which can only be ventilated before a criminal court. If the prosecution does not have reasonable and probable ground for prosecuting him, they are exposing themselves to claims for malicious prosecution. The latter determination can only be made after conclusion of the trial.

[26] I have deliberately omitted to deal with the relief sought in prayer 4 of the notice of motion because, as I see it, it is couched in a manner which autocues the decision which the criminal trial court should take, and I think that it is not legally permissible. The pronouncement in the manner sought by the applicant in prayer 4 can only be made by the criminal court after hearing all the evidence there is to adduce.

[27] In the result, the following order is made:

(i) The application is dismissed with no order as to costs.

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MOKHESI J

I AGREE

BANYANE J

I AGREE

MAKHETHA J

For the Applicant:	**Adv. S. Phafane KC instructed by Mei & Mei Attorneys**
For the Respondents:	**Adv. M. Moshoeshoe from the Attorney General's Chambers**