

LESOTHO / JUDGMENT

Makhotso Mahosi V DCEO & 2 Others (CIV/APN/0004/2023) [2023] LSHC 201 (27 September 2023)

[2023] LSHC 201

COURT

High Court

CASE / FILE NUMBER

CIV/APN/0004/2023

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IN THE HIGH COURT OF LESOTHO HELD AT MASERU CIV/APN/0004/2023 In the matter between MAKHOTSO MAHOSI MAJEREMEA MAHLABANE 1ST APPLICANT 2ND APPLICANT AND THE DIRECTORATE ON CORRUPTION AND1 ECONOMIC OFFENCES ST RESPONDENT DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT THE ATTORNEY GENERAL 3RD RESPONDENT
Neutral Citation: Makhotso Mahosi and Majeremea Mahlabane v DCEO and Others [2023] LSHC 201 Civ (27th September 2023) CORAM HEARD : BANYANE J : 21 APRIL 2023 DELIVERED : 27 SEPTEMBER 2023 Criminal Procedure and Evidence-seizure of money by the DCEO from the applicants- discovery of the money arising from statements or admissions made by the 1st applicant- whether the High Court should pronounce on questions whether the admissions were elicited from the 1st applicant, whether the investigators conducted a search, whether the money was received in bribes or is the lawful property of the applicants-these matters to be competently considered in the Trial Summary Court. Annotations Cited cases: Lesotho

1. Joseph Thulabora & another v Standard Lesotho Bank CIV/APN/300/2019
2. Molisana Sekoala v DCEO C of A (CIV) No.61/2017
3. Kekeletso Mokokoane v Officer Commanding Police Robbery and Car Theft Unit and another 1991-1996 (1) LLK 732
4. T'seliso Motloheloa v Commissioner of Police and others CC 19/2017 South Africa
1. S v Sheehama 1991(2) SA 860
2. S V Nkosi 1980 (3) SA 829 (A) 844-848
3. S v Cele 1965(1) 82(A)
4. Statutes:
 1. Money Laundering and Proceeds of Crime Act of 1999

2. Criminal Procedure and Evidence Act of 1981
3. Prevention of Corruption and Economic Offences 5 of 1999
4. Money Laundering and Proceeds of Crime Act of 2008 Rules:
 1. Rule 50 of the High Court Rules 1980 Books
 2. Hoffmann and Zeffert: The South African Law of Evidence, (4th edn). BANYANE J

Introduction

- [1] The dispute between the parties arises out of seizure of money to the tune of M500 000.00 by the officers of the Directorate on Corruption and Economic Offences (DCEO) on the 12 December 2022 from the 2nd applicant's residence. The 2nd applicant is the 1st applicant's biological mother. Both approached this court on urgent basis on 10 January 2023 to challenge the seizure of this money. They sought reliefs couched as follows:
- (1) That a Rule Nisi issue returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:-
 - a) The Rules as to notice and form shall not be dispensed with on account of urgency;
 - b) The seizure of money to the tune of Five Hundred Thousand Maloti (500,000.00) and a society book that was in possession and control of the 1st Applicant shall not be declared null and void and of no legal force and effect;
 - c) The search and seizure at the applicants premises by the Official of the 1st respondent without any search warrant and the resultant execution thereof shall not be declared null and void and of no legal force and effect;
 - d) The 1st respondent and/or his subordinates shall not be ordered and directed to release to the 1st Applicant an amount of Five Hundred Thousand Maloti (500,000.00) and a society book that were in her possession and control;
 - e) The 1st respondent and officers subordinate to him shall not be ordered and directed to permit the Applicants to be interviewed in the presence of their Lawyers whenever they are called for interrogation pending the finalization hereof;
 - f) The 1st respondent and officers subordinate to him shall not be interdicted and restrained from interviewing and/or interrogating the applicants in any manner whatsoever in the absence of their lawyers pending the finalization hereof;
 - g) The 1st respondent and officers subordinate to him shall not be interdicted and restrained from searching the applicant's premises in any manner whatsoever pending the finalization hereof;
 - h) It shall not be declared that the applicants are entitled to be legally represented by a lawyer of their own choice during the interrogation by the officials of the 1st respondent;

- i) The interrogation of the 1st applicant by the officials of the 1st respondent shall not be declared null and void and of no legal force and effect;
 - j) The respondents shall not be ordered to pay costs on Attorney and Client Scale;
 - k) The applicants shall not be granted further and/or alternative relief;
2. Prayers 1 (a), (e), (f) and (g) be and are hereby to operate with immediate effect as an Interim Court Order. Grounds for relief [2] In a founding affidavit filed in support these reliefs, the 1st applicant deposes that she is an employee of the Government of Lesotho deployed in the Prime Minister's Office as a Chief Executive officer (acting) at the Disaster Management Authority (DMA). Her mother is a pensioner residing at Matholeng in the Mafeteng District. [3] She avers that on 12 December 2022, she was telephonically requested to report at the DCEO offices. On arrival she was informed that certain investigations had been mounted against her and that she is a suspect. Before an intense interrogation by a team of officers ensued, they took her cellphones. She describes the interrogation as intimidating and threatening. 3.1 She was accused of receiving bribes to facilitate certain unlawful payments to private contractors and hiding the monies so received. She vehemently denied these accusations and proffered an explanation that the only amount of money in her possession is M500.000.00 belonging to a certain unregistered society of which she is a treasurer. The society is composed of three members, Rethabile Maphoi, Lerato Maphatsoe and herself. She explained that this amount was accumulated through individual monthly contributions of M12 500.00. The monthly contributions would then be lent to all members. The loans were payable within 3 months period with 15% interest. According to her, she kept the record for all payments and loans by members. 3.2 The officers had none of it and accused her of non-cooperation. As result, she was sternly warned that if she continued to be uncooperative, she would be locked up for days without food or access to her family. She explains that she lives with her minor child aged ten (10) years. For fear of the safety of this child, she succumbed to the pressure and admitted that she received this money as bribe. [4] Based on this admission, she was escorted to her residence at Ha Matala around 7:00 pm. The minor child was home alone when they arrived. The officers conducted an extensive search in the house but did not find anything. They then proceeded to her mother's house in Mafeteng. She was forced to leave her minor child alone.
- [5] On arrival in Mafeteng, they reported at Mafeteng police station. From there, they proceeded to her mother's house in company of police officer Seutloali from the police station. On arrival, the officers searched her mother's bedroom and retrieved money contained in a plastic bag and a society "book". They counted the money. It amounted to M500.000.00. The officers examined the society booklet and confirmed that her story checked out. They, however, seized and retained the money and the booklet. They then drove back to Maseru after dropping off Seutloali at Mafeteng Police Station. [6] They arrived in Maseru around 11:00 pm. She was dropped off at her office and her cellphones were then released to her with a directive that she must pen a statement on the next day. She was sternly warned against communicating with anyone about the matter.

- [7] On the next day, she was instructed to appear before a Magistrate to make a confession. She was, however, able to successfully reject this instruction. She was thereafter interrogated for the entire day (until 5:00 pm) by 8 officers of the Directorate, comprising of eight (8) male and three (3) female officers who threatened and forced her to implicate certain people, failing which, she would be charged. Apprehensive of losing everything she worked so hard for, she again succumbed to their demands. She was thereafter shown a certain statement and ordered to sign it without comprehending its contents. According to this statement, she received the M500.000.00 from Mr. Baba Ketso. [8] She further asserts that during the interrogation, her phones were kept by the officers thereby barring communication with anyone including her lawyers. She was only able to consult with a lawyer on 19 December 2022 after which, the present application was instituted.
- [9] After these occurrences, the officials from the DCEO came to her office and seized certain documents and subjected her to further interrogations. During these interrogations, she was denied legal representation despite her personal requests and the request made directly by her lawyer to these officers.
- [10] Based on this narration, she asserts that the search is unlawful because it was conducted without a search warrant. Consequently, the evidence obtained during the search is inadmissible. In addition, the search and seizure amount to violation of her rights enshrined in sections 10, 11 and 17 of the Constitution of Lesotho 1993. She further asserts that her right of access to a lawyer during interrogation was infringed hence prayer (i) seeking a declarator to the effect that the interrogation conducted in the absence of her lawyer is null and void and of no force and effect. For these reasons, the money together with society booklet must be released to her.
- [11] To the founding affidavit, Ms. Rethabile Maphoi and Ms. Lerato Maphatsoe filed supporting affidavits. They confirm the 1st applicant's allegations about existence, membership, and operations of the unregistered society. The 2nd applicant also filed a supporting affidavit.
- [12] On 10 January 2023 the parties' legal representatives appeared before Mahase J who granted prayers (a), (e) and (j) returnable on 14th February 2023. The matter was argued on 21 April 2023 after closure of pleadings. The respondents' case
- [13] The Director of Investigations at the DCEO, Mr. Thabiso Thibeli filed an answering affidavit. He describes himself as a lead investigator in a case of corruption and money laundering registered under RCVI 07/11/22. He raises two points in limine, namely, non-joinder of Rethabile Maphoi and Maphatsoe Lerato as members of the alleged society. The second point raised is that the application is irregular because it is filed as a review in terms of Rule 50 of the High Court Rules 1980, yet the 1st applicant's affidavit does not identify the decision being challenged on review.

- [14] He further refutes allegations that the DCEO officers conducted any search on either the 1st applicant's house or her mother's. He conversely asserts that the money was discovered after certain admissions were made by the 1st applicant, followed by a pointing out. According to him, the applicant's challenge against admissibility of the evidence discovered through pointing out shall be appropriately determined by the trial court.
- [15] He asserts that the 1st applicant was requested to appear before his office for an interview in relation to certain unlawful payments made by her as the chief accounting officer of the Disaster Management Authority (DMA). What preceded these payments was a corrupt award of tenders by the erstwhile Principal Secretary of the Ministry of Local Government Ms. Nonkuloleko Zaly. These awards were precipitated by a Declaration of a State of Disaster by the former Prime Minister. The DMA was conferred with power to coordinate matters relating to this state of disaster. In this connection, the DMA was responsible for procurement of contractors to repair bridges and roads damaged by heavy rains and floods. Contrary to proper procurement procedures, Ms. Zaly engaged certain contractors which were later paid under questionable circumstances by the DMA. The 1st applicant as the CEO was therefore called in as the chief accounting officer regarding procedures followed to effect these payments. According to Mr. Thibeli, the 1st applicant was not called in as a suspect but for an interview relating to her functions.
- [16] The officer denies threatening the 1st applicant during the interview. According to him, the 1st applicant narrated how and why a state of disaster was declared. She was questioned based on documentary information in possession of the DCEO at this time. After these documents were presented to her for perusal, she exclaimed that "these people got her into trouble".
- [17] According to him, the 1st applicant willingly told them how desirous she was to tell the truth about the payments because all she wanted was to raise her child. She then voluntarily disclosed that Ms. Zaly invited her to lunch and offered her bribe to the tune of M100 000.00 to effect the payments because (Ms. Zaly) had already awarded contracts in collaboration with his colleague Mr. Motoko. She also revealed the names of officers whom she said were part of the scheme. She thereafter outlined how they manipulated and maneuvered around the system to lure the Ministry of Finance into making retrospective approval of the payments despite these irregular awards. Following successful payments, one Ketso gave her M500 000.00 as a reward for effecting these payments promising a further payment of M500 000.00 upon completion of all payments.
- [18] This Ketso however, insinuated that he would come back or send people to get back this money. Since she lived with a minor child, she feared for her safety and therefore deemed it appropriate to hide the money at her mother's house in Mafeteng. She there and then volunteered to take the officers to her home to retrieve the money.

- [19] Regarding the allegations about the unregistered society, he asserts that the 1st applicant is lying under oath because she never, at any point, mentioned existence of the society, its operations, records nor the two ladies. Ms. Maphoi and Ms. Maphatsoe.
- [20] He also conversely asserts that before leaving for Mafeteng, the 1st applicant requested to pass by her house to inform her daughter that she might come home late. One officer asked if it would not be best to take the child along, but the applicant denied. The officers waited for her outside as she went in to check on the child.
- [21] He further denies that the officers searched the kist and retrieved the money in Mafeteng. According to him, it was unknown to the officers that there was money contained in a plastic bag and stored in a kist in the 2nd applicant's bedroom. The 1st applicant proceeded to the bedroom and walked to what looked like a kist and removed a black plastic bag containing money. The notes were thereafter counted at the Mafeteng Police Station. They amounted to M140 000.00. The 1st applicant told them that the money was short because she remembers putting the amount of M500 000.00 in the kist. She then requested them to return to the house. She took them back to the same room. Another black plastic bag containing M360 000.00 notes was retrieved.
- [22] To buttress his assertion that the officers did not conduct any search, he says investigating officers conduct searches and seizure in accordance with provisions of the Prevention of Corruption and Economic Offences Act 5 of 1999 (as amended) and money Laundering and Proceeds of Crime Act of 2008 (as amended) as well as the Criminal Procedure and Evidence Act of 1981. During investigations, they never request suspects to accompany them.
- [23] He further denies confiscating the applicant's phones or denying her access to a lawyer. He further asserts that the documents they subsequently sought from the DMA relate to a different case, in relation to which the applicant consulted her lawyer before releasing them. She also reserved her right to silence in relation to certain questions, stating that she awaits to consult her lawyer.
- [24] He resists the release of the money to the applicants because it forms part of evidence to be used at trial and its admissibility as evidence may be appropriately challenged during trial and not before this court.
- [25] To this affidavit Inspector Seutloali filed a supporting affidavit. He asserts that he was requested by his superior to assist the DCEO officials who arrived at the Mafeteng Police Station on the day in question. The 1st applicant narrated how and when she made the deal with Ms. Zaly, how and from whom she received the money and why she decided to hide it at her mother's place. After she retrieved part of the money, they proceeded to the station to count it. She said the money was short. She then telephoned her mother to inquire where the rest of the money was. They then returned to 2nd applicant's house. On arrival, 2nd applicant retrieved another plastic bag. This she did in the presence of two other relatives. The money was counted. It amounted to M360 000.00. They returned to the police station and registered it under OB 376/12/22 and then released it to the DCEO officers.

- [26] The Principal Investigation Officer also filed a supporting affidavit of what transpired on the day in question. The parties' Submissions
- [27] Advocate Setlojane for applicants contended that the DCEO's conduct amounts to an arbitrary search and seizure of property prohibited by section 17 of the Constitution. This is because the search and seizure of one's property must be authorized and conducted pursuant to a warrant of search.
- [28] His further argument is based on non-compliance with the provisions of the Money Laundering and Proceeds of Crime Act of 1999 (as amended). He cited the cases of *Joseph Thulabora & another v Standard Lesotho Bank CIV/APN/300/2019* and *Molisana Sekoala v DCEO C of A (CIV) No.61/2017* to submit that the procedure outlined under Money Laundering and Proceeds of Crime Act of 1999 (as amended) ought to have been followed. In this connection, the officers of the DCEO ought to have first applied for a preservation order. Based on their failure to follow proper procedure, the seizure of the money in question is unlawful.
- [29] He advanced a further argument about purposeful detention of a suspect's property. He argues that the respondent's pleadings do not disclose the status or stage of the investigations, nor the time when charges would be preferred against the applicant(s). He submits on this basis that indefinite criminal investigations run contrary to precepts of a fair trial contemplated in section 12 of the Constitution. He relied on *Kekeletso Mokokoane v Officer Commanding Police Robbery and Car Theft Unit and another 1991-1996 (1) LLR 732* to submit that holding a suspect's property is only necessary for purposes of investigation or trial, and it should not be kept indefinitely without charging the suspect. I should outrightly decline to consider this argument simply because the applicants' case as pleaded is not based on purposeless detention since the money in question was seized in December 2022 and this application was filed a month later on 10 January 2023.
- [30] On behalf of the DCEO, Advocate Tsutsubi argued firstly that two members of the alleged society ought to have been joined in this application as interested parties whose monies were allegedly seized by the DCEO. Secondly, this is not a proper case for review because the applicants are not challenging legality of any decision. [31] It is her further argument that the declaratory orders sought by the applicants are untenable because no search was conducted by DCEO officers on the applicants' premises; conversely, the money was discovered because of a voluntary admission made by the 1st applicant and a resultant pointing out. She cited the case of *S v Sheehama 1991(2) SA 860* to submit that a pointing out amounts to communication by conduct. She further submitted that a statement made by an accused person that he or she has knowledge of the relevant facts which prima facie operates to his or her disadvantage constitutes an admission. She further relied on section 229 of the Criminal Procedure and Evidence Act 1981, to submit that this Court is not a proper forum to consider and decide questions of voluntariness of the admission. According to her, the conflicting versions regarding the circumstances under which both the admission and the pointing out were made, will be determined by the trial court through criminal

procedure mechanisms such as trial within a trial. The effect of deciding these matters in this Court would be to bar prosecution against the applicants without the benefit of evidence to be adduced against them at trial. Issue for determination

- [32] The central issue arising from these submissions is whether this court is the proper forum to determine the lawfulness of the procedure through which the money was discovered or its admissibility as evidence. Discussion [33] It is common cause that the events leading to discovery of the money in question were part of a criminal investigation conducted by the DCEO, perhaps in collaboration with the Lesotho mounted police. It is also undisputed that the 1st applicant made a statement or admission of certain facts. What is the disputed is the circumstances under which the admissions and the discovery of the money were made. The 1st applicant avers that she was coerced into admitting the accusations made against her. She further asserts that the DCEO officers conducted a search on their (applicants) respective homes without a search warrant. For these reasons, these admissions, and the resultant seizure of the money amount to inadmissible evidence. The lead investigator conversely asserts that the 1st applicant voluntarily made the admissions which led to the pointing out.
- [34] Search, seizure and detention of property as well as pointing out are aspects of criminal investigation. They are closely connected with confessions and admissions. The question as to whether this court should pronounce itself on issues such as whether a search or pointing out took place, or whether the 1st applicant made certain admissions, falls to be answered in the light of the Criminal Procedure and Evidence Act (CPEA) of 1981 and the common law. Part VI of CPEA governs search, seizure and detention of property.
- [35] Admissibility of any statement classified as either a confession or admission is regulated by the CPEA and the common law. Under section 228(2) of the CPEA, a statement that amounts to a confession made to a peace officer is only admissible in evidence if made freely and voluntarily, and confirmed before a Magistrate. [37] Admissibility of a statement amounting to an admission also depends on the question whether it was freely and voluntarily made. In *S v Cele* 1965(1) 82(A)G-H, the Court stated the common law position to be that a statement by the accused person can be given in evidence against him if the prosecution proves beyond reasonable doubt that it was freely and voluntarily made. At 97 G-H, it said: "Prior prejudicial statements not amounting to confessions are provable outside the provisions of the CPEA. It has been held that such statements must be proved to have been freely and voluntarily made. In this respect they are, under the common law, in a position as regards admissibility, similar to that of confessions; see *R v Burton*, 1946 A. D 773. That does not mean, however, that they are to be regarded for all purposes of admissibility in the same light as confessions. It is for example quite clear that evidence may be given of a prejudicial prior statement by an accused even though it was elicited under question and answer, provided of course the principle of *Burton's* case is followed".

- [38] Section 229 of the CPEA deals with admissibility of facts discovered through a pointing out. Its subsection (2) reads as follows: “(2) evidence may be admitted that anything was pointed out by a person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against him on such trial”.
- [39] My reading of both sections 228 and 229 is that admissibility of any statement or article discovered through pointing out should be considered by the trial court when such evidence is produced before that court. The trial Court must then be satisfied that the statement tendered by the prosecution as an admission is not an inadmissible confession or a part of an inadmissible confession. See *S V Nkosi* 1980 (3) SA 829 (A) at 844-845 where the Court said the following: “it seems to me that it is the duty of prosecuting counsel in a case where evidence is available of an admission made by an accused and where there is any possibility flowing from information at counsel’s disposal that such admission has part of an inadmissible confession accompanied a pointing out following upon a report to the police to investigate the surrounding circumstances in order to satisfy himself of the propriety of proving the admission before he tenders evidence in that regard. If the matter is doubtful and arguable, counsel should convey that to the trial Judge in order to alert him to the necessity of an enquiry into the relevant circumstances”. [40] It is of great importance to also show that voluntariness of a statement or confession is normally determined in a trial within a trial as correctly submitted by the respondents’ counsel. Trial within a trial procedure is designed to ensure a fair trial by considering and deciding questions of admissibility and guilt separately. (Hoffmann and Zeffert: *The South African Law of Evidence*, 4th edn p204).
- [41] I am of the considered opinion that the trial court will competently investigate the circumstances under which the alleged admission and pointing out were made and determine or establish whether the statement made by the 1st applicant is a confession or not. I am of the opinion that this court should refrain from determining these issues. To do otherwise would unjustifiably undermine the criminal procedure machinery designed to resolve disputes on admissibility of evidence. These matters are best left for determination by the trial court after hearing evidence adduced by the parties in support of their respective versions.
- [42] This view finds support from the remarks of Makara J in *T’seliso Motloheloa v Commissioner of Police and others* CC 19/2017 although they were made in the context of the proviso in section 22 of our Constitution. In that matter, the police discovered a deposit of M106 778.70 into applicant’s wife’s account. The discovery was preceded by an interview with the wife. The money was forfeited by the police and the applicant’s complaint was that the conduct of the police and DCEO violates marital privilege, right to privacy and fair trial rights. The learned judge said the following at para 38 of the judgment; “It would have been wise and prudent for the applicant to have allowed the crown to firstly lead evidence. This

would have presented him with an opportunity to timeously take an exception against any testimony connected with the information under scrutiny. In the circumstances, it would be premature for the court to conclude that the operatives concerned founded their emotions exclusively upon the information of the wife". 42.1 At paragraph 30 he said: "On a different discourse, however, the applicant has fatally failed to satisfy the section 22 (3) critical requirement that there were no adequate means of redress for the contravention alleged that are or available to him under any other law. He failed to realize that a proper procedure was for the crown to firstly present its evidence. If that would include a dimension concerning its reliance upon the information given to the third respondent and police, he could then challenge its admissibility against Section 217 (1) and 250 (1) of the CP & EA. The Trial Court commanded Jurisdiction to rule upon that controversy." 42.2 At paragraph 37 he said: "In the event that the trial court did not uphold his objection, he could have appealed against the decision or resorted to this court for a reviewing of the procedure followed. In a nutshell, in the present scenario, CP & EA adequately establishes an avenue for the exclusion of inadmissible evidence for the protection of the constitutional rights complained about."

- [43] Reverting to the present matter, the applicants are indirectly inviting this court to prematurely determine matters of admissibility of evidence based on untested allegations. It will be recalled that the 1st applicant's version is that the money in question belongs to an unregistered society to which she is a member whereas the DCEO asserts that she corruptly received this money as bribe. Sight must therefore not be lost of the fact that the source of this money has a direct bearing on the question of guilt or innocence of the applicants to charges that the Crown intends to prefer against them. The DCEO officers and the applicants' credibility and their respective versions can only be tested under cross examination before the trial Court. If the 1st applicant made certain admissions, then the crown will have to prove before that court that they were voluntarily made. Disposal
- [44] All things considered, I conclude that the disputed questions whether the 1st applicant was denied legal representation during her encounter with the DCEO, whether she was threatened to induce her to make any statement, whether the statement is inadmissible, whether facts discovered as a result of this statement are admissible, whether the DCEO officers conducted a search on the applicants' premises, shall be competently considered by the trial court. It is only through cross examination in the trial Court that witnesses' evidence on these matters can be properly tested. The High Court cannot in this Civil application properly determine admissibility of any statement made by the 1st applicant and whether what occurred in Mafeteng amounts to a search or a pointing out. For these reasons, the application must fail. Order [45] In the result, the application is dismissed with costs.

P. BANYANE JUDGE For Applicants : Advocate Setlojoane For Respondents : Advocate Tsutsubi 25

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