

CIV. CASE NO. 6/99

In the matter between

THE KING**APPLICANT**

And

KELECH ACHIKE UBA MNADI**1ST RESPONDENT****MAGISTRATE NKONYANE NO.****2ND RESPONDENT**Coram
For the Applicant
For the RespondentS.B. MAPHALALA – J
MRS DLAMINI
MR L. MAMBA

JUDGEMENT
(11/03/99)

Maphalala J:

This is an urgent application brought on motion for an order reviewing and/or setting aside the ruling by the 2nd respondent under case no. A16/99. The facts of the matter are that the applicant is charged with the crime of fraud in the Mbabane Magistrate court. On the 1st February 1999, the matter came before the 2nd respondent for a bail application where the crown was to prove the value defrauded from the complainant. The crown was represented by Mrs. Dlamini and the accused in the court *a quo* by Mr. Mamba. In the course of the bail proceedings Mrs. Dlamini was examining one of the crown witness Mrs. Dunn who is the bank manager of the complainant counsel for 1st respondent objected on the basis that all her evidence was based on hearsay and that a certain document produced by this witness was a computer print-out, not provided for under **Section 245 of the Criminal Procedure and Evidence Act 66/1938**. Arguments were heard by the learned magistrate and on the 5th February 1999, he delivered his ruling sustaining the objection. This then precipitated the present application.

This matter came before me on motion court. Mr. Mamba raised from the bar that the application has not been brought in terms of Rule 53 of the High Court Rules, which govern the procedure to be followed in review proceedings. Mr. Mamba further argued that if the court grants such an application this will create a bad

precedence in that every time an objection is raised and ruled upon in the *court a quo* the dissatisfied party would stop the proceedings and proceed to the High Court for review. Trials according to Mr. Mamba would continue *ad infinitum*. This would open flood gates and thus stifle proceedings in lower courts.

On the other hand Mrs. Dlamini is of the view that they have proved urgency to circumvent the strictures of the rule. Further more prayer 1 of their notice of motion is clear that they have prayed for the abridgement of “**Time limits and forms of service prescribed by the rules of the court** (my emphasis). She further submitted that it was imperative that the decision by the 2nd respondent be reviewed as the crown case is based on computer printouts. She cited the case of ***The King vs Solomon Mbuli and Gcina Mbonyani (Review Case No. 26/97 unreported)*** to buttress her case. I must say with due respect to Mrs. Dlamini that this case has no relevancy to the present case save to say that the Acting Chief Justice Sapire (as he then was) was reviewing a magistrate’s decision to recuse himself from proceeding with the trial in that case as they were some allegations of impropriety on his part.

Before proceeding to determine the matter there is a curious aspect of this case where Mrs. Dlamini informed the court from the bar that the decision to take the matter for review was agreed upon by all parties in the presence of the presiding officer. However this is vehemently denied by Mr. Mamba who said he was not present when such a decision was made.

I have looked at all aspect of this case. In a case like this it trite law that the procedure prescribed by Rule 53 is *prima facie* mandatory, that an applicant should normally adhere to the procedure prescribed by Rule 53, except in urgent cases and instances in which interim relief is necessary (see ***Safco Forwarding (Johannesburg) (Pty) Ltd vs National Transport Commission 1982 (3) S.A. 654 (A)***). It is my respectful view that this seem to be the case in *casu*. Here we are dealing with the liberty of an individual where time is of the essence. It would be self-defeating for applicant to follow the full strictures of Rule 53.

I thus Rule in favour of the applicant and order that 1st respondent file opposing papers within (7) seven days from the date of this judgment and thereafter applicant, if necessary to file a reply with two (2) days after receipt of opposing papers and the matter set on the nearest contested motion for full arguments.

Cost to be costs in the course.

S.B. MAPHALALA
JUDGE