HH 26-03
Crb 169/03
THE STATE
versus
SAMSON RUTURI

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 7 and 12 May, 2003

***J Jagada* for appellant**
***G Chikumbirike* for respondent**

CHINHENGO J: This was an appeal by the Attorney-General against the magistrates court's decision admitting the respondent to bail. The appeal was made in terms of s 121(1) of the Criminal Procedure and Evidence Act [Chapter 9:07].

The respondent is facing a charge of fraud or alternatively theft of $958 651 946,16 from his employer, First National Building Society (FNBS). The respondent is not only an employee of FNBS but, through a company in which he and his co-accused Nicholas Border Musona (Musona) are the major shareholders, holds a substantial if not the controlling interest in FNBS. The respondent is facing the charges of fraud or alternatively theft together with Musona.

On 4 February 2003, the respondent and Musona applied to the magistrates court for admission to bail. Their application was dismissed. The respondent, averring changed circumstances, made a second application on his own on 10 March 2003 to the same court. The application was again dismissed. He appealed to the High Court against both decisions of the magistrates court. The first appeal was heard and dismissed by MAKARAU J on 28 February, 2003 - see her ladyship's judgment in *Samson Ruturi* v *The State* HH 31-03.

The second appeal was heard and dismissed by OMERJEE J on 26 March 2003 - see his lordship's judgment in *Samson Ruturi* v *The State* HH 48-03. It is common cause that Musona appealed against the decision of the magistrates court separately. His appeal was heard and allowed by MATIKA J. Musona was thus admitted to bail on certain conditions. This prompted the respondent to lodge a third application for admission to bail to the magistrates court on the grounds of changed circumstances. This time he was successful and he was admitted to bail on conditions similar to those on which Musona was admitted to bail but with additional conditions which were intended to take into account certain circumstances which were peculiar to him.

The changed circumstances which formed the basis of the respondent's third application were that his co-accused had been admitted to bail by MATIKA J and that a period of ten weeks had gone by since his arrest. The mainstay of his application seems to me to have been the first - the admission to bail of his co-accused. The expiry of ten weeks from the date of his arrest seems to me to have been tucked onto the main submission as an incidental factor for the court to consider. I say so because Mr *Chikumbirike* did not make further submissions to advance this ground as a basis for his client's admission to bail and the magistrate did not consider it in reaching her decision.

In the court *a quo* Mr *Chikumbirike* submitted that the respondent should be treated in the same manner as his co-accused and be admitted to bail because they faced the same charges and the court had, from the time that they both first appeared in court, treated them in the same manner and had refused them bail on the same grounds. Indeed in dismissing their first application for bail the court *a quo* seems to have

treated them in the same manner. It is recorded in MAKARAU J's cyclostyled judgment at p 1 that in dismissing their appeal the magistrate had stated the following -

> "In considering the submission by both the State and the defence in their application for bail, it is the court's view that if the accused are granted bail, there is a likelihood that they will abscond considering the amount involved which is close to a billion (dollars) and also the fact that they are internationally connected. As such bail is refused".

It is clear that the magistrate denied them bail on the basis that the amount involved was large and that they both had international connections and were likely to abscond. It does not appear that the nature or extensiveness of their international connections were disclosed to the court. What is significant, however, is that the court *a quo* accepted that the two had international connections and that they were likely to abscond by taking advantage of those connections. This seems to me to support Mr *Chikumbirike's* submission that the court had treated the two in the same manner in so far as the reasons for denying them bail were concerned.

The appellant opposed the respondent's third application for bail in the court *a quo* on the basis that the court was not entitled to treat the respondent and his co-accused in the same manner because the court had to consider their personal circumstances and if those personal circumstances were different, the one could be admitted to bail and the other not depending thereon. The appellant submitted that the respondent's personal circumstances were different from those of Musona in that, whereas the respondent owned immovable property in South Africa and had personal bank accounts in the same country and in other countries, Musona did not. This, it was argued, provided a basis for differentiation. The appellant highlighted in particular that

when the respondent had been called upon to disclose his personal foreign bank accounts, he had failed or neglected to disclose one such account with a bank in South Africa in which he held the sum of R116 218. The non-disclosure of this account was viewed by the appellant as an indication that he intended to abscond and use the amount in the undisclosed account to start himself up in a foreign country. The appellant also viewed the non-disclosure as an indication that the respondent could well have other foreign bank accounts which he had not disclosed.

To these assertions Mr *Chikumbirike* responded by stating that the account did not exist and that the State had not given to the court documentary proof that that undisclosed account actually existed. It seems to me that although the appellant was in possession of a memorandum from Price Waterhouse Coopers in South Africa which stated that the disputed account existed, that memorandum was not produced for the court's perusal. Even though the memorandum was not notarially authenticated it could have provided some basis for the court to reach its decision if it had been handed in.

In granting bail to the respondent, the magistrate gave the following brief reasons:

> "The main basis of this application of the defence is that there are changed circumstances and that the accused's co-accused has since been granted bail as shown by the High Court Order 3529/03 produced in court by the defence.
>
> The court does agree with the defence that right from the start when the accused started appearing in court, they were being treated equally. The reasons for denial of bail were the same for both accused. At no time was there any differentiation. The court finds that the State is taking a wrong approach as it sought in its address to treat the accused differently now.
>
> Since the accused were being treated equally and are equally facing the same charges, the court finds it to be in the interests of justice to treat the accused in the same manner. Accordingly the accused (1) (respondent) is granted bail on the same terms as follows..."

The conditions were that the respondent (a) deposits the sum of $4 million dollars with the Clerk of Court, Harare Magistrates Court; (b) he resides at House No 80 Folyjohn Crescent, Glen Lorne; (c) he

reports at Serious Fraud Squad offices once daily between 6 a.m. and 6 p.m.; (d) he does not interfere with State witnesses; (e) he does not visit FNBS premises until the matter is finalised; (f) all the property of the accused is to remain interdicted and bank accounts frozen as per KARWI J's order in case no HC 997/03.

The magistrate then added other conditions applicable only to the respondent *viz* that - (g) the respondent surrender all his travel documents to the clerk of the court at Harare Magistrates Court; (h) that the (undisclosed) account No 6203370565, FNBS, S.A. with R 116 218 be submitted to the Curator so that it also be frozen; and (i) that the house in South Africa be surrendered to the Curator and to remain so until the matter was finalised.

The magistrate also ordered that the last two conditions will be effected by the accused (respondent) signing a power of attorney authorising the Deputy Sheriff to hold the account and the house until the finalisation of the criminal case in this matter and to be disposed of only in the event of a judicially proven indebtedness.

The magistrate based his decision almost entirely on the reasoning that the respondent had to be treated in the same manner as his co-accused. The magistrate did not state the reasons for imposing the additional conditions. It can however be inferred from the imposition of the additional conditions that the magistrate must

have accepted that the earlier undisclosed account existed, hence the order that it be surrendered to the Curator of FNBS and that the Deputy Sheriff be authorised to deal with it in the event that the accused was found liable to pay any money to FNBS. It is clear that by equal treatment the magistrate meant that if one of two persons jointly charged is admitted to bail the other must also be admitted to bail.

The appellant contended in the appeal that the magistrate had misdirected herself in a number of respects. Whilst the appellant conceded that the admission to bail of Musona constituted a change in the circumstances for the purposes of making a fresh application by the respondent, it did not agree that the court should have treated the two accused persons equally for the purposes of assessing the respondent's suitability for admission to bail. The appellant submitted that the different personal circumstances of the respondent warranted a different treatment. In particular the fact that the respondent had assets outside the jurisdiction required that his application be considered in a different light.

The second misdirection which the magistrate is said to have made was that she missed the essence of the appellant's submissions on the respondent's failure to disclose the existence of a third foreign account in South Africa. Mr *Jagada* said that the essence of that submission was not as to how to control that account after its discovery but that the respondent had failed to disclose it.

The third misdirection alleged is that by imposing the further conditions, the magistrate had failed to consider whether or not it was practicable to enforce the conditions relating to the surrender to the Curator of the foreign accounts and the house in South Africa. Mr *Jagada* contended that the order issued by KARWI J did not have extra-territorial effect and the accounts held by the respondent could thus not be effectively frozen. He also submitted that the stipulation that

the respondent should issue a power of attorney and that his immovable property in South Africa could be disposed of by the Deputy Sheriff upon proven indebtedness were not an assurance that what was intended in the order could actually be achieved.

The appellant submitted that I should take into account the personal circumstances of the respondent, give them due weight, and then substitute my discretion for that of the magistrate, and, without being constrained by the existence of any misdirection or irregularity in the magistrate's decision, deny bail to the respondent.

Mr *Chikumbirike* opposed the appeal on all the grounds on which the State based its case. I will deal with the arguments by Mr *Chikumbirike* in what follows.

When the parties first appeared before me on 7 May 2003, I directed that the appellant should produce proof as to the existence of the "undisclosed account". I gave the appellant up to 9 May 2003 to do so. I extended that period to 12 May. The State did not produce that proof. When the matter resumed on the last-mentioned date, I dismissed the appeal after giving my reasons for doing so. The appellant requested that I should give my reasons in writing which is the purpose of this judgment.

It seemed to me that the following are the issues for consideration. The first is whether the magistrate misdirected herself in the respects highlighted by the State. The s econd is, if she did not misdirect herself, would I be at liberty, nontheless, to substituted my own discretion for hers and reach a different decision so as to deny bail to the respondent.

The question of equal treatment of persons jointly

charged with a criminal offence whether in respect of bail or sentence, is one which in general terms, can always be answered with the words "of course they should be treated in the same manner". By so saying, one is really saying that if there is no basis for differentiating the treatment accorded to persons jointly charged with an offence then they should be treated in like manner, whether in respect of bail, sentence or any other ground. Support for this proposition comes from the decision in terms of which both the respondent and his co-accused were denied bail. One of the reasons was that they were internationally connected. Without explaining to the court *a quo* how MATIKA J had dealt with this very significant point of similarity between the two, the appellant argued for the respondent to be denied bail when his co-accused had been admitted to bail. This did not at all advance the commonly accepted principle that justice must be evenly administered. Further support for the proposition appears in *Peter Raymond Lotriet and Patricia Ann Mitchell* v *The State* HH 164/2001 where BLACKIE J considered the principle of equal treatment and stated the following at p 6:

> "Notwithstanding the significance of the other factors in this case, the applicants are entitled to bail. They are so entitled because of two principles of fundamental importance : the right of the individual to liberty and the perception that justice is evenly administered. It is vital that in the administration of

justice there does not appear any form of discrimination, particularly in a matter where the liberty of a person is involved".

Thus stated, the general principle is that persons jointly charged with an offence must be treated in the same way. In practice however it is not often that persons jointly charged with the same offence are treated equally in every respect. One accused may have to be treated differently from another because of certain factors, either personal or related to the offence, which set him apart from the other person with whom he is jointly charged. In the case of admission to bail, one of jointly charged persons may, in the view of the court, be likely to abscond and the other not. One may be more likely to interfere with evidence or witnesses and the other not. One may be more likely to commit the same or similar offences and the other not. And one may be much more closely connected to the offence and more liable to be convicted and the other not. These are some of the factors which may justify the granting of bail to the one and its denial to the other. In broad terms, therefore, factors personal to jointly charged persons may set them apart for purposes of the grant or refusal of bail. Much the same can be said about the imposition of sentence - various factors can set apart persons who have been convicted of the same offence when it comes to sentence. All this however does not detract from the general principle that persons in equal circumstances must be treated equally. The question in every case would however be a

factual one - whether their circumstances are equal or the same. I have just observed it is not often that those circumstances are the same. In my view, therefore, to the extent that the magistrate based her decision on equal treatment of persons jointly charged with an offence without qualifications, she did not express herself well but I cannot say she misdirected herself. That, in any case, is not the end of the inquiry.

The magistrate dealt with those factors which set the respondent apart from his co-accused - the possession of personal bank accounts and an immovable property in foreign jurisdictions. She then imposed what she considered were suitable conditions to take account of the factors which would have resulted in the respondent having to be treated differently from his co-accused. By imposing the additional conditions in respect of the respondent, the magistrate removed those factors which would have justified a different treatment of the respondent from his co-accused. In effect it can be said that the magistrate did in fact treat the respondent differently from his co-accused by imposing the additional conditions, but at the same time she applied the principle of equal treatment. It cannot be said that she went against the grain of the principle of equal treatment. I am satisfied that in adopting the approach that she did the magistrate cannot be said to have misdirected herself.

Coming specifically to the points raised by the appellant in seeking to show that the magistrate misdirected herself it is necessary to consider whether the alleged concealment of the third account with the South African Bank is a sufficient basis for concluding that the respondent was likely to abscond and that, therefore, he was not a proper candidate to be admitted to bail.

Counsel for the respondent specifically put in issue the non-existence of the account allegedly not disclosed. The appellant did not produce sufficient proof that the account existed. It was necessary for the appellant to place before the court sufficient proof of the existence of the accounts. The furthest that the appellant went was to give the account number, the Bank in which it is held and the amount in credit. When at the hearing of the appeal I gave the appellant what I and the appellant considered to be adequate time within which to establish this fact, still the appellant was unable to do so. The magistrate, however, was careful to ensure that if the account does exist, it should be

brought to account in the same way as the other foreign accounts of respondent. She ordered that it be surrendered to the Curator to be dealt with in the same way that the other declared accounts were to be handled.

This brings me to a consideration of the argument by the appellant that the magistrate misdirected herself by failing to appreciate the difficulties associated with giving effect to the freezing of the foreign accounts and the prohibition against disposal of foreign held assets. In case No HC 998/03 KARWI J ordered that -

"1(a) The Respondent be and is hereby restrained from disposing of or causing the disposal of all or any assets in his control including but not limited to the assets detailed on the schedule hereto and the respondent shall immediately withdraw any instructions already given by him for the disposal of any assets.;

b) This interdict shall not restrict instruction given in respect of properties detailed in the Acknowledgement of Debt signed by the Respondent annexed hereto;

2. The Respondent shall within two working days of the service of this Order by the Applicant's Legal Practitioners on the Respondent or his Legal Practitioners provide to the Applicant (FNBS) full and complete details of all assets owned or beneficially owned by the Respondent or in his control or where he has an interest and the whereabouts of such asset including all bank accounts and investments;

3. In the event of the failure by the Respondent to comply with the terms of this interdict this matter shall again be referred to KARWI J.

4. Each party shall bear its own costs".

In the face of the order by KARWI J, it is untenable to argue that the order cannot be given effect to. The magistrate is a junior judicial officer and it is hardly her place to contradict a decision of the High Court which must have issued the order after satisfying itself that effect can be given to it. The order was drawn to the magistrate's attention and she made it a condition of the granting of bail that the third foreign account be handled in the same manner as the respondent's other foreign bank accounts as determined by KARWI J.

Even though the magistrate was dealing with a criminal matter where KARWI J was concerned with a civil application, I do not consider that the magistrate erred in taking guidance from an order of this court. In any case the order is binding on the respondent and he is required to comply with it.

The non-disclosure of the third foreign bank account as a factor to be considered in the bail application depends very much on whether it exists or not, and assuming that it exists it must still be determined whether the non-disclosure can be construed as an indication that the accused intended to use the funds there in the event that he absconded. In order to establish an intention to abscond, there must be an indication that the accused person might abscond. In *John Raphael Masuku* v *The State* HH 79/02 I referred with approval to the statement in *R* v *Fourie* 1973 (1) SA 110 (D) at 111G where MILLER J said -

> **"It is a fundamental requirement of the proper administration of justice that an accused person stand trial and if there is any cognizable indication that he will not stand trial if released from custody the Court will serve the needs of justice by refusing to grant bail even at the expense of the liberty of the accused (*cf S* v *Mlawili & Others*, 1963 (3) SA 795 (C)".**

(the underlining is mine).

There is, in my view, a need to show a cognizable indication that the accused will abscond. I do not think that

the mere fact of not disclosing an account in a bank in South Africa (if that account exists) provides a cognizable indication on its own that the accused intends to abscond. There can be other reasons for non-disclosure e.g. the need to pay creditors out of the funds held in that account. The non-disclosure would in this case amount to a failure to comply with KARWI J's order but beyond that I do not think that, on its own, it is an indication that the respondent intended to abscond. The magistrate had before her information on the respondent's assets within and outside Zimbabwe. The former are in excess of $2 billion dollars in value terms. I would not consider that in exercising her discretion in the manner she did the magistrate can be said to have misdirected herself.

It may appear that the position adopted by the appellant is supported by the decisions of MAKARAU and OMERJEE JJ cited above but it must be noted that in reaching their decisions the learned judges' attention was not drawn to KARWI J's order. That in my view provides a point of departure.

In the last paragraph of its statement on appeal the appellant stated the following -

> **"It is prayed that this Honourable Court will give the personal circumstances of the respondent the proper consideration they deserve and deny him bail <u>as it can</u>**

substitute the discretion of the learned magistrate with its own without specifically restricting itself to the misdirection or irregularity by the court *a quo* (*Aitken & Anor* v *The State* 1992 (1) ZLR page 249 paragraph G)"

(emphasis is mine).

I understood this submission to be an invitation to me to examine the facts of the case and reach my own decision, whether or not there was any misdirection by the magistrate in the court *a quo*. I have determined that the magistrate did not misdirect herself. The question that must now be answered is : Am I in a position, against that finding, to re-look at the matter and possibly reach a different conclusion.

In HH 31/03 MAKARAU J considered this issue. She said at p 2-3 of her judgment that -

> **"It has been argued before me on behalf of the appellant that in deciding this matter, I am exercising my narrow jurisdiction. As such, the argument proceeds, I must first find a misdirection on the part of the magistrate before I can be at large to consider and substitute my own discretion for that of the magistrate. Mr Chikumbirike was quite clear in his submission that if I were to find as proven, any one of the misdirections alleged by the appellant, I am then at large to use my own discretion in the matter and proceed to determine the application as if I were the magistrate".**
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> **Her Ladyship relied on the decision in *Aitken & Anor* v *The State* 1992(1) ZLR 249 (S) to reach the conclusion that -**
>
> "It thus appears settled that in considering the appeal before me, I need not find a misdirection on the part of the magistrate

before I exercise my discretion in the matter".

I must make it clear that MAKARAU J was considering an appeal from a refusal by the court *a quo* to grant bail to the respondent. In *Aitken's* case, *supra*, the position was the same, that the applicant for bail had had his application refused both by the Magistrates court and the High Court. In *Chikumbirike* v *The State* 1986 (2) ZLR 145 (S) bail had also been refused by the High Court but the Supreme Court, in relation to the issue at hand, stated the following at p 146 E-F -

> **"The next matter to be decided is whether this court in hearing the appeal should treat it as an appeal in the wide sense, that is to say, that it is to be treated as if it was a hearing *de novo*. Once again that matter has been decided by the case of *The State* v *Mohamed supra* at 542 B-C where TROLLIP JA said that in an appeal of this nature the Court of Appeal will only interfere if the court *a quo* committed an irregularity or a misdirection or exercised its discretion so unreasonably or improperly, as to vitiate its decision. On reflection, Mr de Bourbon who appeared for the appellant, has accepted the correctness of that approach".**
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> (the emphasis is mine).

Indeed, as commented by MAKARAU J in HH 31/03, GUBBAY CJ said that in considering an appeal from the magistrates court against a refusal of bail, a judge of the High Court was at liberty to substitute his own discretion for that of the magistrate on the facts placed before the judge. This, I think,

provides the basis of John Reid-Rowland's statement in

Criminal Procedure in Zimbabwe **at p 6.14 that -**

> "On appeal, a judge may make such order as seems just in the circumstances of the case. An order made by the judge on appeal is deemed to be an order of the magistrate against whose decision the appeal was made".

John Reid-Rowland's statement is a true reflection of what is provided in s121(5) of the Criminal Procedure and Evidence Act

[Chapter 9:07] as amended by Act No 8 of 1997. Therein it is provided

that -

> "A judge who hears an appeal in terms of this section may make such order relating to bail or any condition in connection therewith as he considers should have been made by the judge or magistrate whose decision is the subject of the appeal".

Section 121(5) does not, in my view, help to determine whether or not the High Court is at large to substitute its own discretion for that of the magistrate where no misdirection or irregularity has been shown to exist. That determination depends entirely on a construction of the decided cases. ***Chikumbirike's*** **case,** ***supra,*** **and** ***Aitken's*** **case,** ***supra*** **were decided before The Criminal Procedure and Evidence Act was amended in 1997. The 1997 amendment of s 121 of the Criminal and Procedure Act had the result that if bail is refused by the magistrates court an appeal lies to the High Court and in that instance there is no further appeal to the Supreme Court - see s 121 (8) which provides that -**

> "There shall be no appeal from a decision or order of a judge in terms of this section".

This amendment led to the decision in *S* v *Dzawo* 1998(3) ZLR 536 (S)
where GUBBAY CJ had this to say at 538E to 539A about the effect of the

amendment:

> "Subsection (2) (of s 121) provides that an appeal in terms of subs (1) against a decision of a judge of the High Court shall be made to a judge of the Supreme Court and against the decision of a magistrate to a judge of the High Court. Thus, where the initial application for bail was to a judge of the High Court, an appeal with leave lies to a judge of the Supreme Court; but where the initial application was before a magistrate, there is an absolute right of appeal to a judge of the High Court.....
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> Subsection (8) can only mean, in the context of the subsections referred to, that the aggrieved person is entitled to a single appeal. If the initial application was made to a magistrate, the appeal must be made to a judge of the High Court; but if made to a judge, then an appeal lies, with the grant of leave, to a judge of the Supreme Court.

In sum, the change brought about by the amendment to s 121 has removed the right of the person concerned who has appealed to a judge of the High Court against the decision of a magistrate in relation to bail to take the judge's decision, subject to leave, on appeal to a judge of the Supreme Court".

I think that the 1997 amendment had the effect of placing the High Court in exactly the same position which the Supreme Court was in in relation to an appeal against the decision of a judge of the High Court. This means that where the Supreme Court could not substitute its own discretion for that of a judge of the High Court as in *Chikumbirike*'*s* case, *supra*, and *Aitken*'*s* case, *supra*, the High Court also cannot now substitute its own discretion, in the absence of a misdirection

or irregularity, in an appeal against a magistrate's decision. The appeal to the High Court has, in my view, become an appeal "in the narrow sense" as the words are used in *Aitken supra* at 252F. The statement by EBRAHIM J in *Chikumbirike's* case*, supra,* at p 146 F now applies to the High Court, with the result that "a Court of Appeal will only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its own decision". This must be so because the 1997 amendment constituted the High Court as a final court of appeal in matters of bail commenced in the magistrates court and removed the right to a further appeal to the Supreme Court. It seems to me that it would be absurd to find that the High Court on appeal now has wider powers than the Supreme Court had.

I also think that where a magistrate has granted bail to an accused person, on appeal a judge should not lightly interfere with that decision and withdraw the bail unless there are compelling reasons. The finding that a magistrate has misdirected himself or herself should not be lightly made. It must always be borne in mind that the granting or refusal to grant bail is a matter in the discretion, to be judicially exercised, of the presiding judicial officer. If that discretion has been properly exercised and no misdirection or irregularity is shown to exist, a judge on appeal should not interfere with the decision made. As stated by BLACKIE J in *Lotriet's* case, *supra*, the right of the individual to liberty is a principle of fundamental importance. When a responsible judicial officer, after considering all the circumstances, has decided that a person should be admitted to bail, that decision should not be set aside unless there are compelling reasons to do so. It must also be borne in mind that the process of reasoning which a

judicial officer applies in determining an application for bail goes to the probable future conduct of the accused which has to be determined on the basis of certain information which relates to the past and the future and that what has to be determined is not a fact or a set of facts but merely a future prospect which is speculative in nature even though it is based on proven facts (see *Ellish en Andere* v *Prokueur-General, WPA* 1994 (4) SA 835 (W)).

I found no misdirection in the decision of the magistrate in the present matter. I would therefore have had no basis to interfere with her decision. Even if I am wrong on the interpretation which I have given to the 1997 Amendment, as read with the decision in *Dzawo's* case, *supra*, I would still not have allowed the appeal for the reasons I have earlier given. I would have found that the respondent was in all the circumstances unlikely to abscond, considering his extensive proprietary interests in this country and the fact that he is the majority shareholder in FNBS, a building society worth some $15 billion dollars in asset value.

These then were my reasons for dismissing the appeal.

***Chikumbirike & Associates,* applicant's legal practitioners**
***Office of the Attorney-General*, legal practitioners for the State**