CIV/APN/453/93

IN THE HIGH COURT OF LESOTHO

In the matter between

ATTORNEY GENERAL — APPLICANT

and

PHAPANO KHANYAPA — 1ST RESPONDENT
BAHOLO LESENYEHO (MAGISTRATE) — 2ND RESPONDENT

JUDGEMENT

Delivered by the Honourable Acting Judge Mr. T Monapathi on the 15th day of February, 1994

On the 6th November 1993, the Applicant obtained a Rule Nisi, containing the following terms

"1 A Rule Nisi is hereby issue against the respondents returnable on 15th November 1993, to show cause if any

(c) The Officer Commanding or any designated police-officer shall not be authorised by this Court to seize forthwith a firearm 7 65 serial number 655017 Auto Pistol Brono in the possession or control of the 1st respondent and retain it in police custody until its production in Court as an exhbit in the preparatory examination relating to CR 393/90 and thereafter to be dealt with in accordance with law

(d) Costs of suit only in the event of opposing this application

(e) Dispensing with the Rules of Court and the normal practice and procedure regarding form and service on the grounds of urgency "

The Respondents were duly served and the 1st Respondent then filed an answering affidavit while the other Respondent did not The Applicant filed a Replying Affidavit The 2nd Respondent will presumably abide by this Court's final judgement in this matter

It is common cause that the first Respondent and his son Masitha were charged with murder A Preparatory Examination had been held and was pending at all material times The proceedings had been carried on under case number CR 393/90 of the Magistrate's Court of Maseru

Sometimes in August 1992, a firearm Auto Pistol Brumo, Calibre 7 65 Serial Number 655071 was released to the 1st Respondent This firearm is alleged to be the murder weapon It is the circumstances of the release of the firearm which have given rise to these proceedings Mr Ramodibeli the Attorney for the 1st Respondent said that the application was misconceived and ought to be dismissed with costs on an Attorney and Client's scale He made certain submission in support as will be shown in this judgment

On the 26th March 1992, the 1st Respondent filed an application before the learned magistrate Mr Baholo Lesenyeho the 2nd Respondent This was under case number CC 448/92 of that Court The Order prayed for was amongst others release of the firearm to which reference has been made hereinbefore The application was attached to the present proceedings as annexure "C" to 1st Respondent's Answering Affidavit The application was opposed Opposing papers were filed Argument was heard in Court The Court eventually ordered for release of the firearm It also appears that at the time of making the application the charge against the 1st Respondent and his son had been withdrawn as long ago as the 26th September, 1991 It is to be noted that the 1st Respondent's firearm is licensed On the 26th October 1993 a Preparatory Examination in the said CR 393/90 was to commence The accused were before Court

It is Paragraphs 15 and 16 of the affidavit Police Officer Sebohe Sakoane (Sakoane) which correctly captures the mood and the concern of the Applicant (if it is to be believed)

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> On the 26th October, 1993 a preparatory examination in the said CR 393/90 was to commence Five minutes before the Court proceedings were to take-off the public prosecutor in the matter, BUANG MOTHAE was informed by me that the firearm, the subject matter hereof, was released to the 1st Respondent on the order of the 2nd respondent She was

astounded

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> Consequently, the preparatory examination could not be properly conducted without the presence of the firearm and the proceedings had to be adjourned In fact it is unimaginable that the proceedings will ever be continued in the absence of the firearm The absence of the firearm has wreaked havoc in the smooth administration of justice and pulverised the due process of law I am informed and verily believe that despite a request made by the public prosecutor, BUANG MOTHAE, the 1st respondent has refused to surrender the firearm to the Crown There is, therefore, a likelihood of the firearm disappearing, never to be found This is the price the Crown cannot afford to pay For these reasons I consider this application as extremely urgent It is submitted that the applicant is justified in having approached this Honourable Court on urgent ex-parte basis "

Against the history of the matter there is absolutely no reason why Miss BUANG MOTHAE (MOTHAE) (the Public Prosecutor) had to be astounded The most important question is Armed with all the proceedings (which ought to have been in her possession), why was she astounded and only about ten minute before the Court was to commence? I find that the conduct of MOTHAE is difficult to believe and is definitely incredible One Cannot rule out mala fides This further lends suspicion to that it must have been a stratagem to justify the Applicant's coming to this Court Most probably MOTHAE was covering up for the criticism that should befall or be directed at the way the matter had previously been dealt with To be exact the criticism would be why the gun

had to be released And yet there was nothing strange or unusual in that matter It was above board Indeed Applicant was represented by State Counsel Mr Letsie This is even supported by the fact that this Court refused to have the order concerning review to be secured by Applicant on application for a rule nisi Even if she was not a party to the proceedings she must equally share the blame (if there is any blame) of her colleagues and fellow prosecutors The Affidavit of Mrs Ntsasa clearly indicates (in her rebuttal and in support of 1st Respondent) that the suggestion at paragraph 8 of Mothae's Affidavit (about the alleged disappearance of the Court file) is untrue Mrs Ntsasa would have no reason to hide anything

I am not persuaded that the preparatory examination could not proceed in the absence of the firearm It appears from the annexed proceedings that the preparatory examination was able to proceed on the following day and on the 2nd November 1993, when the matter was postponed to the 5th and the 6th November 19923 Even if I am wrong on the law, namely that the absence of the gun would make the proceedings a nullity, I am not convinced that the conduct of the Respondent justified the Applicant's coming to Court This is the Court's concern now since the question of review of the proceedings in CC448/92 has fallen by the wayside This is even more so where as now, the Public Prosecutor wants to play down her role or to feign ignorance of what transpired

towards the release of the firearm I do not hesitate to make a definite finding that MOTHAE and SAKOANE are mala fide and are guilty of serious non-disclosure

The alleged refusal of the 1st Respondent to deliver the gun back for handing in or identification purposes become difficult to decide in favour of the applicant when it is not recorded in the proceedings of the preparatory examination itself It is alleged that Mr Mapetla, the Chief Magistrate, was asked to intervene at one time But this comes out for the first time in the Applicant's replying affidavit and only in reply to 1st Respondent's paragraph 15 I had to reproduce the whole paragraph to give a correct picture which is self-explanatory

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AD PARAGRAPH 15 OF THE FIRST RESPONDENT S AFFIDAVIT

The preparatory examination could not be proceeded with on the 26th of October, 1993 for identification purposes It was only on the 27th October after further verbal discussions with Mr Mapetla, myself and Mr Ramodibedi that the preparatory examination proceeded and the firearm was produced for identification purposes This arrangement of the accused producing the firearm was very unsatisfactory because the prosecutor could not have been able to produce it as an exhibit and that is why I had to approach this Honourable Court I submit that it is in the interests of justice that the firearm should be kept by the Crown till such time that the murder case against the accused has reached finality and the weapon is dealt with in accordance with law "

On the basis of my above comments I do not find that the 1st Respondent or his Attorney was difficult or recalcitrant On the other, hand it does seem that there was agreement all along to have the gun produced in Court for identification purposes I am not suggesting that the agreement was valid in terms of the Criminal Procedure and Evidence Act 1981 What seems most important is the attitude of the people involved Furthermore it does not appear that at that time there was a clear or sharp disagreement or any amount of insistence on the part of the Crown Even if I am wrong another question still remains to be addressed? Did the Magistrate have or did he not have the power to order 1st Respondent to deliver the firearm to him either at the instance of the Public Prosecutor or under a search and seizure warrant I believe he had such power The 1st Respondent argues in the circumstances, that this Court had no jurisdiction or rather that the application was wrongly bought before this Court This question is inextricably tied up with another question Whether the Magistrate was still seized with the matter of the proceedings in which the firearm was an object (or alleged murder weapon)

I have taken the view that the magistrate was still empowered to order the 1st Respondent to produce the firearm in Court on the risk of being taken up for contempt of Court should

he refuse to comply with the Magistrate's Order There was no reason therefore that entitled Applicant to launch the application This exercise was an abuse of process of Court When the totality of all circumstances is taken into account there was no serious cause for the application

I am not so sure that the Mr Ramodibedi is correct that the Attorney General ought not to have brought the proceedings in his name on the ground of lack of capacity That, as it was submitted, it was the Director of Public Prosecutions who should have brought this proceedings on his own behalf I think the matter should be looked at in another way This were civil *proceedings brought on behalf of a government department* May be the Attorney General should have explained further that he is taking the proceedings on behalf of the Director of Public Prosecutions Incidentally in the case number CC 448/92 (the First Application) the 1st Respondent did not cite the Director of Public Prosecutions but the Attorney General I do not accept this complaint as being significant It was even surmised that the Director of Public Prosecutions may not even have been consulted If he had been consulted, it was submitted, he could have filed his affidavit in which he indicates his interest This point should not be carried any further than that It is not weighty and in any event nothing really turns on it

I do not accept Mr Mohapi (for Applicants) submission that because the Chief Justice did not grant the interim order for review of the proceedings in CC 448/92 or that because the Order for review was cancelled, the 1st should not be entitled to an order for costs I found this untenable In deciding the question whether the Applicant was entitled to come to Court, the parties counsels had to traverse each and every aspect of the history, the facts and submissions in the proceedings as shown clearly in the number of issues contained in the papers This was moreso because whether one liked it or not the validity or the effect of the Magistrate's Court's Order had to be debated It was impossible to separate the issue of the Order for return of the firearm without arguing on the effect of the Order or the later conduct of the public prosecutor, the magistrate and the 1st Respondent

Mr Mohapi submitted that, because at the time of the hearing of the matter the firearm had already been handed over by the 1st Respondent to the Magistrate at the Preparatory Examination the application ought to succeed He further contends that the 1st Respondent's abiding by the interim Court Order in handing over the firearm, was evidence of validity or soundness of the application Not necessarily Did the 1st Respondent have any alternative? 1st Respondent was very wise to have not refused to obey the Court Order For reasons already

stated I took the view that 1st Respondent's conduct did not support the argument Neither do I accept that the 1st Respondent has to have costs awarded against him The application was misconceived The application ought not to have been launched

In the premises I would order that the Rule Nisi is discharged with costs on the ordinary scale to the 1st Respondent

T MONAPATHI
ACTING JUDGE

For the Applicant Mr T J Mohapi (noted by Mr Letsie)
For the 1st Respondent Mr M Ramodibedi (noted by Mr Matooane)