CRI/APN/876/2002

IN THE HIGH COURT OF LESOTHO

In the matter between:

HENRY MAKUBETSE 'MASERETSE **Applicant**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

For Applicant : Mr Mpaka

For Respondent: Miss Ntelane

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi on the 8th day of November 2002

In this application the Applicant a taxi owner of above average means, seeks to be released on bail on terms and conditions as set out in the Notice of Motion. In bail applications:

> "The Court is leans towards the liberty for the unconvicted accused rather than towards incarcerating him, even to the extent of taking a risk. A risk can be reduced by suitable conditions. Three main factors are taken into account, namely -
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> (1) the risk that the accused might not stand trial;

(2) the chances that he might commit another offence before his trial; and

(3) the possibility that he might interfere with the corner of justice."

See **LAWSA** (First re-issue) para 211 at page 151.

Mr. Mpaka submitted that Applicant has roots in this country and has vested interest(s) within the jurisdiction of this Court. Secondly his movements can be easily traced by police as he contended the evidence had shown. Thirdly that there were no direct evidence linking or implicating Applicant to any threats in Lesotho. The application was strenuously opposed by the Crown.

At the forefront of the Crown's opposition was the ground that the Applicant was unlikely to stand trial. In addition that the seriousness of the crime would encourage him to abscond. Lastly, that there was an extreme likelihood of his interfering with potential Crown witnesses.

Applicant is charged with two counts of murder and unlawful possession of a firearm. The latter is a 357 Magnum revolver with a serial number rubbed off.

It is necessary at the onset to state that the Applicant has allegedly killed his mother and his elder brother (Monyane). It was after a feast at Mpatloane in

the district of Butha Buthe. The dispute was allegedly over a piece of land which was said to have been allocated to the Applicant's deceased brother as a result of a family decision. It is said that the Applicant ultimately built on the land without any consultation.

There had been tension between Applicant and his deceased brother over the issue of the land. There was evidence that there were threats and statements of ill-feeling by the Applicant and his eldest brother (Letsoko). It is this eldest brother who pressurized for holding of a family meeting over the disputed piece of land after the said feast. The aftermath of this family meeting resulted in shooting of the two deceased people by the Applicant immediately after or at the end of the meeting.

Two witnesses testified, in this Court, to having been present during the fight or were at the immediate vicinity. It was Mamolungoa Maseretse (PW 2) (Applicant's younger wife) and Applicant's junior sister, 'Mataba (PW 6). It emerged that the Applicant was polygamous. It was not disputed by Mr. Mpaka in the circumstances there would be established a *prima facie* case by the Crown. This indicated (if unrebutted) the likelihood of the Accused being convicted of serious offences with which he stands charged.

After the said killing Applicant is said to have travelled back to Soweto Gauteng in South Africa. He was after a few days arrested while at the Caledonspoort border gate where he was going to renew his six months border entry permit. Applicant said his intention was to re-enter Lesotho and report himself at Butha-Buthe Police Station. This supported that Applicant had before not taken any steps to report the incident. Applicant said he had since learned that his injured brother and mother had died.

It was common cause that the Applicant has an original family home and his other home in Mpatloane in Butha Buthe where his second wife 'Mamolungoa resides. His real family roots are, as he said, in Mpotloane, Butha Buthe district. Applicant is also resident in Soweto Gauteng in the Republic of South Africa where he has a home and another or senior wife.

I however considered that due to the seriousness of the offences and the mobility of the Applicant he was more likely to be attracted to making himself unavailable in the jurisdiction of this Court. While the expectation of a heavy sentence may induce the Applicant to abscond with or without a passport or identity document it may equally induce him not to come to Lesotho while in South Africa.

Even without a passport the option of an accused persons are numerous in view of the porous border between Lesotho and South Africa. I may easily take judicial notice of the fact that without a working extradition treaty between Lesotho and South Africa the situation is even more desperate.

Applicant is in possession of South African identity documents having last had a Lesotho passport in 1978. In those South African documents the Applicant uses the name Kgotleng which is the family name of his mother or mother's relatives. Indeed it was undeniable that Applicant has been using the surnames Masereise and Kgotleng interchangeably. Even most witness who interacted with Applicant in the Republic of South Africa generally used the name 'Masereise. I thought the fact of Applicant using another name was not so significant as long as this was known and he had a fixed abode.

Applicant averred he is in the business of running long distance taxis on the Butha-Buthe Gauteng route. As a result Applicant's frequents both destinations almost daily due to the nature at his business operations and family commitments. This was not denied by the Respondent. At the same time it is unarguable that the Applicant has a veritable foothold in South Africa which cannot be ignored for the purpose of these proceedings. It is because it is a weighty consideration. In any event every applicant will say under oath that he

has no intention of failing to stand trial. As Kroon J says in **S v Lukas and Others** 1991(2) SACR 429(E) at F-H:

> "However, this in my view is not the end of the matter. In the case of S **v Hudson** 1980(4) SA 145(D) one had a case in which a similar situation occurred and at 148 Thirion J is reported as follows:
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> > "When an accused applies for bail and confirms on oath that he has no intention of absconding, due weight has to be given to who does not have such intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say so of the accused. The Court should examine the circumstances."

The Court directed that *viva voce* evidence be led into the inquiry. As the commentator Saber Ahmed Jazbay about **SCHIETEKAT v S** [1999] 1 ALL SA 13 (c):

> "Bail applications are *sui generis*. The State is not bound by the same formalities in trial proceedings. It may place before the Court any information of what an uncertain future bolds." (My emphasis)

The Crown led the evidence of five witnesses in support of its opposition to the application and the Applicant testified on his own behalf. The six witnesses were Sakaria Sefali, 'Mamolungoa 'Maseretse, John Lebaka, David Mokuena, 'Tšepo Matšaba and 'Mataba 'Maseretse.

The Crown submitted that the Crown case has established a credible case upon which the Court ought to decline to exercise its discretion in favour of releasing the Applicant out on bail. It based its submissions on the following grounds. Firstly, the Applicant has killed two close relatives which killings amounted to a serious crimes having been committed on the flimsiest circumstances. I agreed with respect. I say so because even if the family meeting failed to resolve the misunderstanding it should have led to other lawful avenues for example the village chief's intervention. I had a suspicion that the family meeting had been urged for purposes of bringing about a confrontation.

Secondly, there was evidence on behalf of the Crown though the evidence of witnesses John Lebaka, David Mokuena and Tšepo Matšaba who testified that they were threatened with death. In particular Tšepo Matšaba stated that he was shot at and chased by the Applicant. This resulted in his seeking refuge with the police in Soweto. Although it is not likely that the above witnesses would be used in the charge before Court Applicant's attitude is indicated for what it is, of someone who is likely to commit further crimes. What was shown beyond doubt was the propensity of the Applicant towards violence.

I had a distinct impression that all these three witnesses were testifying to the truth that the Applicant had threatened the witnesses and that Applicant

was a violent person capable of carrying out his threats. I believe their testimony for its value. I however questioned whether Applicant's conduct towards this witnesses was related to the offence with which he is now charged. I however believed their fears were genuine. Complaints had demonstrably even been filed with police in Soweto in relation to some of the threats to the witnesses.

Thirdly, there was the credible evidence of Mamolungoa 'Maseretse (Applicant's second wife) who stated that Applicant had wanted to kill her. The witnessed death was scheduled as alleged to follow that of the two deceased although the threat to this witness was made before the actual killings. This witness is a clearly potential witness in the main case against this Applicant. The Court clearly took note of this evidence which ought to exercise this Court's mind. It did.

One of the considerations is whether or not the release of an applicant for bail will not hamper the administration of justice. "Interference with the course of justice could exist in tempering with prosecution witnesses or with other evidence of the crime". See **LAWSA** (First Re-issue) (211) page 151, approving **R v Phasoane** 1933 WLD 405.

As I have already recorded the Applicant carries a South African passport identity documents (see ID no. 64091 5649 084 -(South African citizen) - attached to supplementary affidavit of Mamolungoa Maseretse). This photostat copy of the document's cover, and page 1 (bearing names, date of birth and picture of the Applicant) was attached to the said supplementary affidavit. This supplementary affidavit was produced in response to the following statement in paragraph 3 of the Replying Affidavit. It was to effect that:

> "AD PARAGRAPH 8 THEREOF
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> I submit that although temporary resident in the Republic of South Africa, Gauteng Province, I am a citizen of this Kingdom and has a family at Mpatloane, in the ButhaButhe district. For all intents and of purposes I have vested interests in Lesotho." (My emphasis)

I have underscored that which I judged to be factually untrue in the light of what I have already said in connection with Applicant's possession of a South African passport. I concluded that this was untruthful and if indicated the disinclination of the Applicant to be candid with the Court in this respect. In the end Applicant admitted that he was in possession of the passport. It was under pressure of cross-examination.

The information that Applicant had a South African passport seems to have been in possession of the police. They followed the trail of the passport having first attended at the Butha Buthe prison to inquire from the Applicant as

to the whereabouts of the passport. This the Applicant so suggested although it was not explicitly or otherwise confirmed by the prison officer witness as shown below.

This investigation by the police led to their going to interview the Applicant in the Butha Buthe prison. Mr. Mpaka for Applicant explained that what took place at Butha Buthe prison had been underhand and had been a kind of interrogation by the police. This was strongly denied by the Crown. Consequently the Crown called in the evidence of Prison Officer Sakaria P Sefali on this aspect which would ordinarily have been peripheral.

Sakaria P Sefali's evidence was as follows: On the 8th October 2000 police officer Thole and Applicant's friend arrived at the prison to see Applicant. They made to the Applicant a report in the presence of the said prison officer. They told the Applicant that the Applicant's homestead had been abandoned and that his taxis needed a safe place to be kept. Applicant was asked if he could allow the taxis to be kept at the Police Station or at his friend's place. Applicant suggested that before taking any final decision his friend should bring Applicant's drivers to talk to them before making any decision.

The only value of the above evidence was to corroborate that of

Mamolungoa (Applicant's wife) and 'Mataba (Applicant's) sister that the Applicant's vehicles and home are having no one to take care of. The reason they said was the threats and the fear that the witness's had for the Applicant.

The prison officer ended testifying that he had not been aware of any police officers who may have attended on Applicant in prison. This surprised me for the reason that the attendance by police was not irregular and impermissible in terms of prison rules. Furthermore the aspect of the alleged interrogation was no longer pursued by the Applicant.

I remarked at the lessening of the fervour with which the question of police attendance at prison was pursued. Indeed as long as a prison officer was present when police made any inquiry from the Applicant, including the whereabouts of his passport as already intimated, I would not have worried or marked that as irregular. It all depended on whether undue pressure was applied and on what the prison regulations prescribed for situations like that. It was not for this Court to make any adverse conclusion merely by reason of the visit by police. The value of the inquiry was that police had been looking for the Applicant's identity document (as confirmed by his wife 'Mamolungoa).

I observed that not only was the Applicant prepared to disclose that he

had South African identity document, he was even reluctant to hand it over as the Applicant himself testified. Applicant said one policeman had confronted him with the information that there was such a document. This alleged presence of the passport Applicant denied. The question would be why he did not disclose all to the police including that he used many names.

If the personality of this Applicant is as described by three witnesses as a person who will most likely became violent when having given a warning or signal that the intended to do so, the fears of all witnesses including John Lebaka, David Mokuena and Tšepo Matšaba were justified. I granted that the threats were not related to the incidence of the crimes charged. I however could not ignore this as showing the kind of volatility on the part of the Applicant that did not augur well more particularly with regard to potential witnesses. Incidentally the two potential witnesses 'Mamolungoa and 'Mataba spoke for themselves to buttress the fact that such a fear existed.

Applicant submitted that he had roots in Lesotho and that he has vested interest in Lesotho. Secondly, that there was no direct evidence linking or implicating Applicant to any threats in Lesotho. Thirdly, that Applicant's property was unattended and he was currently out of business.

Firstly, I looked at a practical situation where as a result of his release in the absence of a working extradition it could be virtually impossible to summon the Applicant in Lesotho to attend at trial.

Secondly the crimes with which the Accused was charged were cumulatively so serious and the circumstances such that they would not encourage Applicant to stand trial.

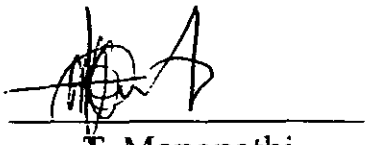
Thirdly, I was inclined to believe on the evidence of PW 2 ('Mamolungoa) and PW 6 ('Mataba) that the likelihood of interference with these witnesses by Applicant was most probable.

The above considerations influenced me to exercise my discretion by refusing to grant bail to the Applicant.

The stringent bail conditions would not suffice to ensure Applicant's attendance on his remands or subsequent trial as I concluded. Counsel had suggested that the following were the terms and conditions. To pay a substantial cash bail deposit to be determined by the Court. Periodic reporting at Butha-Buthe police on days and at times to be fixed by the Court. Submitting of all travelling documents to Butha-Buthe police. And lastly, that Applicant be

restricted to Butha-Buthe and should only leave when necessary and when allowed so by the magistrate.

I concluded that the Crown had discharged its onus of showing that the interest of justice require that the Applicant should not be released on bail.



T. Monapathi
Judge

8th November 2002