CRI/T/95/02

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX

VS

1. **NO. 2911 Capt. RAMABELE MOKHANTŠO**
2. **NO. 4903 sgt. LENKOANE MOLELLE**
3. **NO. 4883 Cpl. LIJANE M. KOLOKO**
4. **NO. 5785 Cpl. NKOPANE MOTENTE**
5. **NO. 3867 Cpl. THATO KHAU**
6. **NO. 5717 Cpl. TANKISO MAJORO**
7. **NO. 5144 Pte FISONE S. NTHAKO**
8. **NO. 6019 Pte LEBATLANG JANE**
9. **NO. 6870 Pte. KEKELETSO V. LESESA**
10. **NO. 6006 SETSUMI M. LETSIE**
11. **NO. 6619 Pte TSEBO LIJANE**
12. **NO. 6586 Ex-Pte MOLEFE MOKHELE**
13. **NO. 6595 Pte TANKISO P. MOLETOA**
14. **NO. 6898 Pte MOJAKI MOSOLLO**
15. **NO. 8571 Pte MOHANOE L. BULANE**
16. **NO. 5818 Pte LECHESA J. MOHAPI**
17. **NO. 6924 Pte KORI M. MOHLALISI**
18. **NO. 8486 Pte TSEPANG E. AKHENTE**
19. **NO. 7372 Pte LIKOBISO J. MOTHAE**
20. **NO. 6094 Pte THABO B. LEROTHOLI**
21. **NO. 6624 Pte THUMO I. MAPALE**
22. **NO. 6591 Pte FELLENG KAPHE**
23. **NO. 6602 Pte MOROENG MAHANETSA**
24. **NO. 4905 Pte E. MOTLOMELO**
25. **NO. 5143 Pte T. KHAULI**

JUDGMENT
ON
APPLICATION FOR RECUSAL

CORAM : HON. MR JUSTICE S.N. PEETE

DATE : 23TH SEPTEMBER, 2002

The twenty-five accused, all the members of the Lesotho Defence Force, are on trial charged with four counts of *kidnapping* and one of *murder*. Victims of these offences were at the relevant time Ministers of Government of Lesotho – They are Messrs ***Pakalitha Mosisili, Kelebone Maope, Shakhane Robong Mokhehle, Monyane Moleleki*** and ***Selometsi Baholo*** who lost his life during the early siege at his house at Lithabaneng – Lithoteng Ha Abia on the outskirts of Maseru during the morning of the 14th April 1994.

The accused were only brought to trial on the 22nd August 2002, some eight years after the occurrence. In this trial, the accused have pleaded not guilty to the multiple charges aforementioned and crown has so far led about nine witnesses in support of the indictment.

Mr Ntlhoki on behalf of the defence team has risen to apply for my recusal from this case. It must also be stated that after the accused had pleaded to the indictment and some evidence had been led, the two Gentlemen Assessors Messrs Mathiba and Leboela were asked by the defence team to recuse themselves or retire from sitting as such because it was being alleged that they were close neighbours of the deceased Mr Selometsi Baholo at Hlotse in the district of Leribe and that they had acquaintance and close familiarity

with the deceased such that would affect their impartiality in the trial. Without any persuasion, the Gentlemen Assessors formally retired from the case. As practice dictates, I sat henceforth alone (**S.v Andiantos** – 1965 (3) SA 436 – see also **R. v Mathi & Others** – 1960 (1) SA 304. Although section 9 of the High Court Act No.5 of 1978 gives the court the discretion to call to its assistance two or more assessors in a criminal trial, it is a well established and most salutary practice of our courts that whenever there is a risk that death sentence may be imposed as in the case of murder, assistance of assessors should be sought. A peculiar feature of this case is that though murder is one of the charges, the retirement of the assessors was precipitated by the defence after the trial had began and duly taken its course. Even if only one assessor had retired, the court could competently continue the hearing with only one assessor. Now that the two assessors have retired, new assessors could not be appointed mid-trial without starting the proceedings *de novo* – this could only all result in the acquittal of all the accused because they had already pleaded. This is a very unfortunate feature of this case. The trial therefore proceeded without assessors the defence team having raised no objection thereto.

In South Africa, it is good practice that if at any time during trial in which the judge is not obliged to summon the assessors to his assistance, any assessor dies or becomes, in the opinion of the judge, incapable to act as assessor, the judge may, if he thinks fit, direct that the trial should proceed without such assessor. **R v Kruger** 1951 (2) SA 294 (T) – Section 110 of the Criminal Procedure Act 1955.

In Lesotho, the appointment of assessors is on the discretion of the judge and, Section 9 (1) of High Court Act reads as follows:-

> *"9.(1) The High Court may call to its assistance at any civil or criminal trial or appeal not more than four assessors whose duty it shall be to give either in open court or otherwise such assistance and advice as the judge may require but the decision shall be vested exclusively in the judge."*

Unusual as it may seem, it seems to me that this court is still properly constituted even after the two assessors unfortunately retired from the case.

– See **R. v. Price,** 1955 (1) SA 219.

Under our law assessors discharge a very important function and great care and circumspection should be exercised in their choice. In the case of **R. v H,** 1955 (2) SA 288 (T) the court in fact discharged itself before the verdict where the assessors were found to be unable to give an unbiased approach to the case. – See also **R. v Matsego** – 1956 (3) SA 411 where **Centlivres C.J.** had this to say-

> *"It is essential in the interests of the proper administration of justice that an assessor should retire from case as soon as it is proved that he has been given information detrimental to the accused which has not been proved in evidence, for nothing should be done which creates even a suspicion that there has not been a fair trial."*

As far as Mr Ntlhoki's application is concerned the typed record of the proceedings (as transcribed) read:-

"**Mr Ntlhoki addresses the Court on the recusal of His Lordship**

D.C.: Your Lordship is being asked to recuse himself and that these proceedings be discontinued at this stage because it has to come of the accuseds' knowledge that from the middle 60s that is 1964,65 down to 1970 or thereabout, the deceased Mr Selometsi Baholo was a teacher and later on the principal of Peka High School and it so happens that His Lordship was then a student at Peka High School at the same time, in other words His Lordship is presiding over a case concerning the death of his former Principal and teacher at Peka High School and accordingly deceased was to all in intents and purposes His Lordship's mentor as far as education is concerned, in short it so happens that there is a direct connection between His Lordship and deceased, that deceased contributed substantially towards the education of His Lordship, and your Lordship for being where he is, is as a result of direct or indirect contribution by deceased by virtue of being a teacher and principal there at, and I say so with all embarrassment on my part, this information only came to light this morning. And the feeling of the defence team which we communicated to our learned friends on prosecution side is that, the very uncomfortable situation has arisen which parties didn't know about, that is the lawyers of both sides at the beginning of this trial. So the question that arises is that in the mind of the ordinary man a

perception may be created and perhaps wrong conclusions be made depending on the fortunes of this case. So my Lord it is our humble and embarrassed request that even as this matter goes into record whether your Lordship will not see fit in those circumstances not to recuse himself and it is not to continue with these proceedings. That is all my Lord thank you.

Mr Suhr addresses the Court

C.C.: *My Lord I'm not aware of the factual basis of this application and I am unable to say to understand perceptions of the accused or the familiar with factually based my Lord, perhaps your Lordship should make a statement stating out the precise a nature of relationship. I am not in a position to make any positive submissions, I leave the matter to the hands of the Court. The suggestion I may make my Lord is that it is ... an important matter this is a significant trial, it has run a significant time already and it is going to run even more significant time in future. The time for the sitting is costing in and we got basically less than an hour to go for sitting today, my Lord my only suggestion will be that the matter be supposed to stand over until the next sitting which is being agreed and decided and the matter can be taken up again then. I am not that conversant with those circumstances; (1) what phrase I am conversant with is that Lesotho is a small country and people do know each other and circumstances may alter cases my Lord, it is essential a matter that your Lordship must sign but unfortunately it is not only a question of the actual facts, it also a question of the perception, and the law of perception may*

create in the mind of a man, I would personally prefer to have some time to look into the matter my Lord, and possibly take advice from D.P.P.

H.L.: *I thought of making an ex tempore decision but I now think otherwise ... Since the matter is still going to be postponed anyway. I will make a written judgment on this mater. But for your convenience I should make a clear statement that my attendance at Peka High School was a factual from 1962 to 1966. Well, ... deceased was a teacher amongst many; ... this can be compared to a situation where if the deceased could have been a school colleague ... does it mean that one cannot try his school colleague who for instance contravenes the traffic law? Those are but some of questions which one can take into consideration. Say supposing you attend the same church with the accused or the deceased ... does it mean that the religious attendance per se is a good ground for recusal? There is no blood relationship between me an the deceased, the only connection there be is that of being my teacher and it should be noted 37 years have passed gone by. The law on this issue of recusal is quiet clear and judge should not lightly recuse himself upon insufficient grounds. I am not making any final decision now but I would ask you to do some research on this. I have written a recent judgment in a civil matter. That case involved some comments made in chambers. I agree with Mr Ntlhoki that reasonableness or what we call the objective test must be applied in this case. Those are the factual facets of this issue – namely to repeat: attendance at Peka High School was for five years, if it was being alleged that at one stage or another I stayed in the deceased house or*

lived with the deceased, [it is not being said so] the only connection is that I attended that school. For your information, he was teaching me Maths which I failed honourably at 40% so, compare that to attending the same church. If you attend the same church with the deceased like in this case, well I don't know what church he is, does mean that he congregants if one is a Judge should not seat on judgment on an errant church-goer or even a school colleague? These are issues of importance and I am not going to take the application for recusal lightly I have got a duty which I don't take lightly to dispense justice without fear, favour or prejudice. Most importantly I would mention the fact that the 37 years that have passed and gone also has to be considered. I cannot say that the deceased was my friend safe for the scholastic relationship that occurred 37 years back, those are facts which I can state now and which I will consider and I will give my judgment on this issue when the court seats on the 23rd of September, I will make it to be as brief as possible."

Law

Under the 1993 Lesotho Constitution (Section 118) the judicial power is vested in the Courts of law; and more importantly section 12 thereof guarantees the right to a fair trial to every person charged with a criminal offence before an *independent* and *impartial* court. Impartiality is generally defined as "*absence of bias or prejudice.*" The concept of recusal is underpinned upon a "*perception of bias and partiality*". Fair trial is a process that begins from the time when the accused pleads to the charge up to the stage when the accused is sentenced; and if he appeals, it continues

throughout the appeal process. Application for recusal can, in theory and in practice, be made at any stage of such proceedings.

"Recusal" - *exceptio judicis suspecti* – Voet 5.1.43- takes place when a judicial officer decides to withdraw from a case because due to certain cogent grounds or facts he has come to the conclusion that it would be improper for him to adjudicate in that particular case. **Claassen – *Dictionary of Legal Words and Phrases*** – R. 32 vol.4. Recusal application should always be made timeously at the commencement of court proceedings in order to cause less disruption to the proceedings and if thus made it can be more favourably considered than an application brought in the middle of proceedings where most witnesses have already given evidence (**Shulte v Van der Berg** – 1991 (3) SA 717 (c); **S. v Suliman** – 1969 (2) SA 385. where **Ogilvie Thompson J.A.** in considering a case where, objectively regarded, the grounds for recusal were inadequate stated as follows:-

> *"Now the basis underlying a judicial officer's recusal of himself is that, some reason or other, he fears that he is incapable of impartially adjudicating in a legal proceeding upon which he is about to embark or with which he is already seized .... The judicial officer is in reality intimating either that for some reason or other – e.g. relationship or friendship with one of the parties – he feels unable to adjudicate impartially or that he is apprehensive lest it even be suspected that he migh conceivably not be impartial. (**R. v Venter** – 1994 A.D. 359 at 365) .... But inasmuch as the criterion is that of impeccable impartiality, much must inevitably be left to the discretion of the individual judicial officer concerned."*

The application for recusal during the course of trial must be seriously considered because, so it seems, there is no power of review vested in the Appeal Court– **S v Burns** – 1988 (3) SA 367.

In the case of **HTR Industries SA (Pty) Ltd v Metal and Allied Workers' Union** – 1992 (3) SA 673 it was held that the test to be applied in recusal proceedings requires objective scrutiny of the facts – that is, the test is an objective one involving a legal fiction of the reasonable man; *in casu* it could mean whether the judicial officer had associated himself with one of the parties to the trial being heard by him as reasonably to create an impression or a leaning or inclination towards one side of the dispute.

In the present, case, as already alluded to, the accused have already pleaded and some eight witnesses have given evidence, have been cross-examined at length. It seems probable that before or when the trial started, the accused did not entertain the apprehension which they now raise. The court is therefore rather in a quandary as to the source of the apprehension (or suspicion) because the apprehension must have arisen and been activated only *after* the trial had begun yet no sworn affidavit has been deposed to by any or some of the accused before the court; only a statement from the Bar has founded the application for recusal. It seems fair to infer that after the Gentlemen Assessors had recused themselves, an investigation of my past was mounted to substantiate grounds for moving another application for my recusal – which if acceded to would necessitate trial **de novo** before another judge or acquittal as the case may be.

That I have been a student at Peka High School during the years 1962-1966 is a historical fact beyond question; that the deceased Selometsi Baholo was one of my teachers at that school is also not in dispute. What has not been fair established is whether this scholastic relationship which ended some thirty five years ago was such that it can reasonably affect presently my impartiality in this trial. The relationship between teacher and student is not one of intimacy or affection which can induce bias in a mind of a reasonable man; the teacher – student relationship involves more of instructive and disciplinary tutorship than intimacy or affection. Mr Ntlhoki states that "deceased contributed substantially towards the education of His Lordship." It should be made very clear that the deceased was only a mathematics teacher to me. He did not contribute financially or otherwise to my education.

In any event, some thirty-five years have come and gone; any contact between the deceased and myself thereafter was but rare and casual. Objectively speaking, no right minded reasonable man – if later in life he takes a solemn judicial oath – can allow himself to be influenced by previous acquaitanceship of old student days. It is the degree of, and not acquaintance itself, that may be of relevance, such as close friendship – which is not being alleged in this application. I am not aware, I should add, that party politics are in issue or relevant; this case is not out of the ordinary save to note that the victims of kidnapping and the deceased were then Ministers of Government and the accused are or were soldiers in the Lesotho Defence Force.

In the case of **Lesotho Electricity Corporation v Forrester** 1979 (2) LLR 440 at 455 **Schutz A.J.A**. had this to say-

> "*.... I would add it is in the interests of justice that recusal applications should be brought as soon as possible. Particularly this is so where an application is based on some remark that it is impossible to reconstruct with the passage of time. In reaching the conclusion that I have I do not overlook the broad principle upon which applications of this kind proceeds, which it is the effect that if a Judge does or says something which would justifiably lead a reasonable litigant to believe that he will not receive an unbiased hearing the Judge should recuse himself, whether he is in fact biased or not. Justice must be seen to be done. It goes almost without saying that in a relatively small capital like Maseru judicial officers have to be particularly careful of what they say about pending cases, that the need for their aloofness should be respected by members of the public. Also, it is inconsistent with the duty of a Judge to take the possibly convenient course of retiring from difficult litigation merely because one of the litigants asks to do so.*"

In **S. v. Bam** 1972 (4) SA 41 it was held by **Kotze J.** that-

> "*... bias which disqualifies a judicial officer from a case must be in connection with the litigation in question and must be of such a nature that a real likelihood exists that the judicial officer would have a bias in favour of one of the litigants from kindred or any other cause.*"

What may be a perception may however not be graced with reasonableness and before a decision maker is disqualified the suspicion of bias on his part must be one which might be entertained by a reasonable litigant – **S. v. Sonday** – 1995 (1) 497. In **S. v. Malindi & others** 1990 (1) SA 962 it was held that-

> *"The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important."*

It must also be stated that recusal from a case, depending upon particular circumstances may sometimes amount to dereliction of duty.

Having given the issues raised in this recusal application much thought and consideration, I come to the conclusion that the application be refused and I hereby decline to recuse myself on the main ground that the previous teacher- pupil relationship that existed between the deceased and myself some thirty-five years ago cannot after that lengthy period have the effect of preventing my unbiased approach to the present case.

S.N. PEETE

JUDGE

For Applicants : Mr Ntlhoki

For Crown : Mr Suhr