

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU (ONLINE)**

**C OF A (CRI REV)**

**2/2020**

In the matter between:

**THOMAS MOTSOAHAE THABANE  
APPLICANT**

**1<sup>st</sup>**

**KHAUHELO MOLAPO  
APPLICANT**

**2<sup>nd</sup>**

**THUTO MAKHOOANE  
APPLICANT**

**3<sup>rd</sup>**

**THATO SIBOLLA  
APPLICANT**

**4<sup>th</sup>**

**and**

**HER LADYSHIP MASEFORO MAHASE ACJ  
RESPONDENT**

**1<sup>st</sup>**

**MAESAIAH THABANE née**

**LIABILOE RAMOHOLI  
RESPONDENT**

**2<sup>nd</sup>**

<b>THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT</b>	<b>3<sup>rd</sup></b>
<b>THE ATTORNEY GENERAL RESPONDENT</b>	<b>4<sup>th</sup></b>
<b>THE COMMISSIONER OF POLICE RESPONDENT</b>	<b>5<sup>th</sup></b>

**Coram: Damaseb, AJA  
Chinhengo AJA  
Van der Westhuizen, AJA**

**Enrolled: 19 May 2020**

**Delivered: 29 May 2020**

### ***Summary***

*This Court has jurisdiction to hear an application to review a decision of the High Court to grant bail. As an eye witness to a murder and a likely witness in the trial, the fourth applicant has standing to bring a review application to this Court. The decision of the High Court to grant bail to the second respondent was irregular and invalid and is set aside. The petition for bail is referred back to the High Court for determination by another judge.*

## **JUDGMENT**

### **Van der Westhuizen AJA:**

#### **Introduction**

[1] Questions, crucially important in a constitutional democracy under the rule of law, are posed in this matter. They revolve around the process to be followed and factors to be taken into account when bail for a murder accused is considered; the possible significance of the high status and perceived power of the accused; the role of the prosecution; and who has the standing to approach a court of appeal to review a court's decision on bail.

[2] This is an application for the review of the granting of bail, on petition, by the Acting Chief Justice of Lesotho (the first respondent) to the wife of the former Prime Minister of Lesotho (the second respondent), who is accused of murdering the former Prime Minister's previous wife. The first three applicants are family members of the deceased. The first applicant, a grandchild, was allegedly raised from childhood by the deceased. The fourth is a friend of the deceased, who was in her presence when she was shot to death and who survived the attack. The first respondent has not filed papers in this application. The second respondent opposes the application. So does the third respondent, the Director of Public Prosecutions, who was involved in the application for bail by the second

respondent. The fourth and fifth respondents have not filed papers.

### **Factual background**

[3] Shortly before Mr Motsoahae Thomas Thabane was sworn in as the Prime Minister of Lesotho, following on elections concluded just days earlier, Ms Lipolelo Thabane, his wife, was shot to death while in her car. The former Prime Minister subsequently married the second respondent. Thus she has been referred to as “the First Lady” of Lesotho.

[4] When the second respondent became a suspect, allegedly partly based on the fact that she stood to benefit from the death of the deceased, the Lesotho Mounted Police (the Police) requested her in January 2020 to come to their headquarters for questioning. She did not heed the call and left Lesotho for South Africa. A warrant for her arrest was obtained. After about three weeks, on 4 February, she returned, apparently because of an arrangement by her lawyers. She reported to the Police. They questioned and detained her. Holding charges were preferred against her.

[5] She appeared before a remanding court on 5 February 2020. A Maseru Magistrate Moopisa, remanded her into custody, on account of being charged with murder.

[6] On the same day the second respondent petitioned the Acting Chief Justice for bail. The petition was served at around 14h05. The matter was heard approximately 25 minutes later, at 14h30. As the prosecuting authority of Lesotho, the third respondent opposed bail. No affidavits had been filed by the third respondent.

[7] Exactly what transpired then is not entirely clear, as the proceedings were not recorded. The first respondent has not furnished written reasons for her decision. From the papers and the response of counsel at the on line hearing of this application by this Court, it would appear that the Acting Chief Justice mentioned to counsel that she would like to see that the second respondent be allowed to honour an appointment with a medical practitioner in Bloemfontein, South Africa, the next day, Thursday 6 February. On 6 February the Acting Chief Justice also had to attend to some ceremonial duties. The possibility was mentioned that the bail application would be postponed to Friday 7 February. It is uncertain what the position of the second respondent as an arrested person would have been during the visit to the doctor.

[8] Counsel then left the chambers of the Acting Chief Justice to discuss the views expressed by her. When they returned, counsel for the third respondent indicated that their office was no longer opposing bail. The Acting Chief Justice granted bail. It

was paid. On the same day the second respondent was released.

[9] Highly dissatisfied, the applicants approached this Court to have the granting of bail set aside. They sought an order that the second respondent be re-arrested forthwith.

### **Urgency**

[10] This application was filed on the basis of urgency on 12 February 2020, about a week after the second respondent had been released on bail. The first 2020 session of this Court was scheduled to take place in April, but was postponed to May, because of the effects of Covid-19. It was enrolled for and heard by this Court, online, on 19 and 20 May 2020. Counsel for the second respondent submitted that the matter was not urgent and should be struck off the roll. In view of the time that lapsed from 12 February to the date of the hearing, it is unnecessary to reach a decision on the issue of urgency. The matter will not be struck off the roll. The nature of the relief sought by the applicants at this stage is dealt with below.

### **Questions**

[11] The following issues have to be decided:

- (a) Does this Court have jurisdiction to hear this application?

- (b) Do one or more irregularities in the proceedings render the granting of bail invalid?
- (c) Do the applicants have locus standi to bring this application?

## **Jurisdiction**

[12] Counsel for the applicants as well as the second and third respondents presented this Court with argument based on case law, explaining the difference between appeals and review proceedings. In some of their submissions the requirements for a successful review and views on the merits of this application were mixed into the question of jurisdiction. In ***Bolofo and Another v Director of Public Prosecutions*** LAC (1995-1999) 230 at 245 Steyn P stated clearly that bail proceedings before the High Court were subject to review by this Court. There should be no difference between the refusal and the granting of bail by the High Court. This court has jurisdiction.

## **Irregularities**

[13] In ***Bolofo*** (referred to above) it was stated that a court considering whether or not to grant bail to an accused person has a discretion, which must be judicially exercised. In order to set aside the order of the High Court on review, this Court must find an irregularity or illegality sufficiently gross to render the High Court's decision a nullity. Counsel for the second respondent quoted Steyn P saying, in the same judgment, that in order to be set aside the decision of the court below must be, for example, "mala fide, arbitrary or so grossly unreasonable as

to be demonstrative of the fact that the decision maker ... failed to apply his mind ...”.

[14] The question is therefore not whether this Court, as the court of review, would have arrived at the same decision as the High Court did. The enquiry is into whether the High Court duly applied its mind and exercised its discretion judiciously.

[15] The right of an arrested person to be released on bail is based on the presumption that an accused is innocent until proven guilty in a court of law. An innocent person should not spend time behind bars. However, for a fair trial to take place, the accused must be present. Furthermore, the accused should not interfere with witnesses or tamper with evidence while awaiting trial as a free person.

[16] Thus a court considering an application for bail must take into account a number of factors. These include (a) the nature and seriousness of the crime charged with; (b) whether there is a risk that the accused may flee and not attend trial; (c) whether evidence may be interfered with or witnesses may be eliminated or intimidated; and (c) the prospects of a guilty verdict at the end of the trial. As to the last-mentioned, bail may not be refused in order to punish for a crime of which an accused has not yet been convicted. Counsel for the second respondent refers to this as “anticipatory punishment”. However, when it seems overwhelmingly clear that a guilty verdict may follow and result in imprisonment, it would not



benefit the accused to start serving a sentence only at the end of a lengthy trial. The time already spent behind bars is often taken into account in sentencing. Furthermore, facing the prospect of a very likely conviction and lengthy sentence, an accused might be more inclined to attempt to escape or to interfere with witnesses or other evidence. The amount and conditions of bail may assist in curbing the risks of flight and evidence tampering.

[17] Cases necessarily differ from one another in their particular factual circumstances. The central point is that a court considering a bail application must judiciously apply its mind to each and every relevant factor of a particular case.

[18] The applicants found their case for the setting aside of the bail granted to the second respondent on a range of – in their view – irregularities. Not all of these are of equal materiality. They include the short time in which the matter was finalised; the lack of opportunity for the third respondent to file affidavits; the fact that the view of the Police was not taken into account; the fact that the proceedings took place in the chambers of the first respondent instead of in open court; and even the impression that the petition was not signed by the second respondent in person.

[19] The applicants point out that the second respondent was in a position of considerable power. They are furthermore

seriously aggrieved by the “indifference” of the third respondent and its sudden change from opposing bail to agreeing thereto after hearing the concerns of the Acting Chief Justice.

[20] The third respondent’s explanation of the last-mentioned was that it did oppose bail, but changed its mind after being informed of the view of the Acting Chief Justice. Counsel for the second and third respondents conceded that the proceedings could have been conducted more properly, but maintained that no irregularity serious enough to render the High Court’s decision fatally flawed was committed.

[21] Given the status of the third respondent and its representatives as officers of the court, with the crucial responsibility of prosecuting and deciding issues related thereto without fear, favour or prejudice, it might have been more helpful to this Court if the third respondent assisted the court neutrally, with all the facts at its disposal, rather than - keenly it seems - opposing the present application, alongside the second respondent. Counsel for the third respondent justified their position by stating that they had done their duty by opposing bail; took note of the view of the Acting Chief Justice; changed their position; accepted the decision; and saw no reason to set it aside.

[22] The Acting Chief Justice as first respondent did not indicate opposition to this application. This is appreciated. However, it is indeed difficult to decide the application without written reasons, or a written or recorded judgment by the High Court. What we do know, from the submissions of the third respondent especially, is that her view that the second respondent had to be able to see a doctor in Bloemfontein the day after the bail hearing significantly influenced the proceedings, in particular the change in stance of the third respondent.

[23] Reasons for the granting of bail would have done much not only to assist this Court, but to meet the concerns of the applicants and to allow transparency for the people of Lesotho who are understandably interested in legal events around a remarkable occurrence. The “first lady” of the country is namely charged with the murder of the previous wife of the Prime Minister, who would have been “first lady”, if she were alive!

[24] Similarly, if the proceedings took place in open court, the applicants and the public would have had the benefit of transparency, an important element of a democracy under the rule of law. This would have done much good for the legitimacy of the criminal justice system of Lesotho. There is a reason for the general requirement that court proceedings must be open to the public, except in exceptional cases, for example the

protection of children. “Justice must not only be done; it must be seen to be done”, so it is often said.

[25] Counsel for the second respondent strongly agreed that it would have been better if these proceedings took place in open court, but was of the view that the proceedings in the chambers of the Acting Chief Justice did not constitute an irregularity serious enough to render the decision of the High Court void. Counsel for the third respondent expressed similar sentiments, but stated that hearings in chambers often happened in Lesotho.

[26] It is understandable that judges see counsel in chambers and discuss possibilities of settlement or agreement with the representatives of all the parties in a matter. However, it is good practice, if not essential, to go into open court to formalise and record what had happened and to issue the order of the court.

[27] At the heart of this matter though, is the question whether the High Court exercised its discretion judiciously by applying its mind to all relevant factors. In order to do so, the Acting Chief Justice needed to be properly informed by the representatives of the parties before her. In so far as they did not sufficiently assist her, she was duty-bound to enquire as to what she needed to know.

[28] Did the High Court, with the help of counsel as its officers, duly consider the above-mentioned factors that are relevant in a bail application? Not only the rights of an accused are at stake, but also the interests of the community and the integrity of the criminal justice system. Were the nature and seriousness of the charge; the risk of the accused fleeing; the possibility of interference with evidence; and the prospects of conviction properly interrogated?

[29] Assuming that the seriousness of murder as a crime was obvious, the issues of flight-risk and likely interference with evidence were next in line. According to counsel, only the flight-risk was discussed. The second respondent did flee to South Africa, but returned voluntarily. This reduced the risk that she would flee again. Replying to questions from the bench as to why the third respondent initially opposed bail and what would have been stated in answering affidavits, if these were filed, counsel for the third respondent stated that flight risk was the only issue. It is not enough.

[30] That the possibility of interference with evidence – and particularly with potential witnesses – was not duly considered, is a serious oversight. To intimidate and even kill witnesses expected to testify in upcoming trials is not uncommon. The fourth applicant accompanied the deceased in her car when the killing took place. She was an eye-witness. In her affidavit, she expresses profound fear for her life.

[31] The second respondent was allegedly an influential and powerful person in her society. In an affidavit, Deputy Commissioner of Police Paseka Mokete states that immediately after the remand of the second respondent he informed the representative of the third respondent that he would “vigorously oppose” her bail application inter alia because she was a flight risk; she was a “very dangerous person who is capable of recruiting assassins to kill ... for her own benefit”; and witnesses in the case were “at high risk”. Senior Superintendent Mamello Victor Ntsane echoes these views, which were not put before the Acting Chief Justice.

[32] This vacuum in the proceedings of the High Court is almost unthinkable, but indeed fatal on its own. It constitutes a gross irregularity and indicates that the High Court did not apply its mind properly and exercise its discretion judiciously. There is no indication that the prospects of conviction were interrogated, but it is unnecessary to proceed to that question.

[33] Other factors strengthen this conclusion of an incomplete and insufficient consideration of relevant issues. The proceedings took place in chambers instead of in open court. They happened with highly unusual speed. Counsel for the third respondent conceded as much and stopped just short of agreeing that they could be described as “rushed”, as was suggested from the bench. No witnesses were called. Counsel

for the accused and the prosecution reached agreement during deliberations outside the chambers of the Acting Chief Justice, after hearing her concern about the visit to the doctor in Bloemfontein.

## **LOCUS STANDI**

[34] Having concluded that the decision of the High Court to grant bail has to be set aside, the remaining question is whether the applicants have standing to approach this Court with a review application of this kind. The respondents argue that they do not have. If they are not properly before this Court, they are obviously not entitled to any relief.

[35] Bail applications are normally launched by or on behalf of the accused. The prosecuting authority - in this case the Director of Public Prosecutions - responds and decides whether to oppose or not. If the decision is to oppose, the prosecution puts together the case for the state, or Crown. If bail is denied, the accused approaches a higher court and the prosecution can again decide on their cause of action. Who, however, is entitled to challenge a court's decision to grant bail if the prosecution does not do so?

[36] Neither the applicants nor the respondents pointed this Court to any provision in the Criminal Procedure Act of 1981 stipulating who has standing in this regard. Arguments focussed on private prosecutions. If the Crown decides not to

prosecute and issues the required certificate in that regard, a stipulated number of interested parties may take up a private prosecution. The assumption is that whoever is in charge of the prosecution, is entitled to oppose bail.

[37] The second respondent points out that none of the applicants in this case qualify to prosecute privately. Section 13 of the Criminal Procedure Act mentions a wife, husband, guardian and next of kin. The third respondent argues that the applicants are not “victims” of the crime. In any event, in terms of section 12 of the Criminal Procedure Act private prosecution only comes into play when the Crown declines to prosecute. In this case the Crown is indeed proceeding with the prosecution and are thus *dominis litis*.

[38] On behalf of the applicants it is argued that the applicants who are family members of the deceased are directly affected by the decision of the High Court; have a direct interest in the issue of bail; did not participate in the proceedings before the High Court because they had confidence in the Police and the third respondent; and are victims of the murder. They have the right to prosecute, give evidence and participate in bail proceedings.

[39] Even though it would normally be the accused who challenges a court decision to deny bail, it is not unthinkable that a spouse or relative would do so, for example when the accused is a breadwinner. However, it is unlikely that a court



would grant bail to an accused who does not want it. The opposite is at stake here. Who ought to be entitled to take a decision to grant bail on review?

[40] To link inextricably the right to challenge the granting of bail to the right to prosecute cannot provide a full answer. Even though one may not be entitled to prosecute privately, or when the Crown is indeed prosecuting, or if one cannot strictly speaking be regarded as a victim, one may well have a direct and substantial interest in the issue of bail. The fourth applicant is an example directly in point. She was a friend of the deceased, was in her company when she was shot and is an eye-witness highly likely to testify in court. Her safety is at stake. She fears for her life and limb. Her constitutional and internationally recognised rights to life, human dignity, security and bodily integrity are under threat. She relied on the Police and third respondent to guard over her interests. Yet, the third respondent - "indifferently" or otherwise - quickly withdrew opposition to bail in the face of what was perceived as the Acting Chief Justice's preference, without bringing the strong views of the Police to the attention of the High Court. The conduct of the third respondent, responsible for the protection of the interests of victims of crime and society as a whole, as well as for securing a fair trial, is highly relevant in this regard.

[41] A criminal justice system based on constitutionalism and the recognition of fundamental rights cannot deny someone in the position of the fourth applicant the right to ask a court of

appeal, like this Court, to review a decision to grant bail to a murder accused. At least the fourth applicant has locus standi. She has a direct and substantial interest in the issue. This is a general test with regard to the right to participate in litigation. It is not necessary to reach a decision on the other applicants.

[42] This does not mean that any victim of a crime, relative of a victim, or any member of society who is concerned about justice will have standing to challenge court decisions about bail, if the prosecuting authority does not do so. Courts should not be flooded by applications of this nature. Each case must be judged on its own circumstances, taking into account the seriousness of the direct and substantial interest of the applicant, the conduct of the prosecution and all other relevant factors.

[43] The respondents argue that, even if the applicants have standing to bring a review application, they did not follow the correct procedures. They should have requested reasons for the decision first. The decision under the spotlight here is not one by an administrative body. It was taken by the High Court. Courts are supposed to give reasons for their decisions. The Acting Chief Justice was cited as first respondent. She had every opportunity – and more than three months – to furnish reasons, but did not do so.

## **Remedy**

[44] In their initial application the applicants asked this Court, as interim relief pending the determination of the application, to stay and suspend the decision of the High Court; remand the second respondent in custody, forthwith; and direct the Commissioner of Police (as fifth respondent) to apprehend the second respondent and place her in custody. As final relief the applicants asked this Court to dismiss the petition by the second respondent and to order her to remain in custody.

45] In his heads of argument, supplemented by oral submissions at the hearing of the application, counsel for the applicants requested this Court to consider an order to set aside the High Court's order admitting the second respondent to bail; and to refer the matter back to the High Court before a different judge. He furthermore proposed that this Court grant leave to the applicants to file papers opposing bail within three days after the order of this Court and the petitioner to file her papers within two days after the filing of the applicants' papers; as well as that the matter should be heard as a matter of priority "immediately afterwards".

46 Thus the applicants no longer seek an order by this Court that the second respondent must be re-arrested. Counsel pointed out that the effect of setting aside the bail granted by the High Court would indeed be that the second respondent is an arrested person without bail. This Court is neither inclined to order an arrest; nor is it necessary to do so. If the High Court's

granting of bail is set aside, it is the responsibility of the third and fifth respondents to manage the consequences.

[47] It would not be good for either the dignity of the second respondent, or the public perception of the administration of justice, to prolong a saga wherein she may continue to be taken into and released from custody. Therefore the process of considering the petition for bail must be sped up as far as possible. The applicants must file papers opposing the petition without delay. It can be assumed that the second respondent will file replying papers soon, if she is in custody. Whether she will be, is not known to this Court though. Thus all parties must be held to tight time lines, in order not to allow anyone to prolong proceedings in a matter overflowing with strong emotions.

### **Costs**

[48] The intense emotions of the parties in this matter are evident from the language used in the papers, even by counsel. Counsel for the second respondent argues that the applicants were indeed “scandalizing the court” with the harshness of their criticism of the Acting Chief Justice. He asked for a punitive costs order.

[49] The language used by virtually all parties, their legal representatives and the deponents of affidavits is indeed

unbecoming and disrespectful, not only of the individuals they refer to, but also to this Court whom they address and try to persuade. It is not acceptable, but does not warrant one - or several - punitive cost orders.

[50] The appellants asked for costs against the respondents who opposed the application. The matters raised are of considerable import to the rights of those involved, the criminal justice system as a whole and the wider society of Lesotho. The applicants were successful and should not be out of pocket. The second respondent's opposition was unsuccessful. No cost order is made against her though, because she is fighting for her freedom in a criminal matter. The same does not apply to the third respondent, whose conduct at least in part caused the application before this Court, but who nevertheless opposed the application.

## **Order**

[51] In view of the above, the following is ordered:

- (a) The decision of the High Court to grant bail to the second respondent is set aside.
- (b) The petition for bail is referred back to the High Court to be determined by a judge other than the first respondent.

- (c) The applicants must file papers opposing the petition, should they wish to do so, within three days from the date of this order.
- (d) The petitioner must file replying papers, should she wish to do so, within three days of the service of the applicants' papers on her.
- (e) Should the third respondent wish to file papers, it must be done within three days of the service of the applicants' papers on the office of the third respondent.
- (f) The High Court is directed to enrol the matter for hearing in open court on the basis of urgency.
- (g) The third respondent must pay the applicants' costs.



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**VAN DER WESTHUIZEN  
ACTING JUSTICE OF APPEAL**

I agree:



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**P.T. DAMASEB  
ACTING JUSTICE OF APPEAL**

I agree:



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**M. CHINHENGO**  
**ACTING JUSTICE OF APPEAL**

**For Appellant:** Adv. M. Rasekoai (appeared for all the applicants instructed by Mr. Ndebele)

**For Respondents:** Adv. D.B. Ntsebeza SC assisted by Adv. M. Qofa and Adv. R Setlojoane (for the 2<sup>nd</sup> Respondent)

Adv. L.D Molapo assisted by Adv. Malebanye and Adv. Ketsi (for 3<sup>rd</sup> Respondent)