CIV/T/598/95

IN THE HIGH COURT OF LESOTHO

In the matter between

Lesotho Highlands Development Authority Plaintiff

and

Masupha Ephraim Sole Defendant

REASONS FOR RULING ON POSTPONEMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge,
on 2nd day of December, 1996.

On 4th November 1996 Mr. Fischer for the Defendant made an application from the bar for postponement of the above mentioned matter sine die.

After hearing argument in the matter I dismissed the application with costs including costs of two (2) counsel. I intimated that reasons would follow. These are the reasons.

In order to appreciate the issues involved in this application it is necessary to recount briefly the background leading to the application. It is this:

Plaintiff issued summons in this matter on 6th November 1995 claiming about M5 million against the Defendant arising out of the latter's alleged wrongful conduct. On 23rd February 1996 Defendant filed his plea.

On 26th April 1996 the matter was set down "for hearing on the 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15 November 1996 and on 2, 3, 4, 5 and 6 December 1996 at 9h 30 a.m." The said set down was arranged with and done with the express consent of Defendant's attorneys.

In so far as the question of discovery may be relevant in this application it is necessary to observe that Defendant's Notice to discover is dated 17th April 1996. such discovery was furnished by the plaintiff on 30th May 1996.

It is significant that the Defendant then did nothing about plaintiff's aforesaid discovery for almost four (4) months. Only on 23rd September 1996 with only six (6) weeks remaining before the trial actually commenced did Defendant's attorneys give Notice in terms of Rule 34 (6) of the High Court Rules. This delay by the defendant in responding to plaintiff's discovery of 30th May 1996 is an aspect to which this court must inevitably have regard in this application and I have certainly borne it in mind in arriving at the conclusion refusing postponement in the matter.

To resume the sequence of events leading to the application for postponement, then followed a series of correspondence between Plaintiff's attorney and Defendant's attorney. It is important to single out the letter of Plaintiff's attorney dated 11th October 1996 in which the latter wrote to Defendant's attorney as follows:

> "I refer also to our telephonic discussion of today as well as your letter of 11th October 1996 relating to the discovery of further documents and confirm that it is agreed that this would be done informally."

Defendant's attorney responded to the aforesaid letter on 18th October 1996 and stated therein in part "the writer is surprised at your Mr. Moiloa's remark about an agreement to discover further documents informally. The further discovery that we require from the Plaintiff must be discovered under oath." Well for my part I regrettably observe that it is a very sad state of affairs indeed that attorneys of this court can no longer rely on the word of their counterparts. This is deplorable to say the least.

Be that as it may I am satisfied that following the invitation of Plaintiff's attorney contained in his letter of 11th October, 1996 Defendant's attorney duly perused and/or inspected Plaintiff's Board Minutes on 14th October 1996. This the defendant's attorney acknowledges in his letters of 18th and 25th October 1996 respectively addressed to Plaintiff's attorney.

I am further satisfied on a balance of probabilities that it was because of the denial of defendant's attorney of the alleged agreement to make informal discovery that Plaintiff's attorney filed a Supplementary Discovery affidavit on 25th October 1996 attaching certain documents.

On 1st November 1996 the parties held a pre trial conference in the matter. It is in my view significant that at this pre trial conference Defendant's legal representatives did not raise the question of postponement with Plaintiff's legal representatives. Neither did they raise the question of further discovery. I have considered these factors against the defendant in this application.

Indeed Mr. Harley attorney for the defendant admitted under cross examination in his evidence in support of the application for postponement of the trial that the decision to postpone was only taken on the morning of the trial on 4th November 1996. I find the behaviour of Defendant and his legal representatives totally unacceptable in this regard particularly as they waited until the very last minute to apply for postponement when plaintiff had assembled its witnesses and its counsel were already in attendance in court.

Nor does the inconvenience end there in as much as the court would also be greatly in convenienced by the postponement. Nor is this court amused by the glaring contradiction between the version of Mr. Fischer and that of his instructing attorney Mr. Harley on the question as to when exactly they became aware that they would have to make the application for postponement. In this regard Mr. Fischer was asked by the court on page 29 of the record of proceedings:-

> "**Court:** May I ask, Mr. Fischer, when did you become aware that you would have to make this application?
>
> **Mr. Fischer:** On Friday during the pre trial."

As earlier stated Mr. Harley's version appears under cross examination by Mr. Penzhorn for Plaintiff on page 164-165 of the record of proceedings as follows:-

> "**Mr. Penzhorn:** Mr. Harley, when did you decide to move for this application for postponement, because there is no reference to it at the board meeting. There was no reference to it in the board minutes. When did you decide to move for this? M'Lord, I apologise, in the pre-trial minute, there is no reference in the pre-trial minute to the fact that you are going to move an application for postponement. That is now yesterday. When did you decide that? -- I considered the matter over the weekend with Mr. Fischer and on Monday, yesterday, that decision was made in the morning.
>
> Only yesterday morning? -- Yes, it was under consideration over the weekend and the decision was finally made yesterday, Monday morning.

Court: On the day of the trial? Was that the day of the trial?

Mr.Penzhorn: The morning of the trial?.....yes."

I find that on either version it is inexcusable that Plaintiff's legal representatives were not told in advance of the intended application for postponement. This is another factor which the court took into account in refusing the application for postponement.

It is trite law that the granting of an application for postponement is in the nature of an indulgence which is preeminently within the discretion of the trial court. I am mindful however that such discretion must always be exercised judicially and not capriciously.

See **Myburgh Transport v Botha t/a S.A. Truck Bodies 1991 (3) S.A. 310** Mahomed AJA (as he then was).

The question that immediately arises is whether this application for postponement was bona fide or was merely a tactical ploy to delay justice in the matter. In this regard it is important to bear in mind Mr. Fischer's opening submissions in support of the application. This is what he said on page 38 of the record of proceedings:

"I wish to make it quite clear that what I seek at this moment in time is an application for a postponement of this case sine die.

Court: This is the application you are making?

Mr. Fischer: For postponement. I am not seeking an order in terms whereof the Plaintiff is compelled to make available documentation. That is an application which the defendant has a right to bring at any stage and he will."

It was therefore clear to me that the application for postponement was made without any reference to discovery of document or in terms of Rule 34 (6) of the High Court Rules. Indeed Mr. Fischer conceded the application in terms of the said Rule had not even been filed when the application for postponement was made. I am therefore not satisfied with the defendant's bona fides in this application. I gained the impression that the defendant's strategy was to move the application for postponement and if that failed he would then fall back to the question of discovery of documents and move another application for postponement based on such discovery. All this in my view amounts to delaying tactics.

To add more confusion to Defendant's strategy in the matter Mr. Fischer subjected the court to another bout of contradiction in terms when he later submitted that the application for postponement was made subject to the granting of defendant's application under Rule 34(6) of the High Court Rules. It seems to me that this is a classical case of putting the cart before the horse. One would have thought that if the question of discovery of documents was the real reason for postponement an application to compel such discovery would have been filed first and then an application for postponement moved on the basis of such application.

Significantly Mr. Penzhorn made a suggestion to hand to the court the documents which defendant insisted should be discovered and await the opening address before deciding on whether to order the discovery of the documents or not after the court had familiarised itself with the issues involved. Because of the importance of this proposition it is necessary to reproduce the whole of Mr. Penzhorn's submission on the point even at the expense of overburdening this judgment. His submission appears on page 67 of the record of proceedings as follows:

> "The proposal I want to make is this, and if this proposal is not acceptable, I obviously want to argue the matter and get on with the matter, these are not my

only submissions. Why do we not do this? Why do we not hand these documents to Your Lordship, we place them before Your Lordship, we tender them to Your Lordship. Once Your Lordship has heard my opening address in which I set out the issues, and once Your Lordship has become au fait with the issues, Your Lordship can then look at those documents, and if Your Lordship finds that there are documents that we ought to have discovered, Your Lordship can make them available to the other side, we give that undertaking to Your Lordship. Your Lordship can make them available to the other side, and deal with the question of prejudice, costs or whatever arises therefrom in Your Lordship's discretion because we are confident that Your Lordship is going to find that there is not one document in there that we should have discovered, but we do not want Your Lordship to arrive at that finding after this case has gone on for two weeks, we have had a mini-hearing, we have lost our court days and it has cost our clients an awful lot of money. Is that not an acceptable proposition that must, if My Learned Friends are genuine about wanting to get on with this matter as we are, that is a proposition surely that must find favour with him. How can they lose? If Your Lordship goes through these documents and after I have opened my case hopefully tomorrow, and it is going to take me a day to open my case because we are dealing with eleven claims and we are dealing with 6,000 pages of discovered documents, once I have taken Your Lordship through that and when I start leading my first witness who will be an accountant, who will deal with all the broader issues in the case, once I have done that and Your Lordship has had an opportunity of going through these documents, if Your Lordship then say you must make that one available, that one available, we give Your Lordship now the undertaking that Your Lordship must make them available.

Court: You are submitting there would be no prejudice if one adopts that type of procedure?

Mr. Penzhorn: I make the submission, I make the bold submission how can there ever be prejudice? If Your Lordship were to find that minute number 17 should have been discovered and the effect of the non-discovery is that the defendant was going to make

investigations or speak to witnesses or whatever would have flown therefrom, if Your Lordship were to find that, then Your Lordship holds that gun against our heads, and says to us gentlemen, I am going to order this trial to be postponed at your cost, and I am going to allow, whatever. Whatever Your Lordship then decides to do. But is that not the appropriate time then for Your Lordship to do it? Otherwise we are going to have a mini-trial and we are going to have a situation where Your Lordship will be in the dark, Your Lordship will have to be informed about all the issues, and we are going to have two attorneys fighting each other. That is my proposal."

Although Mr. Fischer did not accede to this proposal he was unable to persuade me that it would lead to any prejudice to the Defendant if it was followed. For my part I found the proposal not only attractive but very fair and just in the circumstances and I accordingly endorsed it.

It has also not escaped my attention that Mr. Harley conceded under cross examination that Plaintiff's attorney allowed him to inspect Plaintiff's budgets and Board Minutes which he duly did on 14th October, 1996.

Mr. Harley was then confronted by Mr. Penzhorn in cross examination with the discovery affidavit of Mr. Marumo in which he deposed in part as follows:-

"To my best knowledge and belief there are no documents which the Plaintiff has had but does not now have in his possession or power relating to the matters in question in this action."

He was then asked on page 109 of the record of proceedings:-

"Q: Apart from the board minutes you have seen, do you have any basis for doubting that?

A: I must assume that what I read is correct. It is under oath,

I have no other alternative than to accept it."

In the circumstances I am satisfied that the application for postponement was not bona fide and that it amounted to delaying tactics. It is not without significance for that matter that the Defendant himself did not even attend court on first day of trial on 4/11/96.

In the result therefore the application was refused with costs including costs of two (2) counsel.

M.M. Ramodibedi

ACTING JUDGE

For Applicant/Defendant: Mr. Fischer

For Respondent/Plaintiff: Mr. Penzhorn S.C.

Assisted by Mr. Woker.

CRI/A/8-9/87

IN THE HIGH COURT OF LESOTHO

In the matter between:

DANIEL SAKOANE — APPELLANT
TS'EPO MASOABI — APPELLANT

J U D G M E N T

Delivered by the Honourable Justice G.N. Mofolo
on the 15th day of December, 1995.

The appellants were charged along with accused 3 at the trial in the Magistrates Court for the District of Berea for contravening section 3 sub-section (a) of Act No.21 of 1973 relating to Dangerous Medicines in that

> on or about the 22nd day of February, 1986 and at or near Ha 'Matjotjo' in the Berea district the said accused one or the other or both of them dealt with prohibited medicine or any plant from which such medicine can be manufactured to wit; six bags of dagga weighing 102 kg without a permit, licence or certificate.

Appellants and accused 3 had pleaded not guilty and accused 3 at the trial having been found not guilty appellants had been found guilty and sentenced to 15 months imprisonment each.

It was against their conviction that appellants had appealed to this court.

At the trial there had been evidence by P.W.1 Detective Trooper Khoele that while he and the other policeman were on local patrol at 'Matjotjo's their attention had been drawn to

people playing dice and while they had altercation with these people a yellow vehicle had approached them moving deviously and moving where there was no path and this had immediately aroused suspicions and the police had approached the vehicle in which six (6) bags of dagga were found.

Detective Sergeant Khoele went on to say that he noticed each of the six bags contained dagga, that he knew dagga very well by its appearance. Questioned about the dagga accused 1 had said he had asked for a lift in the vehicle and had no knowledge of the contents of the canopy while accused 2 admitted the dagga as his and accused 3 said she had merely asked for a lift. According to the witness, he was not satisfied with accused 1's explanation as the latter had been driving the vehicle but accused 1 had retorted that the reason was accused 2 could not drive. This witness goes on to say that accused asked to say to whom the vehicle belonged the name of one Khoeli cropped up though it seemed accused did not know whether Khoeli was first name or surname. I can only assume that reference to accused by P.W.1 refers to accused 1 with whom he (P.W.1) was in course of conversation.

In cross-examination it emerged that P.W.1 had found the vehicle stationary, with no driver on the seat and the keys were on the floor of the vehicle dumped there. Also questioned who P.W.1 found to be the owner of the dagga he said accused 2

'appeared or presented himself dagga owner.' Questioned by accused 2, P.W.1 said that he handed the key to a person he requested to drive the vehicle. In the course of his interrogation, P.W.1 elicited information that there had been four (4) occupants in the front seat, that the fourth person who was driver had fled leaving the key behind. P.W.1 had nevertheless not believed that there was such a 4th person as alleged.

It was, nevertheless, P.W.1's contention that accused 2 was, in fact, the driver and I fail to understand why, if accused 2 was the driver P.W.1 did not instruct accused 2 to drive ; in the event, that accused 2 was the driver could have been confirmed or accused 2 would have protested his inability to drive. It was also repeated in cross-examination that the canopy of the vehicle was not locked and that it was accused 3 'Mampe who helped P.W.1 unload the bags of dagga.

Accused 2 in cross-examination put it to P.W.1 that when he (accused 2) denied knowledge of the dagga P.W.1 had assaulted him with a stick until it broke into pieces.

After accused persons had given evidence and been cross-examined MR. MATLHARE attorney for the accused had arrived and had been given an opportunity to cross-examine P.W.1. It went like this, inter alia:

Q. I understand this Mothethwa has possession and control of those bags?

A. That understanding is wrong - was not in possession and control as was not at the scene where I found the vehicle was at his parents home.

Q. Did you investigate whether he had connection with this offence?

A. Did investigate from him.

Q. Why did you find it necessary to investigate from him if was just an innocent person?

A. For A.1 complained to me that I separated him with his dagga bags and made Mothethwa to drive his vehicle so Mothethwa was then in possession.

On the above score Mothethwa cross-examined by Mr. Matlhare said:

Q. Did you make any statement at charge office concerning these accused?

A. Never made a statement and police never questioned me about accused.

Q. Did you tell police knew nothing of three accused or dagga?

A. I never made any statement to that effect as never asked anything by anybody in relation to accused and dagga.

A quick glance at what P.W.1 testified to under cross-examination by Mr. Matlhare and what Mothethwa testified to under cross-examination shows that either P.W.1 or Mothethwa could not have been telling the truth as to whether or not Mothethwa was questioned by the police regarding his connection with accused persons. P.W.1 says they questioned Mothethwa on this score but the latter denies this. There is also another thing: P.W.1 and P.W.2's evidence is simply to the effect that they requested

Mothethwa to drive them to T.Y. thus giving the impression that it was a direct approach while Mothethwa said he could not help unless his father's permission was obtained which permission was in any event granted by his father.

In his defence, 2nd appellant has testified that in truth accused 2 was the driver of the vehicle. He also testified that 10 bags of maize were loaded. On the contrary, 1st appellant told the trial court that he had merely asked for a lift and that when arrested 10 bags of dagga had been found.

When this matter came before me for argument on 28 November, 1995, Mr. Sakoane for the Crown had appeared and Mr. Fosa for the 2nd appellant it being claimed that Mr. Phoofolo represented the 1st appellant although instructions were not compelete .

In view of the unexplained absence of Mr. Phoofolo 1st appellant had been given an opportunity to find him and the matter was stood down to 2.30 p.m.

At 2.30 p.m. Mr. Phoofolo had not appeared but as Mr. Fosa was going to be elsewhere on 29 November, 1995 he was given the opportunity to address court and thereafter the matter had been postponed to 29 November, 1995 at 10.00 a.m.

On 29 November, 1995 Mr. Phoofolo made no appearance and the

appeal proceeded. The Crown had made its submissions and the court holding that as Mr. Phoofolo was instructed to appear for the 1st appellant and not appearing that 1st appellant could not address the court. nevertheless allowed 1st appellant to address the court in support of his appeal.

It was in course of address by 1st appellant that Mr. Lehana arrived intimating that he would conduct 1st appellant's appeal. The court being fed up with the circus and playing fields into which the court had been turned and as it was in the middle of 1st appellant's address the request was refused and 1st appellant addressed the court. 1st appellant insisted that there were six (6) bags of maize belonging to Mothethwa and that he (1st appellant) had allowed Mothethwa to load the six (6) bags of maize on the vehicle; this. of course differs from 1st appellant's suggestion in cross-examination of P.W.1 that 10 bags of maize were loaded.

Although there were unsatisfactory elements in the crown evidence which left much to be desired. the question must also be asked whether appellants defence was not a smokescreen to divert the trial court from real issues seeing that appellants defence was not even put to Mothethwa.

Mr. Fosa has submitted on behalf of 2nd appellant that mere physical detention is not enough and that there must be. in

addition, knowledge and intention or mens rea. Further, that the trial magistrate has misdirected himself in finding that physical detention is alone sufficient.

On the contrary, MR. SAKOANE for the crown has submitted that possession or intention do not arise in that the law in this regard is to the effect that once the quantity of dagga exceeds 115 grammes the otherwise offence of possession becomes dealing. Moreover, that because the subject-matter of the crime involves a prohibited substance the need for a permit or licence is not in issue.

The view of this court is that Mr. Sakoane's submissions are spot on in that where the dagga exceeds the magical figure of 115 grammes the crime becomes dealing and consequently that the onus is then placed on the accused to prove on a balance of probabilities that he was not dealing. A recent judgment of the Constitutional Court in South Africa attacks this concept but since it has not been published and we have no access to it yet, it is safer to stick to the beaten road.

As I have said, Mr. Fosa has furiously attacked the finding of the trial court as for example where the court a quo said Sakoane (1st appellant) was a well-known man, the assertion being unsupported by the evidence.

In this regard, in REX v. DHLUMAYO & Or. 1948(2) S.A. 677 (A.D.) it was said

> The appellant court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.

I would add that neither does one swallow make a summer. That the learned Magistrate may have slipped up here and there can hardly amount to failure of justice as Mr. Fosa has suggested.

As I have indicated, appellants have contested the assertion that dagga was found on them in that to their knowledge bags of mealies were loaded on the van they were travelling in. Against the appellants though is the fact that they do not seem to have satisfied themselves whether or not the bags loaded were in fact bags of maize. But assuming that the so-called bags of dagga were contested, i.e. that the appellants were claiming the bags were not dagga, it seems to me that it cannot be said that the crown had proved that these mealie bags were dagga. This must be read in conjunction with the evidence of P.W.1 who, cross-examined testified that it was accused 3 at the trial who opened the canopy of the van and helped P.W.1 off-load the bags of dagga. Of course we are not here concerned with possession but with dealing which, amongst other things, encompasses conveyance.

The view of this court is that where an accused person denies that the substance is dagga the crown is called upon to

produce more weighty evidence. As was said by Vieyva, A.J. in THE STATE v. NGWANYA, 1962(3) S.A. 690 (T.P.D.) at p.691

> The question that arises in this appeal is whether the court below was justified in finding that it had been established beyond reasonable doubt that the substance found was indeed dagga. It is clear that when a person is charged with being in possession of a substance such as a type of liquor or drug, contrary to the provisions of some statutory enactment, the evidence of a state witness who says that he knows what the substance is and that it is of the nature charged is prima facie proof of the state's allegation. Such prima facie proof would in the absence of any other evidence be sufficient to found a conviction. But when such evidence is challenged by the accused and witness are moreover produced to deny the allegation made, then something more is required before it can be said that the court is justly satisfied as to the nature of the substance in question;

also see R. v. MODESA, 1948(1) S.A. 1157(T.). And where the contents of a bottle were challenged VAN DER RIET, J. in R. v. MGOTYWA, 1958(1) S.A.99(E) said at p.101H.

> Now in this case the bottles were produced, sealed, labelled and bearing the seller's personal label, and was stated to contain brandy or gin. If this was a reasonable assumption - and in my view it was unless the nature of the contents was challenged by the defence - a prima facie case was established. Where the defence contended otherwise, to the extent of such contention, the crown would have to elaborate its proof even to the necessity of analysis.

Whether the quantity of dagga found on appellants vehicle was dagga or not dagga, this was not seriously challenged by the appellants for their defence seemed to be that they loaded maize bags and not dagga. As I have said, that the bags found on their vehicle was dagga was not seriously challenged so that the state witness P.W.1 Detective Trooper Khoele who testified that

> 'I know dagga very well by its mere appearance'

is prima facie proof of the state's allegation and is, in my view, sufficient to found a conviction.

Accordingly, the conviction by the trial court is confirmed.

Regarding sentence, there has been no appeal as to sentence and I have found nothing to convince me, even were there an appeal in this regard, to disturb the sentence imposed by the learned Magistrate.

Having said this, it will be noticed that the sentence imposed on the appellant was so imposed on 20 May, 1986 which is almost ten (10) years ago. No reason was advanced why this sentence was allowed to hang over the heads of appellants for such an inordinate length of time. 2nd appellant did, however, give this court a glimpse of what transpired for he said his attorney a long way in 1987 had informed him that the appeal had been dealt with and he (2nd appellant) was not to have sleepless nights about the appeal; that, according to 2nd appellant, when he heard the appeal was resuscitated he was taken aback and hence why he was not able to consult his lawyers timeously.

An appeal is a most serious branch of our law and must neither be taken or treated lightly the reason being, as was said in DHLUMAYO'S case above,

'No judgment can ever be perfect and all-embracing

I would add that no judgment is necessarily right and hence why there are appellate tribunals to test the correctness of judgments of inferior courts. Once a person is on appeal, it is vital that his appeal should be heard at the earliest possible time. Some judicial systems value the early disposition of appeals to such an extend that special courts are set up to deal with appeals or, alternatively, Judicial Officers alternate in disposing of appeals. Where the expeditious hearing of appeals is on hold, unenvious conditions may result as where an appellant having lodged his appeal and being refused bail pending appeal serves the entire period of his sentence before his appeal is heard so that when it is eventually heard it becomes of academic interest only.

There are also cases where appellants seek bail ostensibly to cheat the law by never appearing before court on appeal.

These are serious matters and need to be seriously addressed. I understand that a process is now in place whereby appellants from the Subordinate Court will, on noting their appeals, simultaneously set down their appeals with the Registrar of this court to ensure the speedy resolution of their appeals. I would add that save for unforseen circumstances such appeals be heard as set-down.

I have said that appellants were convicted and sentenced way

back in 1986 and I have not been informed why this appeal came only in November, 1995.

1st appellant is ageing and fast approaching his journey's end: 2nd appellant is, since his conviction and sentence, in his winter months and I doubt he will survive them. I am of the view that interests of justice will be best served by suspending sentences imposed on the appellants.

In the result the appeal against conviction is dismissed and although there was no appeal against sentences for reasons I have already stated sentences imposed on appellants are confirmed but suspended for a period of 3 years on condition that during the period of suspension appellants are not convicted of an offence under the Dangerous Medicines Act.

G.N. MOFOLO
JUDGE
15th December, 1995

For the Crown: Mr. Sakoane
For the 1st appellant: Mr. Fosa
For the 2nd appellant: In Person