CIV/APN/122/97

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MASEFABATHO LEBONA	**Applicant**

and

DIRECTOR OF PUBLIC PROSECUTION	**1st Respondent**
ATTORNEY GENERAL	**2nd Respondent**

JUDGMENT

Delivered by the Honourable Chief Justice
Mr. Justice J.L. Kheola on the 17th day of
October, 1997

This is an application for an order in the following terms:

1. That a Rule Nisi be issued and returnable on the day of 1997 calling upon the respondents to show cause, if any, why:-

   (a) The periods of notice required by the Rules of Court should not be dispensed with on account of urgency of this application.

   (b) Directing that the proceedings in **CRI/T/40/95** be stayed permanently

on the grounds that the applicant's rights under Section 12 (1) of the Constitution have been infringed by the delay in bringing the matter to trial.

(c) Directing the second respondent to pay the costs hereof.

(d) Granting applicant further and/or alternative relief.

2. Prayer 1 (a) to operate with immediate effect as interim relief.

In this application the respondents have not filed any opposing affidavits on the ground that they were going to raise a point of law. It seems to me that that was not a very wise decision because if the point of law they are relying on fails, they shall not have stated the facts in an affidavit and to have refuted the allegations made by the applicant.

I propose to deal with the point of law first. Section 12 (1) of the Constitution reads as follows:

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Another relevant section of the Constitution is section 22 (1) and (2) which reads as follows:

(1) "If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such

a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to in in pursuance of subsection (3),

and may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 4 to 21 (inclusive) of this Constitution.

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

Mr. Mapetla, counsel for the respondents, submitted that the applicant is wrong to have sought a remedy in a civil court and yet there are adequate remedies in a criminal court. He referred to sections 141 and 278 of the Criminal Procedure and Evidence Act 1981. The two sections read as follows:

"141 (1) Subject to this Act, every person committed for trial or sentence whom the Director of Public Prosecutions has decided to prosecute before the High Court shall -

(a) be brought to trial at the first session of that court for the trial of criminal cases held after the date of commitment; or

(b) be admitted to bail, if

31 days have elapsed between the date of commitment and the time of holding such sessions;

unless -

(aa) The court is satisfied that, in consequence of the absence of material evidence or for some other sufficient cause, the trial cannot then be proceeded with without defeating the ends of justice; or

(bb) before the close of such first session an order has been obtained from the court under section 142 for his removal for trial elsewhere.

(2) If the person committed for trial or sentence before the High Court is not brought to trial at the first session of that court held after the expiry of 6 months from the date of his commitment, and has not previously been removed for trial elsewhere, he shall be discharged from his imprisonment for the offence in respect of which he has been committed."

"278 (1) If a prosecutor -

(a) in the case of a trial by the High Court having given notice of trial, does not appear to prosecute the indictment against the accused before the close of the session of the Court; or

(b) in the case of a trial by a subordinate court, does not appear on the court day appointed for the trial,

the accused may move the court to discharge him and the charge may be dismissed, and where the accused or any other person on his behalf has

> been bound by recognizance for the appearance of the accused to take his trial, the accused may further move the court to discharge the recognizance."

In my view section 141 is not relevant to the present proceedings inasmuch as it deals with people who are in gaol who have not been released on bail. The applicant is on bail and therefore subsection (2) cannot apply to her because she was released on bail a long time ago. Her application goes to the root of the charge against her that it should be stayed permanently due to the long delay before she is brought to trial. It is her contention that the delay is unreasonable and in breach of her constitutional right under section 12 of the Constitution.

I agree with the applicant that the delay to bring her to trial is long unless the respondents can justify it on reasonable or sound grounds. So far they have not done so because they have not filed any opposing affidavits.

Section 278 (1) is relevant to these proceedings. If the applicant had moved the court to discharge her and to dismiss the charge on those days when the Crown failed to appear, that would have had the same effect as a permanent stay of the charge against her. I agree with **Mr Mapetla** that the applicant had another remedy under section 278 of the Criminal Procedure and Evidence Act 1981. She ought to have proceeded under that section on the day the Crown failed to appear without any reasonable excuse. Be that as it may that is not the end of the matter because there is a proviso to section 22 (1) of the

Constitution.

That proviso reads as follows:

> "Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law." (My underlining)

As I have said above I am satisfied that adequate means of redress for the contravention alleged are and have been available to her under section 278 ever since she was charged in August, 1994, but she did not take advantage under that law. I have underlined the word "may" in the proviso to section 22 (1) of the Constitution. Section 14 of Interpretation Act 1977 reads as follows:

> "In an enactment passed or made after the commencement of this Act, "shall" shall be construed as imperative and "may" as permissive and empowering."

The word "may" casts discretionary power upon the donee of the power. In **Hartley, N.O. v. The Master** 1921 A.D. 403 at p. 408 Innes, C.J. said:

> "Where upon such reference it appeared that the power was conferred for the purpose of enforcing a right, then, speaking generally, there would be a duty cast upon the donee of the power to exercise it for the benefit of those concerned."

In the present case I have decided not to exercise my

discretion in favour of the respondents for reasons that will appear in this judgment.

It is common cause that there has been a delay of almost three years before the trial of this case. By any standards this is an unreasonable delay and any party responsible for it must suffer the consequences.

In the case of **Baker v. Wingo** (1972) 407 U.S. 514 at pp 530-532 the factors to be taken into account in determining the question whether the accused has been prejudiced in his constitutional right to a speedy trial are set out as follows;

> "The approach we accept is a balance test, in which the conduct of both the prosecution and the defendant are weighed. A balancing test necessarily compels courts to approach speedy trial case on an **ad hoc** basis. We can do little more than identify some of the factors which courts would assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. The length of the delay is to some extent a triggering mechanism.. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious complex conspiracy charge.
>
> Closely related to length of delay is the reason the government assigns to justify the

delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of delay, to some extent by reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasise that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth fact is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests; (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."

The four factors which appear from the above judgment are;

(1) the length of the delay, (2) the reasons for the delay, (3) the assertion by the accused of his rights, and (4) the prejudice to the accused. I have already dealt with the first factor and have come to the conclusion that the length of the delay was unreasonably too long. The length of the delay is slightly over three years. What makes it even more disturbing is the fact that at the moment the case is not set down for hearing for any date. A criminal trial is never postponed **sine die**. If the accused is in gaol the case must be postponed to a specific date every fourteen days. If he is on bail it must be postponed to a specific date every thirty days. On each occasion he must attend his remand. In the present case the accused is on bail but she is no longer attending her remands because the first respondent appears to have forgotten about her or to have lost interest in the matter.

In her founding affidavit the applicant alleges that on the 9th August, 1994 she was served with an indictment. Nothing happened until on the 26th May, 1995 when her counsel wrote a letter to the first respondent's office, in which he urged the Crown to finalise this matter. The letter reads as follows:

"1st Floor Mohlaka House,
Cathedral Area
Opposite Traffic Circle,
P.O. 036
Maseru West 105

26th May, 1995

The Director of Prosecutions,
The Law Office
P.O. Box 33,

MASERU 100

ATTENTION: MR SAKOANE

Dear Sir,

Re: REX VS 'MASEFABATHO LEBONA

The abovementioned matter refers.

You will re-call that the abovementioned client has been on interdiction without pay since March 1994 yet the case against her has not been proceeded with since.

Kindly let us have this matter finalised so that client may know her fate soonest. You will no doubt agree that it is most unfair that client has been on interdiction for more than a year and as you know she cannot seek employment elsewhere.

Yours faithfully,

S. PHAFANE CHAMBERS."

On the 16th August, 1995 the first respondent served upon her a notice of hearing of her trial on the 4th September, 1995. On that day she attended Court only to be interviewed by the Registrar, and to be informed that the date of hearing will then be on the 27th November, 1995.

On the 27th November, 1995 the trial date was postponed to the 6th February, 1996, on which date all parties did not attend Court due to a misunderstanding of the trial date.

When the Court resumed on the 7th February, 1996 the case was remanded to the 30th September, 1996 for hearing. On the 30th September, 1996 the applicant appeared, but counsel for the Crown did not appear, and no reasons were furnished for failing

to appear.

The case was remanded to the 2nd December, 1996 for hearing. Again the trial did not proceed. Her Counsel then requested that the matter be set down for hearing on the 24th March, 1997, and that it should proceed or be withdrawn. On that day the trial did not proceed because the Judges of the High Court had to attend a Commonwealth Judicial Colloquium. The applicant and her counsel attended court.

The reasons advanced by the applicant clearly put the blame of the respondents who seem to be uninterested in the matter. They have not filed any opposing affidavit to refute the allegations by the applicant. Even at the present moment the respondents have not set down this matter for hearing. It was their duty to get a new date after the 24th March, 1997 when the absence of the Judges made it impossible for the case to proceed. They did not do anything until the 15th April, 1997 when the applicant instituted the present application. Why did they not approach the Registrar immediately after the 24th March to get a new date? The reason is that they seem to have lost interest in the matter.

I have already dealt with the second factor and undoubtedly the respondents have failed to advance any reasons for the delay.

Regarding the third factor the applicant has asserted her

rights on several occasions but in vain. The letter marked Annexure "ML8" dated the 25th May, 1995 which is reproduced above is a clear assertion of her constitutional rights.

On the 2nd December, 1996 when the case was postponed to the 24th March, 1997, the applicant's counsel specifically requested that the case should proceed on that day or be withdrawn. It seems to me that to some extent that was an informal application in terms of section 278 (1) of the Criminal Procedure and Evidence Act 1981 that the case be disposed of or be dismissed. It is interesting to note that since the 24th March the respondents have not done anything to show that they still have interest in the case. They ought to have approached the Registrar to find a new date of hearing.

The fourth and last factor to be taken into account by the Court is that of the prejudice to the accused. In her founding affidavit the applicant alleges that one of the reasons why she became prejudiced in the process was that she had to leave per previous counsel for an alternative one because the fees she had to pay were rising, and being paid, rightly so, for court appearances that yielded no trial notwithstanding the postponements were not her fault or of her counsel. She engaged an alternative counsel who was long ready to proceed with the trial, and she kept on paying him again for appearances that yield no trial.

She alleges that up to now neither her counsel nor herself

are aware of the actual cause of delay. She says that she can only attribute it to nothing but a deliberate attempt by the government to frustrate her more than what they have done.

If I may be allowed to digress at this juncture, I must point out that in his work the first respondent is independent and does not get orders from anybody including the government and the second respondent. It is therefore not correct that it is the government that wants to frustrate the applicant. Her trial is entirely in the hand of the first respondent. The applicant alleges that the delay in the convening of her trial has in fact impaired her ability to put up her defence adequately at the trial because the witnesses that she intended would testify on her behalf that she did not commit the alleged offences are no longer available and she will not know where to find them; more particularly some members of Messrs D.S. Textiles who she is alleged to have assisted to deal with goods contrary to the provisions of the Customs and Excise for whom she is alleged to have forged a permit, are no longer available and she will not know where to find them.

The non availability of witnesses caused by the inordinate delay of a trial is a very serious prejudice to the applicant because her defence will be impaired. It has not been denied that the said witnesses are no longer available. It means that the applicant has proved actual prejudice she will suffer if her trial goes ahead without those witnesses.

One of the rights which a speedy trial was designed to protect is to minimise anxiety and concern of the accused. In the present case the applicant is an Advocate of this Court. She alleges that the continued delay does not only cause her anxiety and anguish, added to this is the stigmatisation and ostracism that she has been made to suffer all this time from among her colleagues in the legal profession, the civil service and the society at large.

The applicant alleges that she has three minor children who are dependent solely on her for support and finance for their education. Her husband suffers a somewhat permanent mental illness and is not at all employed. Therefore he also depends on her support. She has no other source of income other than her salary. To be interdicted with only half pay, while her trial has failed to take off for almost three years has also had drastic financial consequences for her. She alleges that all what has happened has been gross violation of her constitutional rights to earn a deserved salary, and above all, a right to a speedy trial and fair trial.

The case of the applicant is not an isolated case. There are other cases in which civil servants have been on interdiction on either no pay or half pay for unreasonably long periods while awaiting trial. The case of Rex v. Mahanye and others CRI/T/28/93 is a typical example of how civil servants are made to suffer for long periods without pay, while at the same time they are prohibited from looking for an alternative job. Is our

criminal justice system not violating peoples' constitutional rights in terms of section 12 of the Constitution. In Mahanye's case the accused have been on interdiction without pay for more than ten years. It is clear that our system of interdiction without pay is fraught with injustice and is used as a punishment before a person is actually convicted by a court of competent jurisdiction. Interdiction is intended for use for only a short and reasonable time. But nowadays it is used as an indeterminate sentence. It is high time that people challenged this unlawful and indeterminate punishment in the courts of law.

It was argued on behalf of the respondents that the applicant has come to the wrong forum/court. She ought to have brought a criminal application in a criminal court. There is no substance in this argument because section 22 of the Constitution refers to an application and not a criminal application. It seems to me that there is nothing wrong with the present application. **Sanderson v. Attorney-General - Eastern Cape,** (1997)1 All S.A. 242 and **Moeketsi v. Attorney-General, Bophuthatswana and another** (1966) 3 All S.A. 184 were civil applications brought in the High Court of the Republic of South Africa. The two cases dealt with constitutional provisions similar to our sections 12 and 22 of the Constitution.

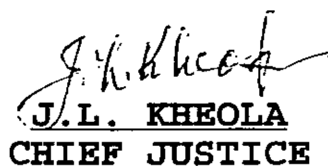
In his book "Constitutional Law of Canada" Hog says at p. 49.9 regarding prejudice to accused:

> "Prejudice to the accused is the last of the four factors that are taken into account in

assessing the reasonableness of the period between charge and trial. If the accused is awaiting trial in custody, or under restrictive bail conditions, there is an ongoing deprivation of liberty which ought to be reflected in a period of reasonableness that is at the short end of the spectrum. If delay might lead to the impairment of defence evidence, for example the death or incapacity of a very old or sick defence witness, the period of reasonableness should be short to preclude the prejudice to the fairness of the trial. Where these sources of actual prejudice are absent, there is still the anxiety presumed to be experienced by a person awaiting trial. In **R v. Askov** (1990), 2 S.C.R.. 1199 Cory J. spoke of the "exquisite agony of a person awaiting trial, and said there was a "presumption of prejudice to the accused resulting from the passage of time"; in the case of long delay the presumption would be "virtually irrebuttable:. This passage made clear that it was unnecessary for the accused to show actual prejudice in order to obtain a stay of the proceedings under s. 11(b). This ruling was another element in the decision that made inevitable the wholesale staying of proceedings that in fact followed the decision in **Askov**.

The **Askov** presumption of prejudice may be undergoing reconsideration by the Court. In the later case of **R. v. Morin** (1992), 1 S.C.R. 771 Sopinka J. for the majority made the points that "in many cases an accused person is not interested in a speedy trial and delay works to the advantage of the accused". He implied that delay by itself might not support the inference of sufficient prejudice to justify a stay of proceedings. And McLachlin J., in a concurring opinion, said that "the accused may have to call evidence if he or she is to displace the strong public interest in bringing those charged with an offence to trial". Lamer C.J. interpreted the opinions of Sopinka and McLachlin JJ. as casting a burden of proving prejudice on the accused, which was a "fundamental change" from the position taken in **Askov.** He dissented on the basis that the Court should not depart from its recent ruling in **Askov**. Only future decisions will tell whether the Court has in fact abandoned the "presumption of prejudice" that was established in **Askov**.

In the result the application is granted in terms of payers (b) and (c) of the Notice of Motion.



J.L. KHEOLA
CHIEF JUSTICE

17th October, 1997.

For Applicant - Mr Phoofolo
For Respondents - Mr. Mapetla.