

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**LEPOLESA KHOTŠENG**

**Applicant**

**and**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**   **Respondent**

**JUDGMENT**

**Coram:**                                      **Hon. Hlajoane J**

**Date Hearing:**                               **24<sup>th</sup> April, 2012.**

**Date of Judgment:**                       **8<sup>th</sup> May, 2012.**

*Summary*

*Bail Application - Matter being opposed – Opposition to be substantiated – Principles governing the granting of bail – Likelihood of Applicant not standing trial – Bail refused.*

**Annotations:**

### **Cited Cases:**

1. 1997 – 98 LLR &LB 38 at 39 Molapo v DPP
2. CRI/APN/84/88 (unreported) Khoali and Another v Director of Public Prosecutions
3. 1974 – 75 LLR 272 at 274 Moletsane v R
4. CRI/APN/151/86 (unreported) Moholisa and Another v DPP

### **Books:**

- [1] This is an opposed Application for bail wherein the applicant is facing three charges of murder and two of Arson.
- [2] Bail is being opposed on the ground that Applicant fled the country to South Africa immediately after the commission of the offence. Also that the Applicant is facing serious charges which might attract severe sentence. Again that there is a likelihood of Applicant interfering with the crown witnesses.
- [3] The Respondent lead the evidence of the investigating officer in an effort of trying to substantiate his opposition.
- [4] The evidence of the investigating officer was that because they have an eye witness who positively indentified the applicant they feel that they have a very strong case against the applicant.

- [5] Also that because he had tried to arrest the applicant immediately after the information of his identity but could not find him there is fear of applicant absconding as he did in fact flee to South Africa after the commission of offence.
- [6] He further showed that he had left messages at applicant's place to his relatives and the chief to tell applicant to report but applicant never reported to him.
- [7] It came out under cross examination that the investigating officer could not say for certain if such messages were in fact delivered to the applicant. He was not even aware as to when the applicant had left for South Africa in relation to the incident. He was also not aware as to how long the applicant had been home before his arrest.
- [8] The evidence further showed that the applicant was arrested at his home during the day time. He made no attempts to flee but left with the police after they had identified themselves to him.
- [9] The investigating officer had not mentioned in his evidence that the applicant had interfered with crown witnesses. It only came out under cross examination when the investigating officer was

told that applicant has not interfered with witnesses, that was when it was shown he had been threatening to kill a star witness. That was not even mentioned in his affidavit hence why applicant's counsel suggested that it be taken as an after thought.

[10] In motivating his application for bail, the applicant has shown that he had been at home even after the incident. That he even attended the funeral of the deceased persons. He said he only left home for South Africa in search of some piece jobs.

[11] Applicant further showed that he has always been coming home for weekends and holidays. He said he was not aware that the police had been looking for him. That was confirmed by the fact that he was arrested at his home during the day time and not at night. He said he had not been hiding.

[12] As correctly argued by the applicant, the presumption of innocence with ordinarily operate in favour of an applicant for bail even where there is a strong *prima facie* case against him, provided his release on bail will not defeat the proper administration of justice see **Molapo v DPP**<sup>1</sup>.

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<sup>1</sup> 1997 – 98 LLR &LB 38 at 39

[13] In *casu*, bail is being opposed mainly because there is fear that the applicant might flee to South Africa as he did immediately after the commission of offence only to be arrested at his home after five months of the incidences.

[14] In explaining his position the applicant showed that he had not even been aware that the police were searching for him. He had not fled to South Africa but had gone to South in search of employment and that he had been engaged in some piece jobs.

[15] It has not been clear from the explanation by the applicant, whether he had always been going to South Africa all along or that happened to be the situation after the incidences.

[16] This case is distinguishable from the case of **Khoali and Another v Director of Public Prosecutions**<sup>2</sup> in which the Court observed that the 2<sup>nd</sup> applicant had explained the reason why he was not in his village when, following his disappearance from the village, the deceased was found dead in his arable land.

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<sup>2</sup> CRI/APN/84/88 (unreported)

[17] The 2<sup>nd</sup> applicant in Khoali above, had always been a hawker who would be going from place to place selling some goods. So that it was not surprising when he was found at a place away from home on his arrest.

[18] With the present application we have not been told that he had always been going to South Africa for piece jobs even prior to the incidences in question. So that if that had always been the position, it would not have been a problem. But because the seeking of employment in the Republic of South Africa only came immediately after the killings and arson, it became questionable.

[19] But as was said in **Moletsane v R**<sup>3</sup> and cases therein cited thus:  
“As I have said the Court relies upon the police and counsel for the crown not to make statements without a full sense of responsibility.”

[20] There is fear that if applicant is released on bail he may not attend trial but flee to South Africa. The fear is based on the fact that it has not been possible to arrest applicant after the happening of events because he could not be found at home. He was only arrested after five months. How convenient was the timing for going for piece jobs!

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<sup>3</sup> 1974 – 75 LLR 272 at 274

[21] In his affidavit the applicant has deposed to the fact that if released on bail he would still want to go across to South Africa and seek for a job. That alone instills fear of him not coming back home any time soon.

[22] Stringent conditions may be imposed but if one is determined to abscond, nothing would stop him from doing that. The circumstances leading to his arrest instills fear of applicant absconding and not standing his trial.

[23] In argument respondent's counsel showed that he had not attached the supporting affidavit of the person whom he alleges was an eye witness as he only found the witness after the pleadings were closed.

[24] But above all the main consideration in bail applications is whether the accused will stand trial, not so much whether at the end of the trial he will be convicted, **Moholisa and Another v DPP**<sup>4</sup>.

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<sup>4</sup> CRI/APN/151/86 (unreported)

[25] The Applicant did not deny that he left for South Africa after the happening of the events and also that he still intends to go back for reasons of seeking for employment.

[26] The circumstances of this case points to accused's likelihood of not standing trial if released on bail.

[27] The Application for bail is thus refused but if there is any inordinate delay in the commencement of the trial occasioned at the instance of the crown, the Applicant may renew his Application.

**A. M. HLAJOANE**  
**JUDGE**

For Applicant: Mr Phafane KC

For Respondent: Mr Tsoeunyane