IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/0082/2020**

In the Matter Between:-

SELEMO CHAKA **APPLICANT**

AND

THE LEARNED MAGISTRATE **1ST RESPONDENT**

THE CLERK OF COURT **2ND RESPONDENT**

THE DIRECTOR OF PUBLIC PROSECUTIONS **3RD RESPONDENT**

JUDGMENT

CORAM **: MOKHESI J**

DATE OF HEARING **:12TH MARCH 2020**

DATE OF JUDGMENT **:4TH JUNE 2020**

Summary:

Constitutional law- *Human rights- Right to a fair trial- delay in prosecuting the accused-Withholding witness statements from the accused- Applicant's application based on these grounds- Applicable principles re-stated and applied- The timing of lodging an application for permanent stay of prosecution-Applicant launching the application after he had pleaded and the trial at the discharge stage- Even though it is desirable to launch the application prior to plea, where the accused was unrepresented when the trial commenced, it should not be held against him that he delayed to apply for a permanent stay of prosecution- In terms of s.22(2) of the Constitution where breach of a right is found, the court may issue directives, make orders and issue processes it may consider appropriate for purposes of enforcing right, however, in casu that route not necessary as the defence counsel has successfully applied for recall of State witnesses- Application accordingly dismissed.*

Annotations:

STATUTE:

Constitution of Lesotho 1993

Speedy Courts Trials Act No. 9 of 2002

CASES:

Director of Public Prosecutions and Another v Lebona LAC(1995 99)474

Ketisi v Director of Public Prosecutions LAC (2005 – 2006) 503

Sanderson v Attorney-General; Eastern Cape 1998 (2) SA 38

Lepoqo Seoehla Molapo v DPP 1997 – 98 LLR – LB 384

Ketisi v Director of Public Prosecutions LAC (2005 – 2006) 502

Wild and Another v Hoffert NO and Others 1998 (3) SA 695 (CC)

Mokhesi J

[1] Introduction

This is an application for stay of prosecution in CR/T/BB/294/18. The applicant has listed several incidents under a rubric "abuse of court process" as evincing that his application is merited. These grounds are summarized in his heads of argument, and for their appreciation I wish to reproduce them *verbatim*:

> "(i) Applicant says his right to bail was unjustly withheld from him on his first remand (see paragraph 4.1 of the founding Affidavit)
>
> (ii) Applicant says the order releasing the 'purported sheep' to the complaint for safekeeping was irregular in as much as the purported sheep were not before court at that time or any time after. (See paragraph 4.2 of Applicant's founding affidavit and see page 19 of the paginated record of proceedings}
>
> (iii) Applicant says though he was subsequently granted bail, he however never enjoyed his freedom as he was given reason provided by the presiding officer whereas, on the contrary the Crown Counsel showed no objection to him being released on bail (see paragraph of Applicant's founding affidavit)
>
> (iv) Applicant says that his prolonged stay was a deliberate one in that, his trial was set down for hearing 9 months later, the refusal to release him from prison in terms of the Speedy Court Act and subsequent refusal of releasing him from prison upon him satisfying of the bail conditions. (see paragraph 6 of the founding affidavit)

(v) Applicant further says that failure of justice depicted itself more when he was denied the opportunity to have access to the crown witness statements as well as the trial proceeding in the absence of the alleged stolen sheep (see paragraph 7 of the founding affidavit)

(vi) Applicant furthermore says that even after he sought legal assistance the unfairness he had been receiving never ceased as his lawyer was not given any hearing in his application for discharge which was relevant at that stage of the proceedings. Even the application for variation of his bail was unjustly and maliciously turned down by the learned presiding officer. (See paragraph 8 of the founding affidavit).

(vii) It is Applicant's case that the evidence led on behalf of the Crown does not in any way tend to proof the charge placed before court in that, the LMPS 12 was not filed by the investigating officer and the charge shows one Thabo Kose as the complainant and possessor of the stolen sheep prior to theft when the evidence proves that the sheep were in the kraal of one Motlatsi Mafereka. (See paragraph 9 of Applicant's founding affidavit)

(viii) All in all, it is Applicant's case that the above procedural flaws and irregularities as well as abuse of process together lead to an abuse of his right to a fair trial and renders the continuance of his trial intolerable and unjust due to oppression and prejudice he has already encountered thus far."

[2] I quoted *verbatim*, the applicant's summary of the grounds of his application for stay to highlight the inelegant way they have been articulated. My guess is that counsel for the applicant did not appreciate the nature of the application he launched and therefore,

the grounds which should render it successful. I revert to these issues in due course,

[3] Factual background

The applicant was charged before the Senior Resident of Botha Bothe on the charge of stock theft. I must, however, pause at this stage to record that there is a serious countrywide scourge of this crime. It is much a serious crime which quite often brings in its wake economic and social hardships. The applicant was duly charged with a crime of stock theft on the 19th December 2018. On that date, as the record reveals, he was only advised of his legal right to legal representation. He was remanded in custody on the 3rd January 2019 whereupon he was advised of his legal right to bail. He applied for bail and was granted same. His release on bail was conditional on, among others, upon him paying a bail cash deposit in the amount of M1000.00 and "to find a surety of M5000.00 in cash," and the trial was accordingly set down to be heard on the 18th September 2019. No reasons were proferred by learned Magistrate why the trial date was set that far (eight months away). On the next remand date being the 13th February 2019, the applicant applied to be released in terms of the **Speedy Courts Trials Act No. 9 of 2002**. His application was unsuccessful, and in her reasons (shortly stated) Magistrate Mothetho says "…. the court looking at the nature of the conditions stipulated in his bail,

considers that even if it were to release him under SCTA [**Speedy Court Trials Act**], the surety should still be there (not cash). He is accordingly advised to secure surety which will only be executed in the event that he absconds." It is difficult to follow the Magistrate's reasoning for refusal to release the accused in terms of **SCTA**.

[4] It is common cause that on the 21st February 2019, the accused's father presented himself before the Magistrate to stand as surety for the applicant, however, his attempts came to naught as the court rejected him on the following reasoning :

> "[o]n the 21/9/2019 Ntate Thabo Chaka, the accused's father [before] [court] wishing to stand surety. However, it seems that he does not have sufficient property to satisfy the surety… In the circumstances, he cannot stand surety."

As to what the Magistrate meant above is not by any means clear to this court. All this time the applicant remained in custody as the surety condition could not be satisfied. He was remanded in custody until the 18th September 2019 when the trial proceeded as scheduled. The trial proceeded until it was adjourned to the 10th October 2019 where it proceeded unhindered. On that day the matter was adjourned further to 24th October to give the prosecutor a chance to subpoena witnesses, with the hearing date set for the 07th January 2020. On that date the matter proceeded,

and the prosecution closed its case, whereupon the presiding Magistrate there and then made a ruling that there was a *prima facie* case for the accused to answer, and accordingly advised the applicant of his rights applicable at that stage.

[5] Thereafter, the record reveals rather startlingly, that the learned Magistrate postponed the matter "to 21/01/2020 for closing addresses". The minutes that followed revealed that the learned Magistrate had rushed to closing addresses when the applicant had not indicated whether he would testify on his behalf or not. The matter was postponed to 06 February 2020 for hearing to give the applicant " …. a chance to make his informed decision".

[6] On the 04th February 2020 the applicant who had hitherto conducted his own defence appeared with Mr. Lenkoane who intimated to the Magistrate that he had just been engaged by the applicant as his defence counsel. On the 06th February 2020 When the matter was supposed to proceed as scheduled, Mr. Lenkoane appeared before the Magistrate and applied for the discharge of the accused even though the Magistrate was *fuctus officio* on the issue. However, be that as it may, the court ruled that the ruling had already been made that there was a *prima facie* case against the applicant. Faced with the refusal of the application, for discharge, Mr. Lenkoane applied that all Crown witnesses who had

already testified be recalled for cross-examination, and this, in terms of the record appears to have been acceded to. Two of the witnesses were in court on that day. The matter was further postponed to the 02nd April 2020 for hearing. It is during this period that Mr. Lenkoane launched this application seeking a permanent stay of prosecution, alternatively an order that the matter start *de novo* before a different magistrate, for reasons outlined above.

[7] The facts stated above are common cause as between the parties. When both counsel appeared before me on the 12th March 2020, Mr. Tsoeunyane raised a preliminary point of law which he termed *jurisdictional*. In respect of this point, Mr. Tsoeunyane argued that this court does not have jurisdiction to hear this application as the applicant is seeking to stay prosecution of an ongoing case. The case was at an advanced stage and therefore, this court cannot interfere with it by staying the applicant's prosecution.

[8] It needs to be recalled that when the trial first started until the discharge stage, the applicant was unrepresented, Mr. Lenkoane only came into the mix after the court had ruled that there was a *prima facie* case against the applicant. Although it is desirable that the accused should apply to this court to have his

prosecution permanently stayed before he pleads, where his challenge is based on his right to a fair trial, and where he is unrepresented, his failure to apply timeously and after he will have pleaded should not be held against him. In the manner of things, a door should not be slammed shut on his face to block him from vindicating his right to a fair trial. These views were expressed in ***Ketisi v Director of Public Prosecutions LAC (2005 – 2006) 502 at 509 J – 510*** *C*, where Smallberger JA (as he then was) said:

> "[11] Where an accused claims that his constitutional right to speedy trial has been infringed the appropriate course to adopt (as was done in the *Lebona*, *Sanderson* and *Wild* cases) would be to apply to the High Court before plea for a stay of prosecution. This will enable the question of whether there has been an unreasonable delay to be fully ventilated thus enabling the court concerned to make an informed decision with regard to the matter including, if there is found to have been an unreasonable delay, what the appropriate remedy would be. But in a country such as Lesotho (as is the case in South Africa see *Sanderson's* case at 40 H) where the vast majority of accused are unrepresented, or only acquire representation at a very late stage (in the present instance on the day the trial commenced), a failure to apply for a stay of prosecution in advance of plea would not necessarily defeat an accused's right to raise the question of the infringement of his right to a speedy trial after plea (as happened in the present instance)."

[9] In the light of these views, it follows that the preliminary point of jurisdiction fails. I turn to consider whether a case has been made out for a permanent stay of prosecution. I wish only to confine myself to the admitted allegations that the accused was denied access to witness statements, and the issue of 9 months delay in prosecuting the applicant.

In terms of section 12 (2) of the **Constitution**

> "(2) Every person who is charged with a criminal offence –
>
> a) Shall be presumed innocent until he is proved or has pleaded guilty;
>
> b) Shall be informed as soon as reasonably practicable, in a language that he understands and in adequate detail, of the nature of the offence charged;
>
> c) Shall be given adequate time and facilities for preparation of his defence;….."

[10]The applicant's case is premised on the right to a fair trial. It is apposite at this point to consider the nature of the relief sought. The application for permanent stay of prosecution is a drastic remedy and "more dramatic and far-reaching…." *(**Wild and Another v Hoffert NO and Others 1998 (3) SA 695 at 702 at***

para. [11]*.* This remedy is far-reaching and dramatic because it flies in the face of the society's interest to see people who are alleged to have commited serious crimes being prosecuted for their misdeeds *(**Director of Public Prosecutions and Another v Lebona LAC (1995 – 1999) 474 at A 96 A – D**).* This remedy is rarely be granted by the courts in the absence of prejudice to the accused; it will only be granted when a compelling case demonstrating prejudice to the accused has been made out *(**Zanner v Director of Prosecutions, Johannesburg 2006 (2) SACR 45 (SCA**)).*

[11] The right of the accused to be given witness statements in preparation of a trial was given judicially imprimatur in the famous decision of ***Lepoqo Seoehla Molapo v DPP 1997 – 98 LLR – LB 384*** at 399, where Ramodibedi J (as he then was) said:

> "1. The 'blanket docket privilege as stated in R v Steyn 1954 (1) S.A 324 is inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure is justified for purposes of enabling the accused to exercise his or her right to a fair trial in terms of section 12(1) of the Constitution."

It should be expected of Magistrates and Prosecutors to be aware of this decision at this day and age.

[12]It goes without saying that withholding witness statement from the accused engendered trial–related prejudice on the accused as he became aware of what the witnesses were going to say about him, during trial, and this is in breach of the applicant's right to a fair trial in terms of s.12(1) of the Constitution, as he was literally ambushed.

[13]The question then remains, whether in view of the fact that the applicant's right to a fair trial has been breached, the remedy should be one of the permanent stay of prosecution. The answer to this question is to be found in the provisions of section 22 (2) of the Constitution. This section gives a direction on how a right to a fair trial is to be enforced. It provides that where a challenge to breaches rights provided for in sections 4 to 21 is successful, the court "..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 such rights. (emphasis added)

[14]*Appropriateness* of remedy for purposes of enforcing a right so breached as appear in section 22(2) above "… require 'suitability', which is measured by the extent to which a particular

form of relief vindicates the Constitution and acts as a deterrent against further violations of rights…" ***(Sanderson v Attorney-General; Eastern Cape 1998 (2) SA 38 at 58 F**).*

[15] It will be recalled that on the 06th February 2020, when Mr. Lenkoane, for the accused (who is also the applicant's counsel in this matter), appeared before the learned Magistrate he applied to have all the state witnesses who had already testified to be recalled for cross-examination by him, and this request was duly granted by the court. The matter was then postponed to the 02nd April 2020 for hearing. In my view the fact that the Magistrate had agreed to postpone the matter to allow for subpoena of State witnesses to be cross-examined by the defence counsel, is significant. Now that a legal representative is engaged, he will exercise his right to demand witness statements before the witnesses take the stand to be cross-examined. The remedy this court would have found appropriate would have been to order recalling of witnesses, and a directive to the prosecution to provide witness statements in time to allow defence counsel to study in preparation of cross-examination, however, that route is unnecessary as the accused is now represented and his counsel is on top of the situation, if one were to put it, judging by his successful request to have witnesses recalled for cross-examination.

[16]Delay of 9 months before commencement of trial.

One of the incidences of a right to a fair trial is for the accused to "…be afforded a fair hearing within a reasonable time by an independent and impartial court established by law (section 12 (2)). The right to be given a hearing within a reasonable time is not being vindicated for the first time in this jurisdiction: See; ***Director of Public Prosecutions and Another v Lebona LAC (1995 99) 474; Ketisi v Director of Public Prosecutions LAC (2005 – 2006)*** 503). What these two decisions highlight is that unreasonable delay leads to injustice, as ".... witnesses' memories fade, or they die and evidence is irretrievably lost. The guilty go free because of the inability of the system to operate efficiently. The citizens lose confidence in the capacity of the state to protect them from crime." **(*Lebona*** ibid p.506g)

[17]There are three factors which the court must address when faced with an application for permanent stay of prosecution on the basis of unreasonableness of delay to prosecute, *viz*, (1) prejudice to an accused person as a result of unreasonable delay, (2) the nature, gravity and complexity of the case, (3) so-called systemic delay which would include resource–limitations on the part of the police to carry out effective investigations or prosecution of the case or court congestion ***(Sanderson*** above from paras. 31 – 35***)***.

[18] On the issue of prejudice, in ***Ketisi*** at p.508, it was said that the protection offered by section 12(1) of the Constitution goes beyond trial–related interests, as it extents to individual liberty and personal security (or social) interest as well. The accused's attitude towards delays and the role he played in prolonging pre-trial period is one of the considerations. In *casu*, the accused complains bitterly that he was detained nine months before his trial could begin. It should be noted that he is complaining about delay-related prejudice not having any bearing on the trial itself. He is complaining about his continued incarceration as a result of stringent bail conditions imposed by the court *a quo*. Prejudice such as the one the applicant is complaining about does not play any major role when the court determines a case of this nature, in the absence of trial-related prejudice, thus in ***Sanderson*** (above at para. 39), the court said:

> "[39] Ordinarily, and particularly where prejudice alleged is not trial-related, there is a range of 'appropriate' remedies less radical than baring the prosecution …. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay."

[19]A case which the applicant is facing in the court *a quo* is a serious one. Theft of stock in this country is a serious issue, people are killed by stock thieves and families are left destitute in the wake of this crime. The prevalence of this crime in every community in the kingdom is a major concern to all and sundry. Individuals who are facing stock theft charges should not be dealt lightly by the court such as by barring their prosecution on the basis of delay-related prejudice, as in this case. I am by no means debasing the importance of delay-related prejudice to the inquiry whether prosecution should be permanently stayed. In the present case the applicant is being kept in detention because he could not satisfy the surety condition of his bail. Although it is not clear from the record why the case was set down for hearing nine months away, to my mind the delay was not inordinately long. Having said that the delay was not inordinately long this court is by no means giving an imprimatur to magistrates and prosecutors to shirk their constitutional responsibility of protecting the accused's right to a speedy trial. Quoting with approval ***Wild and Another v Hoffert NO and Others 1998 (3) SA 695 (CC),*** the court in ***Ketisi (above) at para. 20*** said:

> "[20] (a) The Constitution demonstrably ranks the right to a speedy trial in the forefront of the requirements for a fair criminal trial. That means that the [crown] is at all times and in all cases obliged to ensure that accused persons are not exposed to unreasonable delay in the prosecution of the cases against them. That, in turn, means that both [crown] prosecutors and presiding officers must be mindful that they

> are constitutionally bound to prevent infringement of the right to a speedy trial. Where such infringement does occur, or where it appears imminent, there is a duly under section [22 (1)] of the Constitution to devise and implement an appropriate remedy or combination of remedies. What such remedy or remedies ought to be must obviously be left to be determined in the circumstances of each particular case. (***Wild's*** case at 702 H – 703 C)"

In this case, no explanation on the record, is given why the matter was set for hearing 9 months away, and this is to be deplored. There might have been a valid reason for such a long delay, but without same being recorded, this court is in no position to gauge it. Magistrates and prosecutors are directed to adhere to the constitutional injunctions against delaying accused's trials, as in appropriate cases merit a bar from prosecution.

[20]In the result the application is dismissed. There is no order as to costs.

MOKHESI J

FOR THE APPLICANT: MR. LENKOANE

FOR THE CROWN : MR. TŚOEUNYANE