

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/425/2020

In the matter between:

MOTHEJOA METSING

1ST APPLICANT

SELIBE MOCHOBOROANE

2ND APPLICANT

And

**THE DIRECTOR OF PUBLIC
PROSECUTIONS**

1ST RESPONDENT

**THE ATTORNEY GENERAL
KENNEDY KAMOLI
LITEKANYO NYANAKE
MOTLOHELOA NTSANE
LEUTSOA MOTSIELOA**

**2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT**

Neutral citation: Metsing and Another v. The Attorney General And Others
[2021] LSHC Civ 38 (8 February 2021)

CORAM:

S.P. SAKOANE CJ.

HEARD:

25 NOVEMBER & 8 DECEMBER 2021

DELIVERED:

9 FEBRUARY 2021

SUMMARY

Criminal procedure – joinder of accused in a pending trial – accused resisting joinder on basis that it is not in compliance with the procedure of committal for trial after holding of preparatory examination – decision to indict summarily challenged – whether the challenge can be brought before a non-trial judge – Constitution 1993, sections 12 (1) and 2 (c); Criminal Procedure and Evidence Act, 1981, sections 99, 119, 140, 144 and 160.

ANNOTATIONS:

CASES CITED:

LESOTHO

Jurgen Fath And Another v. Minister of Justice And Another LAC (2005-2006) 436

Lesupi And Another v. Director of Public Prosecutions & Another LAC (2007-2008) 403

Mda And Another v. Director of Public Prosecutions & Another (CRI/T/150/04) [2005] LSHC 72 (18 April 2005)

Millenium Travel And Tours And Others v. Director of Public Prosecutions LAC (2007-2008) 27

Ntaote v. Director of Public Prosecutions LAC (2007-2008) 414

Rex v. Mahao Matete 1979 (2) LLR 304 (H.C.)

Rex v. Rampine & Another 1979 (2) LLR 377 (H.C.)

ENGLAND

Barrow v. Bankside Agency Ltd [1996]1 W.L.R. 257 (C.A.)

Charles And Others v. The State [2000]1 W.L.R. 384 (P.C.)

STATUTES:

Constitution of Lesotho, 1993

JUDGMENT

1. INTRODUCTION

[1] The two applicants are leaders of two political parties which are represented in the National Assembly. The first applicant leads the Lesotho Congress for Democracy (LCD) and the second applicant leads the Movement of Economic Change (MEC). They are challenging the decision of the Director of Public Prosecutions (hereinafter referred to as Director) to join them in an indictment in which the 3rd, 4th, 5th and 6th respondents are facing charges of treason, murder and attempted murder in the main and other charges in the alternative.

[2] The 3rd – 6th respondents were indicted summarily in **CRI/T/0001/2018**. These respondents are standing trial before *Tshosa* AJ. On 19 February 2020, the Director lodged another indictment in which the applicants are joined as co-accused numbers 5 and 6 respectively. It is significant to point out that the February 2020 indictment amends the one filed in 2018 against the 3rd – 6th respondents.

Relief

[3] The applicants are before me to challenge the decision of the Director to indict them summarily and to join them in the pending trial before *Tshosa AJ*. They seek the following relief:

“ -1-

That the ordinary rules of this honourable court relating to notice and service of process be dispensed with on account of urgency hereof.

-2-

That a rule nisi issue and is hereby issued returnable on the date and time to be determined by this honorable court calling upon the respondents to show cause, if any, why the following orders shall not be made absolute:-

- a) That the decision of the first respondent to indict the applicants for summary trial in CRI/T/0001/2018 in the High Court shall not be declared to be contrary to Section 99(2) of the **Criminal Procedure and Evidence Act 1981**; and
- b) The decision of the first respondent to indict the applicants for summary trial in the High Court in CRI/T/0001/2018 in terms of Section 144 of the Criminal Procedure and Evidence Act shall not be reviewed and set aside.
- c) The decision of the first respondent to indict the applicants in the High Court for summary trial in CRI/T/0001/2018 shall not be stayed pending the outcome of this review application.
- d) First and second respondents shall not pay costs of this application, the other respondents only in the event of opposition.

-3-

That prayers 1 and 2(c) operate with immediate effect pending the outcome hereof.”

II. MERITS

Applicants' case

[4] The applicants' case is that

- 4.1 The initial indictment in respect of which they were not joined charged the 3rd – 6th respondents with murder. It did not include the treason. That indictment was filed in 2018 and registered as CRI/T/0001/2018.
- 4.2 The amended indictment to which they are joined as accused numbers 5 and 6 was filed on 19 February 2020 and registered as CRI/T/0001/2018. It includes a treason charge.
- 4.3 In February 2020, the applicants learned about the Director’s desire “of introducing new charges and join us as accused members (sic) five and six in CRI/T/0001/2020.”
- 4.4 On 25 February 2020, the amended indictment together with a notice of trial to appear before *Tshosa* AJ. on the same date came to the applicants’ attention. They duly “presented themselves in the company of our Counsel.” Counsel for the applicants and the Director “agreed and the agreement was sanctioned by His Lordship Justice *Tshosa*, that our proposed joinder would await the decision of the Constitutional Court.”

4.5 The referenced decision of the Constitutional Court was in respect of applications for rescission and leave to intervene in a constitutional challenge to Clause 10 of the SADC brokered Memorandum of Understanding (MOU) in terms of which prosecutions against the 1st applicant and other political leaders would be “postponed until the completion of the national reforms processes that are underway in the Kingdom.”

4.6 The Constitutional Court rendered its judgment on 12 November 2020 and refused the applicants’ application for rescission of judgment. The applicants have noted an appeal to the Court of Appeal.

4.7 On 23 November 2020, the applicants “were alerted to social media reports that the police have confirmed that a warrant for our arrest in connection with CRI/T/0001/2018 had been issued.” Counsel then appeared before *Tshosa AJ* “regarding the issue of our possible arrest” and “promised that he would take us to court on 25th of November 2020 even before he would take instructions from us.”

4.8 On 24 November, the applicants filed this application on an urgent basis to stay the Director's "decision to join us as co-accused tomorrow pending the outcome hereof." The reasons thereof were that:

“35.1 The first respondent (the DPP) has insisted on our joinder in this (sic) summary proceedings and the matter is set to be dealt with tomorrow on the 25th of November 2020 at 9 a.m. before Justice *Tshosa*.

35.2 The prosecution had indicated that it is going to ask that we be remanded in custody and would have to apply for bail pending trial. This is a matter of grave injustice to us in as much as we challenge the filing of the indictment against us on the merits on the prosecution this time.

35.3 Our liberty is at stake in circumstances where we in any event as (sic) we intend to apply for a permanent stay of prosecution for the inordinate delay to charge us since 2014, and doing so

when it is politically convenient for the authorities.”

- 4.9 The applicants are compelled to “frontally take objection” to the Director’s decision to indict them in this Court without complying with sections 92 and 144 of the **Criminal Procedure and Evidence Act No.7 of 1981**.

DPP’s defence

[5] The defence put forward by the Director is that:

- 5.1 In 2018 she indicted the 3rd to 6th respondents “for the deaths of Police Inspector *Mokheseng Ramahloko* at Police Headquarters” on 30 August 2014.
- 5.2 While preparing for the trial in CRI/T/0001/2018, she requested the police to obtain additional statements. The additional statements had been obtained and “filed in a treason investigation conducted by the LMPS in relation to events of 29 and 30 August 2014, which docket was later handed to my office by the police.”

- 5.3 On 22 October and 15 November 2019, Crown counsel in CRI/T/0001/18 put it on record that he would seek to amend the indictment by additional accused “which include former senior government officials and politicians.”
- 5.4 On 21 January 2020, the trial court gave the Crown until 20 February 2020 to amend the indictment, the list of its witnesses and have additional accused. The amended indictment was filed in Court on 17 February 2020 and served on the 3rd – 6th respondents. Attempts to serve the applicants and join them in CRI/T/0001/18 were unsuccessful.
- 5.5 The Director admits that after the applicants received the amended indictment and notice of trial on 24 February 2020, they appeared before *Tshosa AJ* the following day (25 February). It was agreed that the joinder of applicants would be stayed until the delivery of judgment in the constitutional challenge to Clause 10. The awaited judgment was made available to the parties on 20 November 2020. The applicants have subsequently filed a notice to appeal the whole judgment.

5.6 On 24 November, the Crown obtained warrants for the arrest of the applicants to secure their presence before *Tshosa AJ*. This would be done by taking them before the Magistrates Court to be committed for trial and to apply for bail. Applicants' counsel objected and undertook to ensure their appearance in Court on 25 November.

III. ANALYSES

[6] The applicants' case rests on three pillars. The first pillar is that the Director's decision to have them joined in a trial pending since 2018 is unlawful for want of compliance with the statutory requirement of first holding a preparatory examination before committal for trial in this Court. The second pillar is a stay of CRI/T/0001/2018 pending the review of the Director's decision to charge the applicants with a political offence which was allegedly committed way back in 2014 against an administration which has long come and gone. The third pillar is that the applicants' joinder in a criminal trial that has been pending serves the Crown's convenience in disregard of the applicants' constitutional rights to trial within a reasonable and adequate time and facilities for preparation of their defences guaranteed by section 12 (1) and (2) (c) of the Constitution.

[7] The three pillars project an array of objections the applicants are entitled to raise before the trial judge. Our courts have deprecated instituting civil collateral proceedings to attack criminal proceedings outside the criminal process. The Court of Appeal has held that the **Criminal Procedure and Evidence Act, 1981** provides sufficient bases to ground any objection or exception to an indictment and to mount an attack on the legality of the Director's exercise of power: **Jurgen Fath And Another v. Minister of Justice And Another** LAC (2005-2006) 436 para [34]-[40]; **Director of Public Prosecutions And Another v. Lesupi And Another** LAC (2007-2008) 403 para [18]; **Ntaote v. Director of Public Prosecutions** LAC (2007-2008) 414 para [9].

[8] A similar attitude was expressed by the Privy Council in **Charles And Others v. The State** [2000]1 W.L.R. 384 at 388 A-B where it said that the common law and criminal procedure are usually sufficient to address a complaint of undue delay of prosecution and to secure the fairness of a trial. All this is so because the trial judge has the power to stay proceedings if he/she feels that to allow them to continue would be unfair. I do not visualize anything different or to the contrary in the laws of the Kingdom: **Millenium Travel And Tours And Others v. Director of Public Prosecutions** LAC (2007-2008) 27; **Ntaote** (supra) para [10].

[9] This Court has held that holding of preparatory examinations in terms of section 92 of the **Criminal Procedure and Evidence Act, 1981** is a pre-requisite for committals and that summary trials in terms of section 144 are an exception which must be justified. An accused person is entitled to challenge the Director's decision to summarily indict: **Rex v. Mahao Matete** 1979 (2) LLR 304 (H.C.); **Rex v. Rampine & Another** 1979 (2) 377 (H.C.); **Mda And Another v. Director of Public Prosecutions & Another** [2005] LSHC 72 (18 April 2005).

[10] The joinder of persons implicated in the same offence is provided for in section 140 of the **Criminal Procedure and Evidence Act, 1981**. However, the section does not expressly address the question of joinder by way of adding names of persons to an indictment in a case which is already pending trial in terms of section 119. The question is, therefore, open and the applicants challenge the power of the Director in this regard.

[11] It is common cause that the applicants brought this application on 24 November – a day before they were, by agreement, to appear before the trial judge. When the applicants' counsel became a party to that agreement, he had not then consulted them in the matter and, thus, had no

instructions. Seemingly, when he met the applicants thereafter, they gave him instructions to launch these proceedings. Well and good.

[12] However, the application should have been brought before the trial judge and not judges who are not seized with CRI/T/0001/2018. *Monapathi J.* is the judge who was on call on 24 November when the application was filed. Counsel went to his home late in the evening to seek the interim relief. I do not find any reason nor imagine why the matter was not placed before the trial judge to consider the interim relief.

[13] When the matter was re-directed to me on 25 November for interim relief, I enquired from both counsel what became of the hearing before *Monapathi J.* They informed me that nothing was done for reasons that they, by mutual consent, I would rather not know. At that point, the file was clean as it did not have notes by *Monapathi J.*

[14] On the return date, the learned judge's notes were stapled on top of the bound record. They read thus:

- “(1) Matter to be postponed.
- (2) Matter pp to 25/11/20.
- (3) Matter to be allocated to another judge.

- (4) Matter since it is opposed to be carried forward after the parties discuss way forward.
- (5) No need to agree about how to plead.”

[15] Had I been availed these notes on 25 November, I would only have heard counsel on why they did not approach *Tshosa AJ* that morning as he expected them in his Court. I have the impression that by agreeing that the matter be re-allocated, counsel were involved in some forum-shopping. I hope my impression is wrong.

[16] As adverted to earlier, all the reliefs that the applicants are seeking are directed at attacking the indictment in a trial that is pending before *Tshosa AJ*. It is plainly in the interest of the administration of justice as well as the interest of the applicants and the Crown that absent any objection that the trial judge does not have jurisdiction, all objections must first be raised and decided by him. This also serves to avoid piecemeal litigation. As we are reminded by the Court of Appeal of England in **Barrow v. Bankside Agency Ltd** [1996]1 W.L.R. 257 at 260:

“The rule in *Henderson v. Henderson* 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based

on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.”

Although expounded in respect of civil proceedings, I am of the view that this dictum is of relevance and equal application in criminal proceedings.

IV. DISPOSITION

[17] The impugned joinder of the applicants in CRI/T/0001/2018 can and should be pursued before the trial judge. It is also proper and convenient for the applicants to raise all manner of objections before the trial judge. It would not be right for me sitting as a non-trial judge to pronounce on one or all of the issues arising or connected to the impugned decisions of the Director in relation to the indictment filed on 17 February 2020 in CRI/T/0001/2018.

[18] The proper thing to do is to refer this application to the trial judge so that the applicants can ventilate their objections in relation to the indictment in respect of which the Director seeks to have them joined.

Order

[20] In the result, the following order is made:

1. The application is referred to the trial judge in CRI/T/0001/2018 for determination.
2. The rule is extended to the next trial date in CRI/T/0001/2018.
3. There is no order as to costs.

S.P. SAKOANE
CHIEF JUSTICE

For the Applicants: M.E. Teele KC

For the Crown: C.J. Lephuthing