

IN THE HIGH COURT OF LESOTHO

HELD IN MASERU

CRI/T/0010/2018

In the matter between:

MOTHIBELI MOFOLO

1ST APPLICANT

MABITILE MATONA

2ND APPLICANT

HALEOKOE TAASOANA

3RD APPLICANT

Vs

DIRECTOR OF PUBLIC PROSECUTION (DPP)

RESPONDENT

Neutral Citation: Mofolo and 2 Others vs DPP (CRI/T/0010/2018) [2021] 73

CORAM:

HUNGWE AJ

DATES OF HEARING:

23/04/21

DATE OF JUDGEMENT:

23/04/21

RULING ON AN APPLICATION FOR POSTPONEMENT

HUNGWE AJ

Introduction

This is an application for a postponement, on the day set for trial, made from the bar on behalf of accused 2, 3 and 4 on account of counsel's absence. The application for a postponement is made on the backdrop of the following facts.

Background to the Application

[1] Initially, seven accused persons were charged with the crime of murder arising out of the death of a police officer. Some of these seven accused have been held in custody since their arrest in 2017. Others have been on bail. What is critical to state at this juncture is that after several orders, directives, postponements and other processes, 1st, 2nd and 7th accused ceased to be part of the group charged in the indictment for murder. The trial of the remaining four accused persons, namely Thabo Ts'ukulu, Mabitle Matona, Mothibeli Mofolo and Haleokoe Taasoana was set to commence on 17 June 2020 through to 18 July 2020. This date was agreed to by all counsel in open court on 23 January 2020.

[2] On 17 June 2020 when the matter was due to commence the recording services were not available and the recording machine dysfunctional. The matter was postponed to 22 June 2020 by consent.

[3] On 20 June 2020 lead Crown counsel, Mr Abrahams was held up from appearing in court due to Covid19-related issues. He was in quarantine. The Crown indicated that it wished to amend the indictment and call additional witnesses. This resulted in counter applications by the defense. The court made an order regarding discovery of the additional witness statements and service of the amended indictment and access by the defense to certain documents at one of the accused's residence.

The matter was postponed to 1 July 2020.

[4] On 1 July 2020 Crown counsel moved for a postponement on account of its failure to interview other Crown witnesses due to Covid19 restrictions at prison. The application was opposed but in the same vein defence counsel intimated that there were certain Crown witness statements which were still to be discovered. Consequently, the court ordered further disclosure and postponed the matter to 6 July 2020 for trial.

[5] On that day the Crown withdrew charges against 2nd Accused, Ts'eliso Mokhosi. The 1st accused, Molahlehi Peter Letsoepa, had never appeared in Court and the Crown indicated that it is unable to prefer charges against him at this stage. Accused 7, Ts'eliso Moerane, like accused 1, had remain unaccounted for. The Crown decided to proceed against the remaining four. Accused 3 became accused 1, accused 4 became accused 2 and so on.

[6] On the same day, Mr *Mohau* for accused (1), Thabo Ts'ukulu was indisposed. Mr *Letuka*, who appeared on his behalf, advised the Court that Mr *Mohau* had been a guest at a large gathering. One of the guests there had tested positive for Covid19. Mr *Mohau* was required to present himself at Queen II Hospital for tests to be carried out. Further, the defense counsel had not consulted with clients over the latest round of witness statements made available on 3 July 2020 following a request for further particulars.

The matter was postponed to 8 July 2020 for trial to start.

[7] On 8 July 2020 while the Crown was ready to proceed, one of the defense counsels, Mr *Mohau* was absent. Mr *Letuka* advised the Court that Mr *Mahau* had gone to collect his results from the medical tests done on him and had not reported back to the office. Mr *Mafaesa*, who appeared on behalf of Mr *Mda* indicated that

he had not been fully briefed by Mr *Mda* and was unable to proceed with his mandate. He will send back the brief to Mr *Mda*.

[8] Mr *Abrahams* for the Crown, complained to the Court that this was nothing more than a delaying tactic being employed to frustrate the commencement of a criminal trial. The victim of the crime allegedly perpetrated by the accused as well as society at large stand to be prejudiced by the failure of the trial to start. As for the discovery of the investigation's diary, Mr *Abrahams* submitted that the defense is not entitled to this as it is privileged information. He urged the court to postpone the matter to the following day for Mr *Mohau* to join the proceedings.

The matter was postponed to the next day of July 2020.

[9] On 9 July 2020, Crown Counsel was fully represented. Only Mr *Letuka* for accused (1), representing Mr *Mohau* was before the Court. There was no word from Mr *Mda*, who now represented accused 2, 3 and 4. Mr *Letuka* sought a postponement of the trial by a week, by which time Mr *Mohua*'s compulsory quarantine would have ended. Accused 2, 3 and 4 indicated that they had no idea where their lawyer, Mr *Mda* was. During the submissions Ms *Mokoatle* made her appearance on behalf of Mr *Mda*. She indicated to Court that Mr *Mda* had been

given days off duty by his medical doctor. She presented to the Court a medical certificate.

The court ordered that Ms *Mokoatle* furnish it with a comprehensive medical certificate on Mr *Mda* and suggested that should Mr *Mda*'s condition persist beyond 31 July 2020 or indefinitely, then his office should consider briefing other Counsel to take over the matter.

The matter was postponed to 13 July 2020.

[10] On 13 July 2020 Ms *Mokoatle* tendered a medical certificate as directed by the Court. She further submitted that Mr *Mda* requests that the matter be postponed to 1 August 2020 as he still wished to act for his clients. Mr *Letuka* for Accused (1) indicated that he will abide the court's ruling. Mr *Abrahams*, for the Crown submitted that it was clear that both Mr *Mohau* and Mr *Mda* did not wish to release their briefs to other Counsel. In that regard the Court ought to respect their wishes in the hope that they will live up to their undertakings to represent the accused.

The matter was postponed to 31 July 2020. On that day, the matter was postponed to 3 August 2020.

[11] On 3 August 2020 the Crown asked the Court to postpone the matter for two reasons; first the Crown had not yet furnished Mr *Mda* with the statements of the

necessary witnesses following the amendment of the indictment; second; the Crown intended to establish whether the investigations diary requested by Mr *Mohau* can be made available. Mr *Mohau* and Mr *Mda* consented to the postponement requested by Ms *Nku* for the Crown.

[12] Before the Court rose, Ms *Nku* rose to place it on record that in fact the DPP's position was that since the ID was a privileged document the defense must make a formal application for its discovery as it is in a class of its own. Mr *Mohau* submitted that this position of the DPP contradicted an order of this Court which had ordered that the defense be furnished with the investigation's diary. Ms *Nku* countered that as far as the record of proceedings went, at no point did the Court ordered the disclosure of the investigation's diary to the defense. What the Court ordered was that the Correctional Services releases the accused who wished to proceed to his residence in order to identify to his Counsel documents for use in the preparation of their defense.

The matter was postponed to 10 August 2020.

[13] On 10 August 2020, Mr *Mohau* insisted that there was an order in his client's favor for the discovery of the investigation's diary. As such he was not going to

make a formal application for its release to the defense. The matter was postponed to 10 September 2020 over the issue of the disclosure of the investigation's diary.

[14] On 10 September 2020 Mr *Mohau* advised the Court that although they were unable to capture what was recorded on 22 July 2020 in respect of the proceedings, they were able to get a compact disc of the record of proceedings which needed to be transcribed. They had submitted it to the Registry for transcribing. The matter was postponed to 18 September 2020 for the record of proceedings of 22 July 2020 to be transcribed.

[15] On 18 September 2020, Mr *Mohau* indicated to Court that the record was now available. According to him page 7 reflected that the Court said the Crown should make the investigation's diary available to the defense. In fact, my comments appear at page 8 of the transcribed record where the following exchange between me and Mr *Lephuthing* appears:

"COURT: So, what do you mean? Is there an investigation's diary or there is none?"

Crown Counsel: (Mr Lephuthing) It should be there my Lord, but I was"

Court: Yes, So, if it is there it should be available. It is as simple as that."

Crown Counsel: It should be there My Lord, but I was just cautioning the Court that this motion of the investigation's diary from the same defense counsel about the investigation's

diary is frustrating. We must be prepared to handle it meaningfully. In the event that there is that investigation diary, the Crown is undertaking to provide it. But we should also register that most of the documents in this docket went missing. That is what I am aware of. It is a fact my Lord that I have been advised of.....”

[16] The actual order of the Court appears on page 12. There is no reference to the investigation’s diary. On that occasion I expressed my disappointment with Mr *Mohau* for twisting issues and make it appear that other Counsel were being unnecessarily uncooperative. The fact of the matter is that on 22 July 2020, Mr *Lephuthing* had undertaken to provide the defense with the investigation’s diary should it be on the docket. It was a conditional undertaking by the Crown. It was not an order of this court.

The matter was postponed to 25 September 2020 when a date for trial will be fixed.

[17] On 25 September 2020 the Crown confirmed that the defense had been given the investigation’s dairy. The parties agreed that the matter be postponed to 9th November 2020 for trial to start.

[18] On 9th November 2020 Crown Counsel, advised the Court that they had agreed not to take any steps that may be viewed as pre-emptive of the issues in a Constitutional application before the Chief Justice. As such this trial was to be held in abeyance till the first week of December 2020.

The matter was postponed to 7 December 2020.

[19] On that day Ms *Nku* advised the Court that they did not intend to proceed to trial yet pending the Constitutional case before the Chief Justice.

The matter was, by consent of all Counsel present (Advocates *Letuka and Mokoatle*) to 5 February 2021.

[20] Due to travel restrictions imposed to combat the Covid19 pandemic in the Kingdom of Lesotho, I was unable to travel back to Maseru on 17 January 2021 as initially scheduled. I was only able to travel at the end of February 2021. I entered Lesotho by road.

[21] On 24 March 2021 the matter was postponed to the next day as defense counsel were all not before the Court. The following day Mr *Letuka* and Mr *Mafaesa* appeared for Mr *Mohau* and Mr *Mda* respectively.

On this day, the defense appeared surprised by the Crown's intention to proceed with trial in spite of the gentlemen's agreement not to do so pending the finalization of the Constitutional application filed by the accused. Further, the defense counsel raised a further issue of the failure by the Crown to furnish them with certain

detention forms which had been promised. They also raised the lack of service of notice of trial as preventing the court from proceeding to trial.

[22] Crown Counsel responded to these points in reverse order. Mr *Abrahams* submitted that the Crown had a change of heart arising from the need to finalize the trials. He pointed out that six months after the agreement not to proceed to trial pending the determination of the Constitutional application, there was no court order staying these proceedings. The demands of justice required that the matter proceeds to the next stage. As for the detention forms, these were missing from the docket since 2017 and there was no possibility of these being recovered. There was no requirement, in the Criminal Procedure and Evidence Act, for a fresh notice of trial to be issued once an initial one was properly issued and served. Once served, that notice remains valid through the postponements of the matter by court. The matter was postponed to 12 March 2021 for a Pre-Trial conference.

[23] On 12 March 2021 both Mr *Mohau* and Mr *Mda* appeared for their clients. Mr *Mda* indicated that he had filed an application for the discovery of the detention forms. Mr *Abrahams* confirmed that he was made aware of the application in court but will be ready to respond to it. The Crown was directed to file its response by 16 March 2021. The matter was postponed to 22 March 2021.

[24] On 22 March 2021, Mr *Mafaesa* urged the court to make a ruling on the application before the court regarding the discovery of the detention forms. Mr *Abrahams* argued that because the relief sought touched on matters of admissibility of evidence whatever ruling the court made cannot touch on the substantive issues for trial. This matter must be postponed for a pre-trial planning conference to the 29 March 2021 pending the processing of the application in the usual way. The court then gave the timelines regarding the pending application. In terms of the timelines, heads of argument were to have been filed by both parties by 26th March 2021 and a ruling rendered on 29 March 2021.

The matter was postponed to 29 March 2021.

[25] On 29 March 2021, the matter was due for a ruling. It is important to note that on that day the applicants had not filed their answering affidavit let alone heads of argument. The respondent had filed heads out of time. Mr *Mafaesa* handed his answering affidavit from the bar. I proceeded to render the ruling according to the agreed timelines. The ruling dismissed the application. The Crown moved that the matter proceeded to the next stage. Mr *Mafaesa* indicated that he had no instructions from Mr *Mda* to handle the pre-trial conference.

[26] I pointed out that the Court will adhere to the Legal Notice of 2021 in terms of which if one side, for whatever reason, was unable to take part in a pre-trial conference the other side was still required to produce a minute setting out the matters listed in schedule 2 of that Notice. The court therefore directed Mr *Abrahams* to file the requisite minute in terms of the Practice Order of 2021 by 8 April 2021. The matter was postponed to 22 April 2021 for trial.

[27] On 22 April 2021, Mr *Mohau* rose to advise the Court that he had been verbally advised that Mr *Mda* was unwell hence his absence at Court. He had been asked by Mr *Mda*'s office to pass on this message to the Court. Mr *Abrahams* pointed out that today was the day appointed for the commencement of trial. He expressed surprise by the attitude adopted by Mr *Mda*'s office in that although Mr *Mda* has his mobile phone number and email he had not extended the usual courtesy of notifying him of his predicament prior to the day of court. He urged the Court to take the claim of illness by Mr *Mda* with a pinch of salt in the absence of any evidence to that effect. His reason for this submission appeared to be that this was not the first time Mr *Mda* had failed to attend Court on the same basis.

[28] I eventually ruled that the accused must be asked to plead. Mr *Mohau* protested the fairness of requiring unrepresented accused to plead in the absence of their counsel. Since Mr *Mohau* had advised that he had no instructions from Mr *Mda*, I queried the basis of his objection, on behalf of Mr *Mda*'s clients, to the order for the accused to plead. He abandoned his position but pointed out that an important step – with reference to the pre-trial conference – had not been undertaken. I advised him that on 8 April 2021 I had accepted the minutes from Mr *Abrahams* as representing the parties' attitude and maintained that that procedural step had been complied with and court would not go back to it.

Eventually the charges in the indictment were put to the four accused.

[29] Accused 1 pleaded "Not Guilty" to the respective main charges and alternative charges. Accused 2, 3 and 4 refused to plead on account of the absence of counsel. That notwithstanding, I entered a "Not Guilty" in terms of section 165 of the Criminal Procedure and Evidence Act, 1981.

[30] After recording of the pleas, Crown Counsel read out his opening statement in terms of section 175 of the Criminal Procedure and Evidence Act. It is **Exh A** on record. The court took a short adjournment. On resumption, I announced that upon reflection on the absence of Mr *Mda* and resolved that the trial proceeds as

scheduled. Mr *Mohau* then asked the court to adjourn to Chambers. In Chambers, Mr *Mohau* asked for the matter to be postponed to the next day. He would then ask Mr *Mda* to attend court and justify his absence in light of the fact that there was no proof of his illness on record or at hand. Mr *Abrahams* agreed to this proposal pointing out that the afternoon session was only an hour and half long. It would help if Mr *Mda* was able to attend Court.

Consequently, the matter was rolled over to the next day.

[31] On 23 April 2021, Mr *Mohau* told the Court that he had been asked to deliver a sealed letter from Mr *Mda*'s medical doctor. Mr *Abrahams* unsealed it. He advised the Court that the doctor in it certified Mr *Mda* unfit for work from 22 April to 27 April 2021.

Mr *Mohau* submitted that the purpose of submitting the report from Mr *Mda*'s medical doctor was two-fold: first it was to dispel the court's concern about the absence of any evidence of the illness claim by Mr *Mda*. Second it was to establish a ground for an application for a postponement of the matter until such time as Mr *Mda* would be certified fit for work and is able to join the proceedings.

[32] The Crown opposed the application for a postponement on the basis of Mr *Mda*'s indisposition. Crown counsel submitted all the certificate tells the court is that Mr *Mda* woke up went to his doctor and was certified unfit for work for a certain period. It does not state anything more than that. It does not say when Mr *Mda* will be fit for work. It does not state the arrangements Mr *Mda* made with alternative counsel to represent his clients in his stead.

[33] Mr *Mohau* persisted with his submission that the certificate from Mr *Mda*'s medical doctor was sufficient basis upon which to grant a postponement. Mr *Abrahams* persisted with his submission that since Mr *Mda* had not made any arrangements for other counsel, or Mr *Mohau* himself to take over his brief, this matter ought not to be held in abeyance in light of the history of this case.

[34] With this background to the application for a postponement of this trial, I have to decide whether or not to grant a postponement on the basis of submission by counsel.

[35] The question raised in this application for a postponement goes deeper than just what is being sought on the face of it. In the circumstances of the present matter this court must take a holistic view of each and every step which the matter has so far

gone through and decide whether, in light of the requirements of due administration of justice, a further postponement of the matter is justified.

[36] As I pointed out above, Mr *Mda*'s office has, on more than one occasion, previously briefed other counsel to stand in for him. That is an appropriate arrangement where counsel is conscious of his duty to court as well as to client. If this had not occurred on two consecutive days, one would have taken it as an isolated event. The accused remain represented by their counsel until such counsel formally withdraws. In light of the continued absence of counsel the court must give such directions as would protect both the administration of justice and the accused's right to counsel.

[37] Right to legal representation is recognized in the Constitution of the Kingdom of Lesotho as a fundamental right. As such, where an accused cannot afford counsel the State is obliged to provide one to such an accused where justice could otherwise not be served. The exercise of this right is essential where an accused faces a serious criminal offence. The provision of legal and ensures equality of arms which is an essential element of a fair trial.

[38] In *National Director of Public Prosecutions v King* 2010 (2) SARC 146 the court said:

“It is well to remind oneself at the outset of a number of basic principles in approaching the matter. Constitutions call for a generous interpretation in order to give full effect to the fundamental rights and freedoms that they create¹. The right to a fair trial is, by virtue of the introductory words to section 35 (3) of the Bill of Rights, broader than those right specifically conferred by the fair trial guarantee therein and embraces a concept of substantive fairness that is not to be equated with what might have passed muster in the past.² This does not mean that all existing principles of law have to be jettisoned nor does it mean that one can attach to the concept of a ‘fair trial’ any meaning whatever one wishes it to mean.³ The question remains whether the right asserted is a right that is reasonably required for a fair trial. A generous approach is called for. This is a question for the trial judge and there is in general not an a priori answer to the question whether a trial will be fair or not. Potential prejudice may be rectified during the course of the trial and the court may make preliminary rulings depending on how the case unfolds and may revoke or amend them. Irregularities do not lead necessarily to a failure of justice.

..... Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable treatment but also requires fairness to the public as represented by the state. This does not mean that the accused’s right should be subordinated to the public’s interest in the protection and suppression of crime;

¹ S v Zuma 1995 (2) SA 642 (CC) @ para 14

² S v Zuma (supra) @ para 16

³ Key v Attorney-General, Cape Provincial Division & Another 1996(4) SA 187 (CC) @ para 13

however, the purpose of a fair trial provision is not to make it impractical to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems,⁴ or to encourage preliminary litigation⁵-a pervasive feature of white-collar crimes cases in this country. To the contrary: courts should, within the confines of fairness, actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges – and especially minimum sentences have little inclination to co-operation in a process that may lead to their conviction and any new procedure can offer opportunities capable of exploitation to obstruct and delay.⁶ One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution.”

[40] A court may give directions regarding representation in an appropriate case. In the present matter, I am aware that the accused remain committed to their counsel of choice Mr *Mda* as their preferred legal practitioner for this matter. However, where the preferred or chosen counsel remains unable to so represent the accused, the right to representation cannot be a bar to other rights such as speedy trial, the administration of justice as well as the interests of justice. The choice of a legal practitioner who cannot observe basic ethical

⁴ *Zuma v National Director of Public Prosecutions & Others* 2009 (1) SA 1 (CC) paras 65-66

⁵ *Regina v H & Others* [2004] UKHL 3 para 22

⁶ *Montgomery v HM Advocate General and another* [2003] 1 AC (PC) 673 per Lord Hope quoting *Pular v United Kingdom* 22 EHRR 391

practice of making appropriate arrangements cannot be subordinated to the other rights such as trial within a reasonable time.

[41] In my view at this point in time it is appropriate to do what Mr Mda ought to have done, i.e. arrange for alternative counsel to represent the accused. In *S v Kuzatjke* 1992 NR 70 (HC), a Namibian case, the Court, relying on South African and Zimbabwean case law, held that “*neither in South Africa nor Zimbabwe which have a similar clause in its Constitution was an absolute right to insist on a specific Counsel recognized.*”

[42] In *Paweni & Another v Acting Attorney – General* 1985 (3)720, the Supreme Court held that:

“The inalienable right to a legal representative of his own choice afforded to an accused by Section 18 (3) (d) of the Constitution of Zimbabwe does not mean that if for one reason or another it is inconvenient for the person chosen to conduct the case on the date set for hearing, the court has no option but to order that the proceedings be held in abeyance pending his availability. What is protected is the right of an accused to resist a legal practitioner being foisted upon him even where such service will be rendered without charge. He is entitled to choose whom he wished to represent him, but if his prime choice is unavailable, then he is obliged to look further afield and engage someone else. In other words, the right of choice is always subject to the practitioner’s availability on trial date.”

Disposition

This matter has experienced erratic appearance by counsel for over a year now. As an example, on 6 July 2020 the matter was postponed on account of Mr *Mohau*'s unavailability. Today's postponement sought by Mr *Mohau* is on account of Mr *Mda*'s unavailability. The time has come for the court to insist on trial proceeding and deal with whatever a fair trial would require in the process. A court ought to err in the side of caution than to wring its hands and shirk its responsibilities in the administration of justice where acceding to endless requests for postponements would bring the administration of justice into disrepute.

In light of the foregoing the application for the postponement of this matter is dismissed.

HUNGWE AJ