C.of A.(CRI).NO.8 OF 1996

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

MATSOSO BOLOFO	**1ST APPELLANT**
SEOEHLA MOLAPO	**2ND APPELLANT**
MAKARA SEKAUTU	**3RD APPELLANT**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS	**RESPONDENT**

Held at:
MASERU

Coram:
STEYN, P
BROWDE, JA
KOTZÉ, JA

JUDGMENT

STEYN, P:

This matter concerns an order granted by Maqutu J in the High Court. Before him was an application by three applicants (referred to as appellants i.e. MATSOSO BOLOFO, SEOEHLA MOLAPO AND MAKARA SEKAUTU) to be released from detention and to be granted bail pending their trial on a charge of High Treason.

The first and third appellants mentioned above had applied previously for their release on bail. Appellant Molapo (second appellant) was applying for the first time. Their application was lodged on the 30th October, 1996. On the 6th of November the Director of Public Prosecutions (Respondent) filed a notice of opposition and the matter was set down for hearing on the 13th of November, 1996. On that date, the High Court per Maqutu J ordered that: "The date of trial and the indictment be obtained by Friday 22nd November, 1996. Unless this is done, the applicants will be released on their own recognizance(s). The Registrar is directed to provide the Crown with the nearest possible date. The matter is postponed to 22nd November 1996 at 2:30 p.m."

The matter was not heard on 22nd of November but was called on the 25th of November, 1996. On that date the Court made the following order:

"COURT ORDER

BEFORE: HIS LORDSHIP MR JUSTICE W.C.M. MAQUTU ON THE 25TH DAY NOVEMBER 1996

On the 25th November 1996 Mr. Phoofolo for applicant and Mr Mdhluli (DPP) for the Crown. The DPP says the charge sheet before the Magistrate shall act as an indictment for the time being. The Registrar has given the date of trial as 4th up to 25th February, 1997.

COURT:- In the circumstances the application is postponed to the 25th February 1997 for mention, with the condition that if the trial does not for good reason proceed the applicants will be released on their own recognizance."

It is this order which has been challenged in proceedings before us. I say "challenged" because it became clear during the course of argument that it appeared *prima facie* that there is no appeal to this Court from a decision of the High Court to refuse bail. See in this regard the decisions of the Court of Appeal in *Motloung and Ors v. Rex* 1974-1975 L.L.R. 380 at 384 and *Sekhobe Letsie And Director of Public Prosecutions* C of A (Cri) No.3 of 1991 delivered on the 13th of February, 1992. Indeed in his final argument Mr. *Phoofolo* was constrained to concede that this Court "has no jurisdiction to entertain an appeal against refusal to grant bail by the High Court". Counsel's argument was however that this Court has powers of review and that in making an order granting the postponements on the 13th and the 25th of November, 1996, the Court exercised its discretion irregularly—more particularly in the light of the history of the matter and in view of the fact that no opposing affidavit had been filed.

I will deal with these submissions below. However, in order to do so, it is necessary to set out the background against which the applications for bail came before the High Court culminating in the granting of the order aforesaid.

On the 27th of May, 1996, Appellant Matsoso Bolofo applied to the High Court for bail, that he had a right to do so appears from the provisions of the *Criminal Procedure and Evidence Act* 1981. See in this regard Chapter VIII - Bail.. In an affidavit in support of his application, Appellant relates the following version

concerning the events:

"5.1 During January 1996 myself and some other people met to discuss various grievances which, as concerned citizens, had against the Government of Lesotho *(sic)*. Thereafter there were subsequent meetings at which various options as to the way our Government's attention would be drawn to ever growing list of complaints which we perceived constituted bad governance. One such option was to request various opposition political leaders to bring our grievances to the government's attention. Another option was to approach the Ministry of Information and to request it to broadcast the listed grievances to the nation through Radio Lesotho.

5.2 During the last week of February 1996 the text of the statement was completed and I undertook to deliver it to Radio Lesotho and to ask the Authorities there to allow me to broadcast the statement in the air. Indeed on the 29th February the second accused, another man, SESIOANA, and myself went to Radio Lesotho at about lunch time. We gained entrance to premises and to the newsroom where I read the

listed grievances to the listeners over the radio. It was when my colleagues and I left the newsroom that we were arrested.

6.

I respectively (*sic*) say that there never was a conspiracy by myself to overthrow His Majesty's Government. Even when I went to Radio Lesotho I was neither armed nor did I carry out any acts of sabotage there. Indeed I did not have the melans (*sic*) or the capacity to do or engage in the doing of any of the acts mentioned in the charge sheet.

7.

I respectively *(sic)* apply to be admitted to bail. I am a Lesotho citizen aged 58 years, married and have three children. I have a home in Lesotho nowhere else. I can therefore have no inducement to flee to any other place. I undertake to attend remands and to stand trial."

The only information which had been made available to him, concerning the charge on which he and his co-accused was to be indicted, was a charge sheet which he annexed to his papers. It reads as follows:

"Annexure "A"

"That the said accused are charged with the crime of High Treason. In that upon or during the period between the month of September 1995 and 29th Day of February 1996 and or at or near Radio Lesotho,

> in the District of Maseru the said accused did each or both conspire to rebel against and to overthrow the Government of His Majesty the King. To (It is not clear) it by force, and by aid of sabotage to hinder the said Government in its lawful democratic position."

As is apparent from its terms, it is terse and devoid of particularity. Appellant's attorney also filed an affidavit in support of the application. It is relevant to record some of the allegations. He says that he received instructions to apply for bail immediately after Appellant was arrested on the 29th of February. He goes on to say:

> "In view of the apparent complexities involved in the investigation of crimes such as that which is alleged against applicant, I advised applicant to refrain from applying for bail at least for a month to give police an opportunity to complete their investigations.
>
> On the 20 March the application for bail was lodged. Even after that I still advised client to give the Crown all the opportunity to file opposing affidavits as it had intimated that it opposed the application. From the 25 March the matter was postponed to 15 April to give the Crown chance to file opposing affidavits. On the 15 April 1996 the matter was further postponed to the 22nd April 1996 and on that date

it was postponed further to the 29 April. Meantime on the 23 April 1996 I wrote to the second respondent pleading for the filing of opposing affidavits. I annex the said letter marked "A". I even set the matter down for the 6 May 1996 and served second respondent with the notice. I annex hereto the said notice marked "B". On the 6 May 1996 argument was postponed to 13 May. On the 13 May 1996 matter was postponed to 15 May for argument. It is significant that on the last postponement the second respondent clearly indicated that he would not file any opposing affidavits for the Crown, and that he would argue the Crown's opposition purely on the law and applicant's papers. On the 15 May 1966 respondent still had not filed opposing papers."

No opposing papers were filed. However, at the hearing before Guni J, the Director of Public Prosecutions -according to appellant's attorney, made certain statements from the Bar. These included the following:

"(a) That applicant was heard over Radio Lesotho announcing that he had taken-over the democratic Government of Lesotho. As this was published in the Radio it is a matter of common knowledge which does not require any evidence. He therefore invited the court to take judicial notice of that allegation.

(b) He testified that applicant was not honest with the court because, according to him, the applicant in motivating his application lied to the court in his affidavit, and also he failed to disclose material facts in order to enable court to assess the seriousness of the allegations in the charge against him.

(c) He testified that investigations were still continuing, that it would still take time before being completed, and that therefore the delay in bringing applicant to trial should be excused."

Appellant's attorney went on to say that he raised objections to evidence being tendered in this informal manner on issues which would ultimately be determined at the trial. However, his objections were overruled and the application for Appellants' release from Gaol was refused "with costs". The application was disposed of without any evidence being presented on behalf of the Crown and without disputing on oath any of the allegations made by the Appellant or by his attorney.

I will deal with the manner in which these proceedings were conducted later in this judgment. As would appear from the facts cited above, any challenge to these proceedings fell away because they were superseded by the decision made by

Maqutu J in the application for bail when he granted the order referred to above on the 25th November, 1996. The purpose of setting out the facts is to give an holistic picture of the events surrounding the continued detention of the Appellants and the refusal to admit them to bail. For this purpose, certain further events need to be recorded. I have perused the original file in this and associated applications for bail and the notations on it paint the following picture.

On the 17th of June, 1996, the appellant Sekautu, who was charged with the same offence, applied for bail before Kheola CJ. There was no appearance on behalf of the Director of Public Prosecutions and the application was granted. On the same day, the following notation appears on the file:

> "On 17/6/96 Mr. *Mdhluli* for the Crown. We intended to oppose the matter but Mr. *Sakoane* came late after the bail had been granted. We have prepared a Notice of intention to oppose. The officer who was handling the matter went out of the country at very short notice.
>
> We ask that the order be recalled to enable us to file our opposing papers."

The following Order was then granted pursuant to this request:

> "The order granting bail is cancelled and the Crown is given the

chance to oppose the matter and to file their opposing papers. Ppd to 24/6/96."

There is nothing on the record to indicate that the Appellant or his legal advisor was present or that they had been notified of the hearing.

It is not necessary to set out subsequent events in detail. It will be sufficient to say that applications for bail were set down for hearing on numerous occasions and postponed on each and every such occasion. (I say "numerous" because although the handwriting on the file is not always legible, it would seem as if there were in respect of this Appellant there were at least 11 such occasions).

It is, however, most important to record that in respect of the First and Second Appellants before this Court and as at the date of the hearing of the "appeal" i.e. the 28th of January 1997, no papers opposing their application to be released on bail had been filed.

There was an exception to this state of affairs. In an application for bail made on behalf of 3rd Appellant which came before Monapathi J., and as a result of the learned Judge's insistence, an affidavit by one Thai Makara of the Royal Lesotho Mounted Police was filed. I say this because in the Appellant Sekautu's file is a judgment by the learned Judge which confirms this fact. What Judge

Monapathi has to say is most instructive. After referring to the fact that the application for this Appellant's release on bail had been served on the 11th of June, 1996, the Court goes on to say the following:

> "It was only on the 21st August 1996 that the Respondent's answering affidavit - deposed to by THAI MAKARA of the Royal Lesotho Mounted Police - was served and filed. It had been clear as long ago as the 24th June 1996 that the Crown intended to oppose the matter. For this I refer to the Chief Justice's minute of that date which reads:
>
> > "The Order granting bail is cancelled and the Crown is given the chance to oppose the matter and to file their opposing papers."
>
> The delay in filing the opposing affidavit typifies the arrogance of the office of the Director of Public Prosecutions, which has been amply demonstrated for me to see, in this matter. I had to be very patient. It is to be regretted that there has been a delay in hearing this matter.
>
> Various judgments of this Court have come out to seriously urge that there should e expeditious filing of opposing affidavits by the Crown. My own attitude has always been to view such affidavits as being extremely helpful. Unless *viva voce* evidence has been allowed to be put in, as much facts as possible in the affidavits cannot be a hindrance but can immensely assist the Court.
>
> In bail applications the Courts deal with a procedure whose nature at times is not clearly understood. I had occasion to deal with this aspect in *Mofokeng vs D.P.P.* CRI/APN/487/95 of 17th January 1996. My understanding is that it is in the nature of a bail application that as much information as possible must be made available to the Court. To that extent, although a strictly technical approach is discouraged there is no excuse for the absence of a full supporting affidavit, an answering affidavit and a replying affidavit. This is more so where the Court would be faced with a dispute on facts as against where a reply on points of laws is the order of the day. Even in the latter event a clear indication is often necessary that reliance will be made on conclusions on the points of the law." (own emphasis)

I will deal with the approach of the learned Judge and his pertinent comments

later in this judgment. In order, however, to preserve the chronology of the events in question, I now return to the order granted by Maqutu J and the challenge directed at it by Counsel for the appellants.

As already indicated above, it was ultimately conceded that no appeal lies to this Court from a decision of the High Court refusing bail. Apart from the authority in this Court cited above, see also *S v. Mohamed* 1972(2) SA 531(A), *S. V. Heller* 1970(4) 679 and *R. V. Lembada and Another* 1961(1) SA 411(A).

Ackermann JA in the *Letsie* case referred to above, points to the fact that the *Court of Appeal Act* ("the *Act*") makes no provision for an appeal to this Court against the High Court's refusal to grant bail (see p.3 of the judgment). See also in this regard *Makhoabenyane Motloung v. Rex* cited above.

What the Court in *Motloung*'s case did say (*op cit*) concerning the authority of the Court to adjudicate upon a High Court's refusal to grant bail is the following (per Milne JA, Smit and Ogilvie-Thompson JJA. concurring):

> "In our view there cannot validly co-exist, under the legislation with which we are dealing, a subsisting order of the High Court refusing to release an appellant on bail pending his appeal to this court from his conviction by the High Court on trial before it, and a contrary order by this court made upon precisely the same basis. For this court to make a valid contrary order in such a case it would be necessary for it to be made in the exercise by it of an available appellate jurisdiction, or by way of review proceedings based

> on such gross irregularity or illegality as to render the High Court decision a nullity, and that would involve, in either case, setting aside the order made by the High Court refusing to admit the applicant to bail. There is, as has been indicated, no such available appellate jurisdiction. No such review proceedings have been instituted, nor does it appear from the papers before us that any grounds exist for a successful review of this kind. There is the clearest indication, by the use of the disjunctive word "or" in section 10(1) of *Proclamation No.72* of 1954, that the intention of the legislator was to provide for wholly alternative courts to which application for release on bail pending appeal might be made. The substitution, on the same facts, of a contrary order for the one made by the High Court would, apart from review proceedings of the kind mentioned, constitute an exercise of an appellate jurisdiction which we do not possess." (my underlining)

It would appear from this passage that the Court recognized that review proceedings could be brought against a High Court's refusal of bail "...based upon such gross, irregularity or illegality as to render the High Court's decision a nullity..."

In the absence of a legislative constraint, I can conceive of no reason why the right of this Court to review the proceedings of any tribunal including those of the High Court - should not be unfettered, save by the tried and tested limitations laid down in our common law. Clearly if the decision of a Court adjudicating a bail application is e.g. *male fide*, arbitrary or so grossly unreasonable as to be demonstrative of the fact that the decision-maker had failed to apply his mind, such a decision would be a nullity and capable of challenge and revocation on review. See in this regard Clifford Chatterton: *Bail Law and Practice*, London (Butterworths) 1986 at 9:21, where the learned author commenting on the right of review says the following:

"9.21 It is open to persons appearing either before the magistrates' court or the Crown Court to seek leave to apply to the High Court for a prerogative order of:

(i) certiorari;
(ii) prohibition; or
(iii) mandamus,

by way of judicial review

This order providies for a uniform, flexible and comprehensive code for the exercise by the High Court of its supervisory jurisdiction over proceedings and decisions of inferior courts, etc. It eliminates the procedural technicalities by removing the differences betwene the remedies from which the applicant previously had to select the one most appropriate to his case. The object of the present procedure is to avoid technical injustice.

The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application is made, but the decision-making policy or in other words, the reasoning process. This point was emphasised by Lord Hailsham LC who, when giving judgment said:

... It is important to remember in every case that the purpose of the remedy is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is no part of the purpose to substitute the opinion of the judiciary or individual judges for that of the authority constituted by law to decide the matters in question.

On this point Diplock LJ has also commented that judicial review may be exercised where decisions are found to be defective because of:

(i) illegality;
(ii) irrationality; and
(iii) procedural impropriety."

See also *Chief Constable of North Wales Police v. Evans* 1982 (3) All E.R. 141 and *Council of Civl Service Unions v. Minister for the Civil Service* 1985 A.C. 374.

For the purposes of determining whether bail proceedings in the High Court are subject to review by this Court, it is instructive to examine the nature of the

proceedings when a Court is approached to determine whether or not bail should be granted. In *Prokureur Generaal van die Witwatersrandse Plaaslike Afdeling v. Van Heerden en Andere (van Heerden*'s case) 1994 SACR 469(W) the Court held that a bail application does not involve criminal proceedings ...merely judicial proceedings.

It is also instructive to note other comments on the nature of bail proceedings. Kriegler J in the latest edition of the *South African Law of Criminal Procedure* (Straf Prosesreg) says at p.50 (in translation) :

> "'In fact, the question may be asked whether there is any reason at all for the existence of an onus of proof in a bail application. The premature, interlocutory, informal inherently urgent, future-oriented and in all respects unique nature of the proceedings simply does not fit into a comfortable niche."

See also the comments of van der Merwe J in the unreported judgment of *Maharaj v. S* under case no. A394/94 in the Republic of South Africa. The learned Judge expressed the opinion that the Court's approach should be the following:

> "I am of the opinion that a court, either as a court of first instance

> or as a court of appeal, should look at the evidence as a whole and then consider whether it will be in the interests of justice in general to grant bail to an applicant or not. In deciding that question a court will obviously look at the question whether the accused will stand his trial, whether he will interfere with State witnesses and whether he has a propensity to commit crime whilst out on bail *et cetera*. No *numerus clausus* of facts can be enumerated because various different facets of the case must be kept in mind. At the end a court will have to exercise a discretion, judicially exercised, in deciding whether to grant bail or not." (own emphasis)

In *Ellish v. Prokureur General van die Witwatersrandse Plaaslike Afdeling v. Van Heerden en Andere* 1994(2) SA CR 579(2) van Schalkwyk J with reference to the above cited comments in the *Maharaj* case says the following:

> "This is the approach that was preferred and that was applied by Eloff JP in the court *a quo*. For the reasons already stated, I believe that there can be no question of an onus of proof in a bail application. I agree with the learned Judge President that in terms of the Constitution a presiding officer is at present expected to ensure that a balance is maintained between the interests of the

individual in respect of his freedom and the interest of the community in justice being done. I believe that the interest that the community has in an offender appearing before a court of law is no less important than the interests of an individual in respect of his freedom.

As regards the procedure it is clear from the wording of section 25(2)(d) of the Constitution that the State must be required to commence with the presentation of evidence. For the same reason it is also clear that if at the end of an enquiry it turns out that there is a balance between the interests of the accused and those of justice, then the accused is entitled to be released on bail. This right flows from the provisions of section 25(2)(d), however, and is not the result of the application of an onus of proof.

It has already been found that the magistrate in a bail application has to act in an investigative or inquisitorial manner and that, if important information is lacking, he has to take the necessary steps himself to gather the information. It therefore necessarily follows that he should have the power, if necessary, to take the necessary steps to gather such information as he deems necessary and essential to hear the application, even after the State and the

accused have presented such evidence as they choose."

(Translation and own emphasis)

I will return later to deal with the approach a Court has to adopt in adjudicating upon a bail application. Bearing in mind the nature of the proceedings what we are concerned with presently is, whether (1) the bail proceedings are subject to review by this Court, and if so (2) on what grounds they can be reviewed. The cases cited above indicate that whilst they are judicial proceedings, they are *sui generis*, confer investigative or inquisitorial duties upon the presiding officer who in the end has to exercise a judicial discretion in which he is obliged to ensure that his decision is taken in the "interests of justice". See the *Ellish* judgment at p.593.

Accordingly in my view, the answer to the two questions posed is:

(1) Bail proceedings before the High Court are subject to review by this Court and

(2) That a decision taken by the High Court confers a discretion on a Court which must be judicially exercised. In determining whether or not the Court has so exercised its discretion a Court reviewing such decision will apply the tried and tested criteria referred to above.

It is in this context that we will assess the submission made by Counsel challenging the exercise of discretion by Maqutu J in making the order cited 25 November, 1996, cited above.

Mr. *Phoofolo*'s contention that the decision of the court *a quo* to postpone once again and on two separate occasions the application for bail was an improper exercise of its discretion requires serious consideration. Anyone looking at the file would have been distressed to find that these applications for bail had been postponed on eleven occasions; that bail had been granted on a previous occasion and apparently unilaterally "withdrawn" and that at no stage (except in the case heard by Monapathi J) had any evidence been submitted which could have assisted the Court to exercise its discretion in a properly informed and judicial manner. I should add that there is *no evidence* in the application before Maqutu J of the kind referred to by Monapathi J in his judgment, and no opposing affidavit was filed by or on behalf of the Director of Public Prosecutions despite the fact that notice to oppose was given by his office on the 6th of November.

Indeed had Maqutu J simply postponed the matter on the 25th of November without further ado, it could well have been said that to have done so in the circumstances outlined above and in the absence of a reasoned judgment was a decision so grossly unreasonable as to border on the arbitrary.

However, this is not what the learned Judge did. At the hearing of the first application, i.e. on the 16th of November, 1996, he ordered that: "the date of trial and the indictment be obtained by Friday 22nd of November, 1996. Unless this is done the applicants will be released on their own recognizance(s). The Registrar is directed to provide the Crown with the nearest possible date."

Similarly, when the matter is called once again on the 26th of November, the Judge *a quo* puts the Crown to terms to prosecute the Applicants at the first session available for trial in the High Court i.e. the 4th of February, 1996. He also provisionally orders their release on the 25th February on their own recognizance if the trial "does not for good reason proceed".

Whilst this Court may well have decreed otherwise, it seems clear to me that we cannot typify the exercise of discretion aforesaid as so grossly unreasonable as to represent a failure by the Court to apply its mind or to have acted unjudicially. I say that this Court may well have decided otherwise, because of the lamentable and indeed regrettable failure of the Crown to furnish the Court *a quo* with such facts as to have enabled it to make a properly informed decision. The failure to do so is the more incomprehensible in the light of the numerous applications made, granted, revoked, postponed and refused without placing any information before the Court presided over by Maqutu J. The failure to do so is further compounded by the fact that the Respondent knew what the

views of the High Court per Monapathi J were, more particularly that "there is no excuse for the absence of a full supporting affidavit, an answering affidavit and a replying affidavit".

It must be borne in mind that "an adjournment of a criminal trial" (or the postponement of the hearing of a bail application) is not to be had for the asking". See *S. V. Acheson* 1991 (2) SA 805 20 at 811 (Per Mahomed AJ)

I now turn to examine the terms of the *Constitution of Lesotho* and its relevance to the case before us. The *Constitution* has not been enacted merely for purposes of promoting the Kingdom as a country that expresses a commitment to acceptable international norms and standards of behaviour. On the contrary, it is a solemn and effective covenant regulating the relationship between the Crown and its citizens. It provides that every person in Lesotho is entitled *inter alia to*

> "The right to a fair trial on criminal charges against him and to a fair determination of his civil rights and obligations (see Sec 4(1)(h))". It enshrines "the right to personal liberty" (Sec. 4(1)(b)). It enjoins the Crown to observe "the right of equality before the law and the equal protection of the law." (Sec.4(1)(o).

When dealing with the right to personal liberty, the *Constitution* provides that:

> "6(1) Every person shall be entitled to personal liberty, that is to say, he shall not be arrested or detained save as may be authorised by law in any of the following cases, that is to say —*(inter alia)*
>
> > "(e) upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law of Lesotho.""

The said section goes on to say that if such person is not released he/she "shall be brought before a Court as soon as is reasonably practicable".

Sub-section (5) of Section 6 is particularly pertinent. It provides as follows:

> "(5) If any person arrested or detained upon suspicion of his having committed, or being about to commit, a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

Section 12(1) of the *Constitution* insofar as it is relevant under the heading "Right to fair trial, etc", provides as follows:

> "12. (1) 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.
>
> (2) Every person who is charged with a criminal offence -
>
> > (a) shall be presumed to be 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 the preparation of his defence.
(d) shall be permitted to defend himself before the court in person ro by a legal representative of his own choice;"

Sub-section (8) provides as follows:

"(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or another adjudicating authority, the case shall be given a fair hearing within reasonable time."

These provisions can only be meaningful if all those involved in the administration of justice perform their duties in a manner consistent with the ethos and the values that underpin them. This obligation rests on those who are part of the cohesive unit that administers criminal justice. Those involved include the following: The police officer that exercises the power of arrest and first detention; the judicial officer who is seized with responsibility to decree the continued detention of the accused or his release on bail and the terms and conditions upon which this is to occur and regulates the conduct of the trial; the Director of Public Prosecutions who determines whether and when a prosecution should be instituted and upon which charges and who exercises a discretion as whether to oppose bail or not; the High Court and this Court as the final arbiters of the fate of an accused and ultimately the prison authorities who are obliged to

see to the protection of the public by ensuring the secure incarceration of the committed prisoner and to see to his possible rehabilitation. Even the Social Services that facilitate the reintegration of the released prisoner into society is part of such a unit.

There is a very considerable power vested in those that have to determine whether a person should be detained pending his trial or not.. This is particularly so if the processes of criminal justice are dilatory, inefficient and proceedings are constantly delayed. As Ackermann JA put it in the *Letsie* case:

> "The maxim 'justice delayed is justice denied' is not an empty one."

Indeed, continued detention without a speedy trial is an arbitrary form of punishment unacceptable in a civilized state. Regrettably this Court's experience of the criminal justice process in the Kingdom indicates that lengthy delays are the rule rather than the exception. See in this regard e.g. the circumstances outlined by Ackermann JA in the *Letsie* case referred to above. It is not at all uncommon for accused persons to spend several years in detention before a verdict is pronounced. Thus e.g. in an appeal before us during this session three accused persons who appeared before the High Court on a charge of murder, were committed and sentenced to death some 4½ years after their arrest and initial detention. Fortunately their appeal was heard within 7 months of their

conviction. Nevertheless the whole process took some 5 years to run its course —and one of those accused was acquitted on appeal.

Some 30 years ago, Vieyra J in the case of *S. V. Geritis* 1966(1) SA 753 (W) at 754 said that "...an accused person deemed to be innocent is entitled, once indicted, to be tried with expedition".

It is clear to this Court that in the proceedings conducted in respect of these Appellants there has been an inadequate sensitivity both to the provisions of the common law, of the *Criminal Procedure and Evidence Act* and of the *Constitution* when acting in regard to or adjudicating upon applications for bail and upon applications for postponement of the interlocutory proceedings associated with these bail applications. In the first place, the decision of the Crown to deny the Court access to evidence under oath setting out why the "interest of justice" required the continued pre-trial detention of the Appellants was a primary flaw in the process. This is particularly so where an Applicant for bail does go on oath and articulates reasons why the Court can be assured that he will stand his trial. Should the Crown case be that he may well not do so, or that one or more of the many other *numerus clausus* of facts properly considered in a bail application, oblige the Court to exercise its discretion not to grant bail, such circumstances should be placed before the court in an acceptable form.

Whilst there may well be circumstances in which urgency compels informality, the correct approach especially where evidence is tendered by an applicant is to place facts before the court on oath explaining why an adjournment and continued detention are necessary or why bail should be refused. In this respect, this Court supports the views and approach articulated by Monapathi J referred to above insofar as he indicated in his judgment how a bail application should be presented for adjudication.

It is obvious from what has been stated above that *ex facie* the record of proceedings as reflected on the file, the manner in which these bail applications were dealt with at various times left a great deal to be desired. The proceedings (except in the application adjudicated upon by Monapathi J) were conducted in a manner that failed to demonstrate the vigilance required by the constitutional safeguards referred to above. Neither did the Courts who were seized with these applications apply the principles to be observed which this Court and the other Courts in Southern Africa have laid down when a bail application is adjudicated upon.

As indicated above, an application for bail initiates a *sui generis* process. Such process is investigatory and inquisitorial. The Court seeks information which will enable it to exercise a judicial discretion whether it is in the interests of justice to grant bail or not. Mr. Justice Mynhardt in the *Ellish* case referred

to above, in my view correctly says that:

> "Since the concept "in the interests of justice" is not a factual matter, it follows that there can be no question of there being an onus of proof. The onus of proof is nothing other but an aid used by a Court to determine which party has to suffer defeat if insufficient grounds were submitted for a finding on a factual issue..."

The learned Judge goes on to say *op cit:*

> "Accordingly where the presiding officer has to exercise a discretion of the nature set out above in a bail application it would, in my view, be wrong of him to simply sit back and, figuratively speaking, hold the scales, waiting for the State to present (sufficient) reasons why an accused should not be released on bail. The presiding officer is called upon and obliged to reach a decision. He therefore has to ensure that he has sufficient information to enable him to exercise his discretion in a judicial manner. Therefore, in my opinion, he is required to act in an investigative or inquisitorial manner."

See also the *van Heerden* case (*supra).* For a contrary view on the issue of whether there is an onus or not see the comments of Southwood J. and see also "Report on bail reform in SA"; South Africa Law Commission - Project 66- December 1994 and the *Ellish* case at P.595-597.

It is true that the Courts in South Africa were seized with a duty to interpret the South African Constitution where a so-called right to bail is enshrined. Mr. Ndhluli for the Crown has quite correctly pointed out that no such explicit provision is to be found in the *Lesotho Constitution.* This does not in my opinion in any way affect the validity of the approach outlined concerning

the procedure to be followed in both the *van Heerden* and the *Ellish* cases. Indeed this approach is entirely consistent with the views expressed in this Court by Ackermann JA in *Letsie* cited above and by Mahomed AJ (as he then was) in the Namibian decision of *S. v. Acheson* referred to above. The considerations which are to be borne in mind are well-stated by the learned Judge in the latter judgment at p.822-823:

> "An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice. The considerations which the Court takes into account in deciding this issue include the following:
>
> 1. Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail? The determination of that issue involves a consideration of other sub-issues such as
>   - (a) how deep are his emotional, occupational and family roots within the country where he is to stand trial;
>   - (b) what are his assets in that country;
>   - (c) what are the means that he has to flee from the country;
>   - (d) how much can he afford the forfeiture of the bail money;
>   - (e) what travel documents he has to enable him to leave the country;
>   - (f) what arrangements exist or may later exist to extradite him if he flees to another country;
>   - (g) how inherently serious is the offence in respect of which he is charged;
>   - (h) how strong is the case against him and how much inducement there would therefore be for him to avoid standing trial;
>   - (I) how severe is the punishment likely to be if he is found guilty;
>   - (j) how stringent are the conditions of his bail and how difficult would it be for him to evade effective policing of his movements.
> 2. The second question which needs to be considered is whether

there is a reasonable likelihood that, if the accused is released on bail, he will tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again involves an examination of other factors such as

(a) whether or not he is aware of the identity of such witnesses or the nature of such evidence;

(b) whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject-matter of continuing investigations;

(c) what the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;

(d) whether or not any condition preventing communication between such witnesses and the accused can effectively be policed.

3. A third consideration to be taken into account is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. This would involve again an examination of other issues such as, for example,

(a) the duration of the period for which he has already been incarcerated, if any;

(b) the duration of the period during which he will have to be in custody before his trial is completed;

(c) the cause of any delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such a delay;

(d) the extent to which the accused needs to continue working in order to meet his financial obligations;

(e) the extent to which he might be prejudiced in engaging legal assistance for his defence and in effectively preparing for his defence if he remains in custody;

(f) the health of the accused.

Some of these considerations will be more weighty than others, depending on the circumstances of a particular case."

I deal next with the proceedings before Guni J in the application lodged by the First Appellant. I do so in order to demonstrate the inadvisability of not adhering to the procedural safeguards refered to above - particularly those articulated by Monapathi J.

I will also examine the proceedings before Maqutu J when he granted the order dated 25th November, 1996.

In her judgment refusing bail, Guni J quite correctly pointed to the fact that it would be inappropriate always to grant bail, "regardless of the seriousness of the offence". She also, again correctly in my view, pointed to the fact that an objection to bail by the Director of Public Prosecutions "must be carefully considered by the court and not lightly discarded, after all he is a responsible officer charged with onerous duties" (Per Mofokeng J. In *Soola v D.P.P.* 1981 (2) L.L.R. 277 at 280).

The only qualifications that I would import into this consideration are that

1. Whenever possible the DPP's opposition should be premised upon evidence properly placed before the Court. There will always be exceptions such as e.g. cases of great urgency. These would permit of exception, but the approach adopted by Monapathi J referred to above is a salutary one deserving of general application.
2. The Court must never allow itself to abrogate its responsibilities in this respect. It, and it alone is to balance the scale, weighing the conflicting interest of the community on the one hand and that of

the accused's fundamental right to freedom on the other. The attitude of the D.P.P. is a relevant consideration; however evidence is required in order to enlighten the Court as to why he has adopted such a view. See in this regard *S v. Lulane* 1976 (2) 204 at 211 (N) where Didcott J says:

> "Mr. *Hodgen* told me that the Attorney-General was firm in his belief that the accused were likely to flee if they were released. But he did not suggest that information in this connection was available to the Attorney-General, which I lacked because its disclosure was not in the public interest. He admitted, on the contrary, that the Attorney-General knew no more than I did on the subject. He nevertheless attempted to persuade me that the attitude of the Attorney-General was *per se* a reason to refuse bail. I do not agree. Although the opinion of the Attorney-General always commands respect because of his experience and responsibilities of his office, it seems to me that, once it is evident that he is no better informed than the Court, it is in as good a position as he to assess the likelihood or otherwise that an accused person will abscond. (See *R. V. Mtatsala and Another*, 1948 (2) S.A. 585 (E) at p. 587; *Leibman v. Attorney-General,* 1950(1) S.A. 607 (W) at p. 614; *S. V. Essack,* 1965 (2) S.A. 161 (D) at p. 163H). Indeed, having heard full argument, I appear to be better placed than he to decide this in the present case."

The risks attendant upon an approach not based on evidence but on speculation - disguised as "notoriety" - is demonstrated by the observations of the learned Judge Guni where she says the following:

> "The offence with which this accused is charged has political connotations. It is therefore necessary to weigh the accused's

> chances of standing the trial not only with the seriousness of the charge and the likelihood of severe penalty. It is common for the accused who are facing this type of charge and who are free, sometimes even when they are in lawful custody, to escape to other countries where they seek and are granted political asylum. This is one of those facts that are so notorious, that it would be strange it never occurred in my mind as the really possibility."

No one alleged on oath that the Applicant in the case under consideration might flee. He had no opportunity to contravene such an allegation, or e.g. to suggest bail conditions such as "house arrest" to counter such an allegation if made.

The learned Judge is quite correct when she faults the Applicant for not being frank with the Court concerning the incidents which precipitated his arrest. However, this did not mean that he was a risk if freed on appropriate restrictive conditions. The Court was also left in the dark concerning the other factors which had to be evaluated - in addition to the gravity of the offence charged.

Mahomed AJ (who at the time he gave his judgment in the *Acheson* case was the President of this Court of Appeal) put it well when at p.822-823 of the

judgment cited above he articulated the factors to be considered when adjudicating upon a bail application. (See citation at p.28 - 29 above)

The considerations mentioned must have been present to the mind of Maqutu J when - although postponing the matter for some 6 weeks - he put the Crown to terms:

1. As to the date of the hearing and the furnishing of an indictment; and
2. Running the risk of the release of the Applicants without bail or bail conditions and on their own recognizances.

It seems to me that the learned Judge may have been well-advised to insist on evidence being placed before him as to the actual situation as at the 25th of November. Although the adjournment was for a short period of time, the consequence of his order meant that at least one of the Applicants would have been in detention for a year without the Court being informed why such detention was in the "interests of justice" and without any details of the charge other than the terse charge sheet cited above.

The fact that the Court was seized with the adjudication of a matter which to use Guni J's words, had "political connotations" in my view made it even more imperative for the prosecution and the Court rigorously tobserve fairness

in the manner in which their application for bail pending trial was dealt with. Otherwise the perception that they are being "punished" because of their alleged unlawful activities can become vested in the broader community.

Finally, I return to the question of delay and its destructive impact on the principle of fairness which is the foundation stone upon which the criminal justice system is built. I have cited Ackermann J's dictum concerning the maxim "justice delayed is justice denied" not being an empty one. The learned Judge went on to make the following significant and pertinent comments at p.23-24 of the *Letsie* judgment:

> "The other side of the coin requires justice for the people as a whole. It is in the public interest that justice be not delayed. Confidence in the judicial system, particularly in the criminal justice system, is of paramount importance for the ethos of justice and human rights and, indeed, for the general well-being of society. It is a notorious fact that loss of confidence in the working of the judicial system tempts people to take the law into their own hands. Justice must not only be done, it must manifestly be seen to be done. Undue delay in finally disposing of a criminal case, where the accused is languishing in goal, can lead to the perception that there is an ulterior motive behind the delay."

The prosecuting authority as well as the Courts must be particularly mindful of these considerations and sensitive to these concerns when the pre-trial incarceration of the accused in political cases assumes the proportions it has done in this case. No reason has been advanced why 12 months has elapsed before they are being brought to trial. If there are good reasons, the Crown has only

itself to blame for not placing these before the Court. The impression can therefore be so easily created that they are being detained without trial and are undergoing "anticipatory punishment".

This Court is therefore pleased to record the solemn undertaking given by the Director of Public Prosecutions that the Crown will proceed with the prosecution of the Applicants during the current February Session of the High Court that commenced on Monday the 3rd of February, 1997. There is, of course, no reason why the Applicants cannot, on good cause shown, apply for bail before the trial Judge - particularly if there are further delays at the behest of the prosecution. In that event, such application will proceed and be adjudicated upon in accordance with the procedure and principles stated above.

The order the Court makes on the matters before us is the following:

1. In the matter of C of A (CRI) No.3 of 1996 *Bolofo v. Guni and the D.P.P.* the order for costs decreed by the High Court is set aside. No order is made in respect of the other relief claimed.

2. The "appeal" in the matter of C of A (CRI) No.8 of 1996, *Bolofo and Others vs. D.P.P.* is struck from the roll. There is no appeal from a decision of the High Court refusing bail on an application

brought before it. However, there is a right of review of such proceedings where they are conducted irregularly and offend against the required principles of a fair hearing. These are set out above in this judgment.

3. Inasmuch as the matter mentioned under para.2 above can be construed as a review application of the proceedings before Maqutu J it is dismissed.

.....
J.H. STEYN
PRESIDENT OF THE COURT OF APPEAL

I agree .....
J. BROWDE
JUDGE OF APPEAL

I agree .....
G.P.C. KOTZÉ
JUDGE OF APPEAL

Delivered in open Court this 5th day of FEBRUARY, 1997.