CRI/T/05/2005
CRI/APN/473A/2013

In the matter between:

'MOTA 'MOTA **APPLICANT**

And

THE DIRECTOR OF PUBLIC PROSECUTIONS **1ST RESPONDENT**

THE ATTORNEY GENERAL **2ND RESPONDENT**

JUDGMENT

Coram : Honourable Justice E.F.M. Makara
Dates of Hearing : 1 October, 2013
Date of Judgment : 24 February, 2014

SUMMARY

The Applicant who is the accused in the criminal case of murder which has been pending prosecution since 2006 asking the Court to order a permanent stay of the prosecution – It being reasoned that the Crown despite its dominis litis status has done little or nothing for the prosecution of the case – The Applicant stating that as a result of the delay he has lost the vital evidence which he would advance for his defence – The consequent complaint being that his fair trial rights under S12 of the Constitution have been violated – The Court determining that the constitutional challenge should be brought through the Constitutional Litigation Rules 2000 for the Chief justice to assign its hearing to a panel of 3 judges and not be presided over by one Judge in the course of hearing an ordinary criminal trial. A tendered suggestion for a way forward.

CITED CASES

Rex v Mota Mota CRI/T/05/07
DPP v Lebona 1995 – 1999 LAC 474
The Chief Justice & Others v The Law Society of Lesotho C OF A (CIV)/59/ 2011

Sole v Cullinan NO & Others LAC (2000 – 2004)572, Tsepe v Independent Electoral Commission & Others LAC (2005 – 6) 169, Minister of Labour & Employment & Others v Ts'euoa LAC (2007 – 2008), Ts'enoli v Lesotho Revenue Authority & Others C of A (CIV) 25/ 11.

Mamatete Morienyane v Nqosa Morienyane & Others CIV/APN/204/2003

STATUTES

Criminal Procedure & Evidence Act No. 9 of 1981
Internal security (Arms and Ammunition) Act No. 17 of 1966
The Constitution
Sec.5 of The High Court Act.

MAKARA J

Introduction

[1] The applicant has launched the present application in which he is in the main asking this Court to:

(a) Direct that the proceedings in **Rex v Mota Mota CRI/T/05/07** be stayed permanently on the grounds that the Applicant's rights under section 12 (1) of The Constitution of Lesotho 1993, have been infringed by the inordinate delay in the matter to trial.

Alternatively,

(b) Direct in line with **Sec 278 (1) (a) of the Criminal Procedure & Evidence Act No. 9 of 1981** that the indictment against the applicant be dismissed.

[2] The 1st respondent has accordingly filed an intention to oppose the application and responded to the charges advanced against them by the Applicant and resisted the granting of the prayers sought for by him.

Matters of Common Cause between the Parties

[3] The Applicant is a member of the Lesotho Defence Force (LDF) who has in consequence of the criminal charges instituted against him by the Crown been suspended from duty on half pay. This has obtained since 2005.

[4] It is readable from the papers before this Court and their illumination by the heads of arguments submitted to the Court by the Counsel for the parties respectively that the case is premised upon the historical and the current developments which are of a common nature between them. The revelations hereof commence that the Applicant was arrested on the **17th July 2005** and subsequently released on bail on the **15th August 2005.** The Director of Public Prosecution (DPP) subsequently acting pursuant to S 144 of the Criminal Procedure & Evidence Act 1981 indicted him for a Summary trial before the High Court. The charges preferred against him were *murder* and **the contravention of Sec. 43 of the Internal security (Arms and Ammunition) Act No. 17 of 1966**. The Applicant has thence forth had the case pending against him since there hadn't been any progress towards its prosecution. The indication is that the *status quo* has obtained for over eight (8) years.

[5] A foundational basis of the application and the prayers therein is that whilst the Crown is *dominis litis* in criminal proceedings, it has ever since the institution of the criminal case of **murder** against

him in **Rex v Mota Mota CRI/ T/ 05/ 07, failed** to prosecute it within a reasonable time to the detriment of the applicant's *fair trial rights* under **Sec. 12 of the Constitution.** The main alternative prayer is, in the same vein, associated with the said delay.

[6] Some of the dimensions of significance in the chronological unfolding are that the case had originally been scheduled for a hearing on the 1st June 2009 and on the same day had the hearing postponed to the 3rd June 2009; On this day the matter appeared on the roll call as being re scheduled for hearing on the 4th – 9th September 2012; It is not clear what had transpired during those days.

[7] On the 13th February 2013, the applicant was called upon to present himself before the Court to have the new trial dates identified. The chosen dates were 2nd – 6th September 2013. On the 1st of these latest hearing dates, the Counsel for the Applicant notified the Court about his intention to launch the instant application. Thus, the hearing was postponed to the 4th September 2013 to enable the respondents to file their counter papers. I only became seized with the case from the 2nd September 2013. The application was argued before me on the said 4th September 2013.

[8] It ultimately featured to be common cause that whilst the applicant attributes the blame for the delay to the 1st Respondent whom he accuses of a dereliction of duty, the latter denies the

charge. He instead, counter charges that the applicant has been responsible for some of the delays. A contextual suggestion appears to be that the Applicant doesn't have clean hands in the matter.

Arguments Advanced for the Parties

[9] The Counsel for the Applicant premised his arguments on the statement that the eight (8) years taken before the case could be prosecuted demonstrates that the DPP has been in a state of a dereliction of duty despite his *dominis litis status.* In illustrating the point, he referred the Court to the record of proceedings and maintained that *ex facie* same there is no evidence that the Crown had dedicatedly over the years endeavoured to timeously exploit its advantaged position in favour of a speedier progress in the case.

[10] A second leg of the argument for the applicant was that the Crown has throughout failed to utilise the legal instruments at its disposal to ensure that there was progress at all material times. Here, it was pointed out that the Crown had been at large to have applied for the issuance of a Warrant of Arrest in the event that the applicant was not attending the hearing. Instead, the record reveals that the Crown had been inactive and failed to be pro active as it should have done so in the circumstances. It was on that strength stressed that the Crown was the one which had in any event dragged the Applicant before the Court and yet it didn't, thereafter, act reasonably expeditiously.

[11] It has at the conclusion of the contentions been lamented that in consequence of the dereliction of duty by the Crown for the many years happened that the applicant is now confronted with a situation where a progress with the prosecution would be detrimental to his right to a *fair trial*. In support of this statement a complaint was registered that the unreasonable length of time taken before the task was executed to its end, has caused the applicant to lose vital evidence. This was described as being the bullets holes which had been in existence and which he would rely upon to demonstrate his innocence towards the charges. On the same note, it was explained that the potential witnesses upon whose evidence the Applicant would rely have died and understandably, he wouldn't be in a healthy situation to advance his defence with reference to supportive evidence.

[12] In persuading the Court to uphold the application, the Counsel for the Applicant has relied heavily on the case of **DPP v Lebona 1995 – 1999 LAC 474** where at page 492 the test to be applied in determining the infringement of the S12 (1) *right to a fair trial* was tabulated thus:

1. The length of the delay;
2. the reason for the delay;
3. The assertion by the accused of his or her rights;
4. The prejudice to the accused.

[13] The Crown counter reacted by denying that it was responsible for the years of stagnation of progress in the case. It charged that

the Applicant had in some instances occasioned the delays. The Court was referred to an instance on the 3rd June 2009 when the Applicant and his Counsel didn't appear for trial. In addition, it was argued that the Applicant had on the 4th September 2013 caused the postponement of the hearing by notifying the Court about his intention to launch this application and, therefore, applied for postponement to facilitate for the exchanging of papers between the parties.

[14] Otherwise, the Crown maintained that it had all along been ready to prosecute the case and that was frustrated by the logistical obstacles and the absence of the Applicant and his Counsel on one or two occasions.

The Finding and the Decision

[15] The Court realises that the application before it is foundationally based on **Sec. 12 of the Constitution** since in the main it seeks for a declaration that the delays in the prosecution of the case and the *fair trial* evidential prejudices resulting from there are in conflict with the section. The alternatively desired dismissal of the case on the basis of the delay which is described as being contrary to **Sec 278 (1) of the Criminal Procedure & Evidence Act 1981**; is linked to the main constitutional violation complained about.

[16] The present application has effectively introduced a constitutional question within the otherwise normal criminal

proceedings which the Court has in the main been seized with. It is precisely this sudden turn of the situation which calls upon it to detail a direction to be followed. The Court has in its response to the challenge received guidance from the decision in **The Chief Justice & Others v The Law Society of Lesotho C OF A (CIV) / 59/ 2011.** A significance of this case is that it addresses a question concerning the nature of the sitting which the High Court should adopt when presiding over a constitutional matter and the rules which it should apply in the proceedings. It *mutatis mutandis* bears an analogous similarity with the instant case in that here the Applicant has in the course of the hearing of the stated criminal trial, suddenly introduced the issue of the constitutionality of the commencement of the proceedings which he maintains that would be in conflict with the Sec. 12 rights in the Constitution. These are the *fair trial procedural rights* which would, within the context of criminal justice apply to the criminal suspects, the detained persons and to the accused persons. The constitutional dimension including its jurisprudence would, appreciably, have to be addressed first because of the supremacy of the Constitution over all laws and its determinative effect.

[17] In a nutshell, in the case of **The Chief Justice & Others v The Law Society of Lesotho *(supra),*** the Applicant had challenged the constitutionality of the new Court Rules made by the 1st Respondent.[1] The Rules in essence gave the registrars of the Court

[1] These are the High Court (Amendment) Rules 2009 made pursuant to S 16 of the High Court Act 1978.

judicial powers over specific matters. The case was brought before the High Court in its ordinary jurisdiction and correspondingly through its ordinary Rules. The relief sought for was, in the main, that the Court should declare those Rules to be null and void since they were in conflict with **Sec. 131 (a) of the Constitution and with Sec. 5 of the High Court Act.** At the end, the Learned Judge who presided over the case found for the Applicant.

[18] On appeal the Court of Appeal noted that the Chief Justice had in the exercise of the powers vested upon him under **Sections 22 (6) and 69 (5)** of the Constitution made and published **The Constitutional Litigation Rules 2000.** These Rules are intended to prescribe a procedure to be followed by the High Court and the litigants whenever a constitutional case is being instituted or heard. This introduced two separate procedural regimes in which one applies to the ordinary litigation in which the Court is exercising its ordinary jurisdiction as opposed to when it is being seized with a constitutional matter.

[19] The Court of Appeal has in the afore cited case which is being relied upon for guidance, been acknowledged that ever since the promulgation of the Constitutional Litigation Rules a practice has been maintained for the constitutional cases to be heard by three (3) judges. To illustrate the trend, this was said to have been so in **Sole v Cullinan NO & Others LAC (2000 – 2004)572, Tsepe v Independent Electoral Commission & Others LAC (2005 – 6) 169, Minister of Labour &**

Employment & Others v Ts'euoa LAC (2007 – 2008), Ts'enoli v Lesotho Revenue Authority & Others C of A (CIV) 25/ 11.

[20] In recognition of the Constitutional Litigation Rules and their application whenever a constitutional case is brought before the Court and accordingly presided over, it was found that applicants ought to have followed the procedure prescribed in the Rules. This would have occasioned the matter to be assigned a Constitutional Case Number and referred to the Chief Justice for him to appoint 3 judges who would preside over it. The impression given was that the respondents had a constitutional right to have the case treated in accordance with the Rules and presided over by 3 judges and that they hadn't been accorded it by the High Court. On that reasoning, the Court of Appeal upheld the appeal against the decision of the High Court which had granted the applicant the declaratory and the interdict orders prayed for. Its reasoning was, however, not premised on the merits but on the inappropriate form which according to it had been followed in the Court of the 1st instance.

[21] The Court of Appeal didn't address a situation where the High Court is incidentally faced with a constitutional application in the course of hearing a case in the exercise of its ordinary jurisdiction. Be that as it may, the understanding of this Court is that the Chief Justice had in his wisdom realised the importance of the constitutional cases and their related jurisprudence. It was in that perception that he architected The Constitutional Litigation Rules

and promulgated them as a practical instrument in constitutional matters. This is indicative that where the normal proceedings suddenly assume a constitutional dimension of substance, a litigant who introduces it must be directed to follow the appropriate Rules. The end result would *inter alia* be that the Chief Justice would schedule the matter for hearing by 3 judges. This is attributable to what the author of the Rules conceptualised as the deserving way to treat the constitutional cases regardless in the view of the Court as to whether the litigation is in the main or incidental. Once a litigant introduces a constitutional issue, the relevant Rules would have to be invoked. Otherwise, there would be inconsistency and the Rules may be technically circumscribed or undermined. The mere fact that a constitutional issue is brought out during the main trial does not render it less constitutional or less important.

[22] It is the feeling of this Court that it is in its attitude reinforced by the remarks expressed by my brother Nomncongo J which have been referred to in **The Chief Justice's case *(supra)***. There the Learned Judge has when confronted with a similar challenge in **'Mamatete Morienyane v Nqosa Morienyane & Others CIV/APN/204/2003** has been quoted to have remarked:

> ..... It would seem therefore that the constitutional challenge is not properly before me – this Court sitting as it is, in its ordinary sitting civil jurisdiction.

[23] The impression which this Court gets from the expression by the learned Judge is *inter alia* that a Court sitting in its *ordinary jurisdiction* should hear *an ordinary case* in which *an ordinary relief* is being sought for. The contemplated *ordinariness* includes all the cases over which the Court can administer *ordinary jurisdiction* as opposed to the constitutional oriented ones. The latter should be the subject of the procedure prescribed under the Constitutional Litigation Rules. This is recognised so regardless of whether a case is criminal or civil.

[24] Whatever a *prima facie* attitude this Court may have towards the present application concerning the presented essential elements laid down in the case of **DPP v Lebona *(supra)*** in assessing the constitutional violation in question, it feels that a primary challenge now hinges on the incidental issue of *choice of forum.* This has in the view of the Court been dictated by the litigation developments which have been acknowledged by the Court of Appeal in the post promulgation of the Constitutional Litigation Rules 2000 era. It should suffice to indicate that there is a catalogue of the cases demonstrating the new trend and the composition of the Court whenever it sits in its *extra ordinary fashion* to hear a constitutional matter. Such cases were referred to by the Court of Appeal in the **Chief Justice's case above**.

[25] What appears to be a challenge ahead is for the Rules to provide for a mechanism which would render justice easily

accessible *speedier, economically* and *simply.* It could for instance, be provided that in the event of an incidental challenge as the present one, the Chief Justice may simply assign three (3) to urgently attend the suddenly emerging constitutional assignment. This would map a way forward.

[26] The Court finds it unnecessary to address the alternative prayer since as it has already been stated it depends upon the primary one which is constitutional in character. It, therefore, refrains from pronouncing itself in connection with it.

[27] In the final analysis the Court holds that the Applicant should introduce the constitutional dimension through the Constitutional Court Rules. This would procedurally facilitate for that case to come to the attention of the Chief Justice for its allocation to a panel of 3 judges. The Applicant is, however, exempted from paying for extra duty stamps in an endeavour to make the access constitutional route and the relief he is seeking for. This is intended to render justice easily accessible.

E.F.M. MAKARA

JUDGE

For the Applicant : Adv. Rasekoai
For the Respondent : Adv. S.V. Thaba