

IN THE HIGH COURT OF LESOTHO

CRI/APN/0431/2017

In the matter between:

THABO TŠUKULU

PETITIONER

And

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT

Coram: S.N. Peete J.

Dates of Hearing: 5th, 6th, 28th September 2017

Date of Judgment: 19th October, 2017

A SUMMARY

Bail – Constitution of Lesotho - 1993 – Section 6(5) – Criminal Procedure and Evidence Act No.9 of 1981 – Section 109 A (1) (as amended by Act No. 10 of 2002) – Serious offence – “Exceptional Circumstances” - What are – Evidential burden on the petitioner in the application for bail – Balance between interests of justice and integrity of the judicial system - Personal circumstances – Whether exceptional – Judiciary discretion.

Where a high ranking police officer is charged with murder of a police constable in macabre circumstances that involve mysterious disappearance of the police constable and the grisly exhumation of the body from a graveyard, such case falls squarely under Section 109 (A) (1) of the Criminal Procedure and Evidence Act 1981(as amended by Act No.10 of 2002).

Section 109 (A) (1) casts an evidential burden on the applicant to satisfy the court that “**exceptional circumstances**” exist that justify his release and that it will not prejudice the “**interests of justice.**” In so far as **Section 109 A (1)** casts an evidential burden on an applicant for bail, it does not violate the constitutional presumption of innocence. Bail inquiry is not a trial.

The public interest, interest of justice, and judicial integrity may outweigh the positive personal circumstances in matters of bail. A holistic approach is needed in balancing the interests when exercising judicial discretion whether to grant or to refuse bail.

The right to bail provided for under **Section 6 (5) of the Constitution of Lesotho** is integral to the fundamental right to liberty. No right is absolute and as it may be attenuated by law and should be exercised with due regard to rights of others. In casting the evidential burden on the applicant for bail, the law becomes utilitarian and protects society from heinous crime. It is a form of social protection.

Annotations:

Statutes

Constitution of Lesotho 1993

Criminal Procedure and Evidence Act No.9 of 1981(as amended by Act No.10 of 2002)

Penal Code Act No.6 of 2012

Legal Notice 172 – Fugitive Offenders (Designation of Country and Direction) Notice 2005.

Speed Trials Act No.9 of 2002

Interpretation Act No.19 of 1977

Criminal Procedure Act No.51 of 1977 (South Africa)

Reported Ceases

Lesotho

Bolofo v DPP – LAC (1995-1999) 231

Letsie v DPP - CRI/APN/596/2004

Thabiso Mofihli v DPP – (1991-1996) LLR 421

Makhaba and Another v DPP – CRI/APN/12/2003

July v DPP – CRI/APN/219/2004

Mosa Raymond Mokete – CRI/APN.0342.014

Phello Senatla v DPP – CRI/APN/191/04

Lehlohonolo Kelane vs DPP – CRI/APN/78/2004

Kori and others v DPP - CRI/APN/235/245/2004

Thabo Khetheng v Commissioner of Police – CIV/APN/276/2016

South Africa

S.v. D.V. – 2012 (2) SACR 492

S.v. Viljoen – 2002(2) SACR 550 (SCA)

S.v. Jonas – 1998 (2) SACR 677

S.v. Mauk – 1999 (2) SACR 479

S.v. Thornhill (2) – 1998 (1) SACR 117

S.v. Tshabalala – 1998 (2) SACR 259

S.v. Dlamini – 1994 SA 623

S.v. Schietekat – 1997(7) BLCR 771 (CC)

Nambia

S.v. Acheson 1991 (2) SA 805 (NmHC)

Books

Van der Berg – Bail – A Practitioner’s Guide (2nd Edition)

Devenish – Interpretation of Statutes (1996)

Peete J.:

- [1] This is a petition (*application*) for bail. The Petitioner **Thabo Joseph Tšukulu** is a member of the ***Lesotho Mounted Police Service (LMPS)***¹. At the time of his arrest on the 4th August, 2017, he was the Officer Commanding at Leribe Police Station – Hlotse. He is presently on interdiction as from 28th August 2017.
- [2] The Petitioner is facing a charge of murder along with four other persons. The charge reads:-

ANNEXURE

- I. Thabo Tšukulu*** a Mosotho male adult aged 51 years of headman ‘***Malebohang Tšiu*** underchief ***Seeiso*** at ‘***Malere Matelile*** ha ***Qaba***.
- II. Mabitle Matona*** a Mosotho adult aged 39 years of headman ***Mopeli Mopeli*** underchief ***Retšelisitsoe Mopeli*** at ***Butha-buthe*** ha ***Nqabeni***.
- III. Haleokoe Taasoane*** a Mosotho male aged 44 years of headman ***Mathaba*** underchief ***Qetho Sekonyela*** at ***Liphofung Mokhotlong***.
- IV. Mothebeli Mofolo*** a Mosotho male adult aged 49 years.
- V. Tšeliso Mokhosi*** a male Mosotho adult of ***Ha Mabote***.

That, the said accused are charged with crime of **Murder** in contravention of **Section 40 (1)** of the **Penal Code No.6 of 2010**.

*In That Upon or about the 26th day of March, 2016 and at or near **Ha-Mokhalinyane** in the Maseru district, the said accused while being members*

¹ LMPS is an organ established under section 147 of the Constitution of Lesotho 1993 and functions under the Police Service Act No 17 of 1998.

*of the **Lesotho Mounted Police Service** acting in concert and in furtherance of a common purpose did unlawfully and intentionally perform an unlawful act or omission with the intention of causing the death of **Mokalekale Khetheng** and the accused did commit the crime of **Murder**.”*

The former Minister of Government **Mr. Tšeliso Mokhosi** has been later joined as the Fifth Accused. He is presently on bail the application of which was not opposed by the Director of Public Prosecutions.²

[3] In this petition which was filed before this court on the **30th August 2017**, the Petitioner prays for an order couched thus:-

- “1. **Releasing your Petitioner on bail;***
- 2. **Directing your Petitioner to pay M1000.00 cash bail deposit;***
- 3. **Directing your Petitioner not to interfere with police investigations or tamper with crown witnesses;***
- 4. **Directing your Petitioner to report to the Maseru Central Charge Office once every month on a Friday between the hours of eight in the morning and four in the afternoon.***
- 5. **Directing your Petitioner to attend remands and to stand his trial.”***

[4] When the petition was urgently moved before this Court on the 6th September 2017 the respondent had not as yet filed any opposing affidavit, and by agreement between Counsel, this Petition for bail being an enquiry *viva voce* evidence was led on both sides.

² CRI/APN/0435/2017

The Law on Bail

[5] *Section 6 (5) of the Constitution of Lesotho 1993* reads as follows:

“6. (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.” (My underline)

[6] It must be understood that although the right to bail is provided under *Section 6 (5) of the Constitution of Lesotho*, like other rights guaranteed under the Constitution, it is not absolute and it may be attenuated by the law³, and that the courts of law are vested with judicial discretion to grant or refuse bail. Each case must be treated *ad hoc* upon its own circumstances. The law on bail in Lesotho needs to be streamlined for the guidance of the courts of law. Some offences are serious and heinous; some are petty; and the exercise of judicial discretion in granting of bail will certainly differ from case to case.

[7] The duty of court in exercising its judicial discretion in matters of bail involves bringing about a fine balance between many interests e.g. public interest, interest of justice, integrity (*repute*) of the judiciary, interest of the victim and kin the interests of the petitioner for bail. The court should also demonstrate societal accountability in the exercise of judicial direction.

[8] Under the *Constitution of Lesotho 1993* and under the *Criminal Procedure and Evidence No.9 of 1981* and indeed under our common law, a person who

³ In the present case, an amendment to Section 109 of the Criminal Procedure and Evidence 1981 renders granting of bail to be more difficult or less easier an amendment. *Mosa Raymond Mokete v DPP – CRI/APN/0342/2014; Motsielehi Makhaba and Another v DPP – CRI/APN/12/2003*

is charged with having committed a criminal offence is, if in detention, entitled to be granted bail by a court of law subject to bail conditions that the court may impose to ensure his attendance at trial and if his release will not prejudice the interest of justice e.g. by absconding or interfering with witnesses or evidence.

[9] *Section 109* of the *Criminal Procedure and Evidence Act No.9 of 1981* (as amended⁴) in turn reads:

“109. A (1) Notwithstanding any provision of this Act, where an accused person is charged with-

(a) murder under the following circumstances-

(i) the killing was planned or premediated and the victim was-

(A) a law enforcement officer performing his functions as such whether on duty or not at the time of the killing, or is killed by virtue of his or her holding such a position;

(B) A person who has given or was likely to give material evidence with reference to any offence referred to in Part II of Schedule I

.....

The court shall order that the accused person be detained in the custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.” (My underline)

The paramount effect of the amended *Section 109* of the *1981 Act* is to attenuate the right to bail provided under *Section 6(5)* of the Constitution, and to cast an evidential burden on the petitioner for bail to satisfy the court

⁴ Act NO.10 of 2002

that (a) “*exceptional circumstances*” exist which justify his release on bail and that such release will not prejudice the “*interest of justice*”.

“*Exceptional Circumstances*” – what are they?

- [10] In my view, “*exceptional circumstances*” cannot be defined with precision that fits all cases. It has been said that circumstances must be unusual *sui generis* and not ordinary. Since 2002, our courts have in many cases sought to define the exceptional circumstances.⁵ Like interests of justice, exceptional circumstances, defy precise definition or parameters. A measure of holistic objectivity is required, and each case must be treated *ad hoc* upon its own particular circumstances.
- [11] In my view, personal circumstances of every human being vary from one person to another. Some people are industrious or studious and exceptionally talented. Some of us are not so talented or industrious. Personal positive attributes and circumstances sometimes do not qualify as exceptional as to justify release on bail pending trial where the applicant is facing a very serious charge. Academic studies and fixed assets, as in this case, cannot by themselves qualify as exceptional circumstances; other considerations are relevant and may need prioritization.
- [12] In my view, the *rationale* and purpose behind the 2002 Amendment is to render it “*less easier*” (or *more difficult*) for an accused who has committed a “**Schedule Offence**” (often serious or heinous) – to be granted bail. It is accepted that the effect of this section is also to place an “*evidential burden*”

⁵ See Section 60(11) (a) of **Criminal Procedure Act No. 1977**; *S.v. Viljoen* – 20002(2) SACR 550 (SCA) *S.v. Jonas* 1998 (2) SACR 677, *S.v. Mauk* – 1999(2) SA SACR 479. *S.v. Mohammed* – 1999(2) SACR 507

on the applicant to satisfy the court that “*exceptional circumstances*” exist that justify his release on bail and that such release shall not prejudice the “*interest of justice*”. This requires a moralist analysis and prioritization of many other interests pertinent to case *in casu*.

[13] In my view the incidence of “*evidential burden*” in no way attenuates the trite principle of *presumption of innocence* fossilised under *Section 12 (2) (a)* of the **Constitution of Lesotho**;⁶ the presumption enjoys universality in many democratic constitutions of Africa, of Commonwealth and of many international protocols. In several cases, the **High Court of Lesotho** has had occasion to consider the paramount effect of the *Section 109* in matters of bail and what constitute “*exceptional circumstances*” and “*interest of justice*.”⁷

[14] In Lesotho the courts of law are vested with the exercise of judicial powers⁸ a power which also has a discretionary underpinning. In applying *Section 109 (A) (1)* the court has a judicial discretion whether other interests and circumstances justify release on or refusal of bail. In doing so the court must act impartially and without fear or favour or bias or prejudice.

Our courts have demonstrated that whilst “*exceptional circumstances*” and “*interest of justice*” are a phenomena which should not be defined in any measure of precision, bail should not be granted easily where the crime is heinous or serious e.g. involves murder of a law enforcement officer offices aggravated robbery, and rape of young children and – I

⁶ *S. v. Dlamini & Other/S.v. Schietekat* – 1997 (7) BCLR 771 (CC) (Para 64-79)

⁷ See Annotations (*supra*)

⁸ *Section 118 (1) of the Constitution*

dare add – of old women! Commission of such heinous abominable a crime raise *brouhaha* and public condemnation.

Judicial Discretion

[15] In the Namibian case of **S. v. Acheson**,⁹ Justice **Mahomed AJ** suggested the following factors as important in the exercise of the judicial discretion:-

- (a) *evidential burden – incidence of;*
- (b) *seriousness of the charge;*
- (c) *decree of implication;*
- (d) *motive to influence evidence or witness;*
- (e) *flight riskiness;*
- (f) *stringency of conditions that may safely be imposed by court;*
- (g) *public interest;*
- (h) *exceptionality of the circumstances;*
- (i) *societal duty and integrity of the court in criminal justices system;*¹⁰

The weight of each factor will vary from one case to another.

[16] In deciding whether to grant bail in the exercise of its judicial discretion, our courts are guided by these principles and paramount issues are whether the accused is “*a flight risk*” likely to abscond if granted bail or is he likely to interfere or influence the evidence/witnesses to be called. Granting or refusal of bail is judgmental about the future conduct of the Petitioner and all these must be founded on reasonable apprehension.

⁹ 1991 (1) SA 805 at 822-23

¹⁰ **S.v. Thornhill** – 1998 (1) SACR 177

[17] Each case will depend upon its own particular circumstances. Nothing is cast in stone. The *ex facie* serious nature of the charge is of great importance as is the severity of sentence if accused is convicted. It must always be remembered that due weight should be attached to the broader public interest, especially “*brouhaha*” and public excitement may have rightly or wrongly aroused by the macabre or grisly circumstances of the commission of the crime.

[18] This court is of the view that a holistic approach that “*exceptional circumstances*” can have practical meaning if what is required is that when considering granting or not granting bail where the accused is facing a very serious charge especially - as in this case - the court must exercise an “*extra*” or “*special*” or “*exceptional care*” – and be satisfied that the release of accused on bail or will not prejudice the interest of justice.

Incidence of evidential burden (onus)

[19] Under *Section 109 (A) (1)* of the **Criminal Procedure and Evidence Act** as amended by the 2002 amendment, it should be Petitioner who should adduce evidence to demonstrate exceptional circumstances should satisfy the court that release on bail will not prejudice interest of justice. In other words, no burden lies on the crown to show that circumstances are not exceptional or that even if exceptional are shown to exist interests of justice would be prejudiced by the Petitioner’s release on bail.

[20] ***Advocate Tlali*** (with him ***Advocate Fuma***) – for the ***Director of Public Prosecutions (DPP)*** - called their first witness **Sergeant Thamae No. 10252**

- a member of the *Lesotho Mounted Police Service* since 1998. He informed the court that he was part of the investigation team tasked on 14th day August 2017 with the investigating the circumstances surrounding the death of **Police Constable Mokalekale Khetheng** was last seen on the 25th March 2016 at Leribe Police Station and whose corpse was exhumed some seventeen months later in August 2017 at Lepereng Cemetery in Maseru.

[21] He informed the court that their investigation resulted in the arrest of the Petitioner and that the Petitioner then Officer Commanding Leribe had been urgently requested to report himself at Police Headquarters on the 4th August 2017. The Petitioner was arrested after having been interviewed and was remanded into prison custody on the 7th August 2017. A **Detention Form (LMPS 107)** filed on that occasion has however not been presented in court.

The Petitioner later told this court that the **Detention Form** would reveal that he had been arrested immediately after his arrival at Police Headquarters at 9 am on the 4th August 2017.

[22] **Sgt. Thamae** candidly informed the Court that he is very much opposed the Petitioner being released on bail on the ground that the Petitioner is likely to interfere with police witnesses whom he knows very well. **Sgt. Thamae** also informed the Court that the Petitioner had already attempted to influence certain potential police witnesses (at **Leribe Police Station**) to change their story regarding the case.

[23] **Sgt. Thamae** also stated that the Petitioner was a “*flight risk*” likely to abscond because he is facing a very serious charge for which if convicted, he can receive a heavy punishment.

- [24] **Sgt. Thamae** also opined that since the arrest of the Petitioner there have been sporadic demonstrations that **Tšukulu** should not be released ...“*we never want to see him again*.” Not much weight needs be attached the public excitement right or wrongly demonstrated.
- [25] He concluded by saying that the investigation is fervently ongoing and other police officers – **Senior Inspector Matona** and **Inspector Mofolo** have also been arrested and also **Mr. Tšeliso Mokhosi** (former Minister in the previous Government) and are all facing a charge of murder of **PC Khetheng**.
- [26] It should be noted for record that this court has not been furnished with the particulars of the implication of Petitioner in the commission of the crime of murder as indicted. That does not mean that the case against the accused is “*non-existent*” or is falsely fabricated. The parameters of this bail inquiry do not include verification of complicity.

Cross Examination of Sgt Thamae

- [27] To **Adv. Mohau**’s cross-examination, **Sgt. Thamae** confirmed that having been telephoned, the Petitioner came on his own accord to the Police Headquarters. There was no immediate apprehension that **Sgt. Thamae** would flee; he did not question Petitioner’s impeccable record in the Police service since 1991. The Sergeant insisted that notwithstanding this good record and his laudable study plans at **UNISA** accumulated properties and benefits, the Petitioner would be tempted to run away run to escape the harsh sentence likely to be imposed. He was aware that there existed *Extradition*

*Treaty*¹¹ between the **Kingdom of Lesotho** and the **Republic of South Africa** over extradition of fugitives from justice and that it would be futile for the Petitioner to flee – only to be extradited back to Lesotho.

- [28] A detailed account was made about the Petitioner’s horticultural businesses in apple/pear orchards at Ha Qaba Matelile. Much was also said about the Petitioner’s academic pursuits with *University of South Africa (UNISA – enrolled as Student No. 53062124)* in Community Development and in Criminal Justice.

Detention Form – 4th August 2017

- [29] It is not in dispute that when a suspect is detained after an interview by police, a *Detention Form (LMPS 107)* is filled to officialise and to record the fact of detention; this is also for accountability and for transparency. The fact that the Detention Order signed by the Petitioner when he was detained at Police Head Quarters on the 4th August 2017 is missing leaves much to be desired. All that could be gathered from the Occurrence Book were the four remands on the 8th August, 14th August, 17th August and 31st August, 2017.

- [30] It was strongly suggested during cross-examination that the restrictive conditions at Maseru Central Prison had the effect of scuttling the Petitioner’s desire to access his books such as – *Constitution of Lesotho 1993, Criminal Procedure and Evidence Act 1981* and **Kazofi – An Introduction to Law in Lesotho**. It was explained to the Petitioner that his latter book edited by **Kazofi** was denied admission because its pages had

¹¹ See Annotations - Statutes

many handwritten notes – which were incompatible with security regulations at the Central Prison. All these, so the Petitioner argues - prejudices his preparation for trial for the charge he is presently facing and that this violates his right under *Section 6*, of the *Constitution*.

[31] *No. 49112 Detective Police Constable Ntoane* - a member of Lesotho Mounted Police Service was called to give his evidence. On being asked in - chief as to his attitude to the Petitioner’s prayer that he be granted bail, he replied:-

“... I asked that [bail] should be denied.

... I fear that he could kill me through his men because I am a witness in a case he has to answer over the murder of Police Constable Mokalekale Khetheng. The evidence I have against Petitioner is rather strong ... he would try to kill me to destroy the evidence ... he instructed me how to respond to questions. He vehemently told us that anyone of us who would not do as he said would lose his poor job (... mosebetsinyana ona oa sono...). This was after Khetheng had disappeared.”

[32] *Detective Police Constable Ntoane* admitted under cross-examination that the Petitioner had never directly or personally threatened him with death; he only entertained such fears. He denied being buttressed and coached under interrogation to say the Petitioner would kill him. He maintained that even before the exhumation of **PC Khetheng**, the Petitioner was already coercing police officers under him “*to say some untruths regarding what happened to Khetheng.*” He says he feared to report such threats to Police Headquarters. He says he also saw his police colleagues **Makotoko** and **Mphutlane** at Mabote Police Station.

[33] **PC Ntoane** insisted on his claims despite the fact on the 28th August 2017 Petitioner had been placed under interdiction which effectively curtailed his police powers – “*He was not salute - worthy*” - he quipped. He would be tempted to influence witnesses despite whatever bail conditions the court might impose ... “*I am rightly scared,*” he shutters!

[34] Next called was *No. 44005 Chief Officer - Phakiso Kheleli* of the *Lesotho Correctional Services*. He described his responsibility as “*receiving applications and/or grievances, complaints and requests by inmates and also to organise programmes for rehabilitation.*”

[35] He informed the court that after the Petitioner had been formally remanded into custody at *Maseru Correctional Centre*, he had made a request for two books namely the *Constitution of Lesotho and Criminal Procedure* and *Evidence Act* (a booklet); he also wanted to be allowed access to his laptop, which an IT gadget to write assignments and to study. He says he straight away told the Petitioner that getting a laptop was out of question.

[36] He continued to inform the court that after 3 days the Petitioner called in to say that he was no more pursuing his studies and he had wished to withdraw. This was on the 15th August 2017. The Petitioner had also complained about the 10 minutes he was being given to read his books but that the time had later been increased to one hour.

Evidence by the Petitioner

- [37] The Petitioner is **No. 8316 Thabo Joseph Tšukulu** - a Senior Superintendent and an erstwhile Office Commanding Leribe Police Station. He is aged 51 years.
- [38] Petitioner informed this Court that he was born at Qaba Matelile in the district of Mafeteng Lesotho and has a residence at The Khubetsoana Suburb of Maseru and that he is a married man with two daughters and one son. The eldest daughter is presently pursuing nursing studies at Maluti Adventist College - Mapoteng (3rd year) and that second child is daughter Form 1 at Methodist School Maseru, and a boy is doing Form 1.
- [39] Petitioner holds a BA degree in Social Work (1992). In August 2017 he was doing his first semester BA in Community Development with **UNISA**. He also has a Certificate in Local Law and in Psychological Counselling.
- [40] Petitioner informed that court that he is a proud owner of an apple orchard at Qaba, Mafeteng with some 250 apple trees. This is indeed laudable and a noble pursuit.

- [41] The Petitioner was formally asked by **Advocate Mohau KC** to identify certain official correspondence such as "**Letter of Representation.**" It reads:-

*Lesotho Mounted Police Service
Police Headquarters
Maseru 100
Lesotho*

Ref: CP/C/PF/8316

U.F.S. Regipol North

*SSP Thabo Tšukulu
Police Station*

Dear SSP, Tšukulu,

Letter of Representation

“I have been instructed by the Commissioner of Police (COMPOL) to inform you, as I hereby do and by this Letter of Representation that the Commissioner of Police has intended to interdict you in accordance with Section 53 (1) of the Police Service Act 1998.

You will vividly recall that on the 04th August, 2017, you were arrested on suspicion of murder of No.54161 P/C Khetheng and remanded on the 8th August, 2017 by the Maseru Magistrate Court.

COMPOL has further instructed me to inform you that taking into account of the allegations and the seriousness of this matter, your continued presence in the Lesotho Mounted Police Service has proclivity of tarnishing its image and as such bringing it into disrepute. It is axiomatic that your presence is likely to impede the on-going investigations surrounding the same matter.

Upon the receipt of this letter, you are required to give reasons if any why the Commissioner of Police cannot proceed with his intention as contemplated. Your response is expected to reach this office on or before 23rd August, 2017.”

Regards.

INSP. M.A. MACHELA
STAFF OFFICER TO COMPOL
CC: ACP. SMSS & IC &D

[42] The Petitioner responded to this letter as follows:

Pitso Ground
P.O. Box 2172
Maseru – 102

21st August 2017

The Commissioner of Police
Police Headquarters
P.O. Box 13
Maser – 100

Commissioner of Police,

RE: LETTER OF REPRESENTATION

Thank you for the letter of the 11th August, 2017 requiring me to make representations on why I may not be placed on interdiction pending the outcome of the criminal charge preferred against me on the 8th August, 2017.

I am mindful of the fact that the charge I am facing relates to the death of a member of the LMPS. It may thus be in the interest of all concerned and the good name of the LMPS as well as the interests of justice itself that I should await the outcome of my case away from office.

I would however plead with you that in the meantime, I should continue to receive my full pay for the following reasons:

(a) *The presumption of innocence conferred by the Constitution on everyone facing criminal charges should operate in my favour.*

(b) *Past practice in LMPS has been for people in my situation to continue to receive their full pay pending the outcome of their trials.*

(c) *In terms of the law I remain bound by the law governing the Police Service even if I am placed on interdiction that means I cannot seek alternative employment as I remain a member of the LMPS.*

(d) *I have been informed that investigations in the matter are continuing and it is not clear when the case against me will be heard.*

(e) *In the meantime, I, as the sole breadwinner in the family, have to provide for my family; I have in this regard, a child who is at Maluti Adventist Training College for whom I have to pay fees and other needs.*

I hope these representations will meet your favourable consideration.

Yours in service.

Thabo Tšukulu

[43] The *Interdiction Letter* reads:

*Lesotho Mounted Police Service
Police Headquarters
Maseru 100
Lesotho*

Ref: CP/C/PF/8316

U.F.S. Regipol North

SSP Thabo Tšukulu

LMPS

Leribe Police Station (sic)

Dear SSP, Tšukulu,

RE: INTERDICTION FROM DUTY

Reference is made to the letter representation which was dated 09th August, 2017 and also to the response thereto which is dated 23rd August, 2017.

I have been instructed by the Commissioner of Police (COMPOL) to inform you, as I hereby do that the COMPOL has carefully considered your reasons which are stated in your response.

In terms of Section 53(1) of the Police Service Act No. 7 of 1998, The COMPOL has made a decision to implement his intention to interdict you from Police Duty on Full Pay of your salary with effect from the date of this letter. You will also cease to draw any allowances during the period of interdiction and any other benefits which you enjoyed by virtue of performing police duties.

Upon the receipt of the this letter, you are instructed to return to Police Headquarters' store any uniform or part thereof, the Service Firearms if any, and any other equipment that were issued to you."

Incarceration of Petitioner - Effect of

[44] The Petitioner contends that his continued incarceration at Maseru Central inhibits his studies with **UNISA** and that (he has been deprived of his essential books (*supra*) and that adversely affects his effort to prepare for his defence to the murder charge he is facing.

[45] As regards the charge of murder, the Petitioner states:-

*“...I am aware of the charge against me and its particulars under Section 40 of the Penal Code 2010. I have never been at Mokhalinyane. I was never part of a conspiracy to kill Khetheng. Evidence has been fabricated against me. I want to clear my name and have no intention to run away and I have no interest to interfere with evidence. ... Other than persons named so far I am not privy to any list of any potential witnesses. I do not wish to know them. I know the mother and father of **PC Khetheng** who will possibly testify.*

*.... I hear **PC Ntoane** voice his concern that I would kill him. I do not have an intention/desire to take the life of **PC Ntoane**. His evidence will in fact help clear my name. ... I have never threatened him or said “**mosebetsi ea sono etla lahleha.**”*

[46] Petitioner continued to tell this court that since his interdiction, he exercises no power or control over his former subordinate police officers and he is still duty bound to obey police rules and regulations.

[47] He then outlined the circumstances of his being telephoned to report himself at Police Headquarters. He says:-

*“I was arrested before my interview was even begun. On the 4th August 2017 at about 10-11am the interview stopped and said they were going to exhume the body of **Khetheng**.”*

[48] Petitioner told the court that though he was not subjected to any physical assault, whilst under interview he was confronted with policemen who seemingly looked traumatised from seemingly inhuman treatment.

[49] Petitioner solemnly declares in this evidence:-

*“I shall not run away. I have been in a loyal police service for 26 years. I have benefits ranging between M600-7000,000 to lose if run. I love my country and the police service which I did not join by chance or by accident. I only want to serve my country. Extradition Treaty can ensure my return. **Tšeliso Mokhosi** was released on bail I also wish to be given bail. My co-accused are still at Central Prison. I am deeply bonded to my family ... I will not decamp.”*

Petitioner (Cross-Examination)

[50] ***Adv. Tlali*** - for the *Director of Public Prosecutions* - in cross-examining the Petitioner sought to depict the Petitioner as “*unreliable*.” He did this through detailing instances at the **Central Prison** but in my view *per se* these cannot be classified as material or relevant to the inquiry as to whether the Petitioner should be granted or refused bail.

[51] Petitioner maintained throughout that notwithstanding the serious nature of the charge he is facing that he will not abscond. He loves his country Lesotho and adores his family and will not do anything to cause forfeiture of the benefits of his long service.

[52] The Petitioner contends that his Detention Form is being concealed and not being produced because some “*embarrassing/humiliating things would be seen.*”

Question : *You are a flight-risk?*

Answer : *That is not so!*

Question : *You could interfere with witnesses?*

Answer : *Police regulations would not allow that!*

Question : *You could not abide by the conditions because you are unreliable?*

Answer : *I have not been found unreliable by this court ...!*

Submissions of Counsel

[53] As drafted the amended ***Section 109 A (1)*** of the ***Criminal Procedure and Evidence Act*** squarely places the evidential burden on the applicant to satisfy that (a) there exist exceptional (*not personal*) circumstances that justify his release on bail and (b) that such released will not prejudice the interest of justice.

[54] In this case, the judicial discretion which this court must exercise must be confined to the parameters of the law and to the actual matrix of the case. This involves subjectivity as well as the objectivity of the balancing approach to the exceptional and objective circumstances of the case.

[55] *Adv. Mohau KC*, for the Petitioner, strenuously submitted that the definition of “*exceptional circumstances*” should not be too restrictive or too above the ordinary parlance – “*exceptional*” does not mean beyond the ordinary. He submitted that cumulatively the factors tilt the scales in favour of granting of the Petitioner bail and he submits that with 26 years loyal service and as an erstwhile commanding officer, the Petitioner is unlikely to breach bail conditions and flee the country or influence the potential witnesses – police constables at Leribe Police station.

Factual Analysis

[56] In this Petitioner for bail before the court can analyse the factual matrix, the court is imperative that it should place this bail inquiry in its proper perspective both under the **Constitution of Lesotho** and under law (*Common and Statute*), because the **Constitution of Lesotho** is the supreme law of the land and the *Bill of Rights* under Chapter II of the Constitution is specially entrenched. In addition, *Section 109* of the **Criminal Procedure and Evidence** should be contextually applied to the circumstances in the case.

Judicial Discretion

[57] In matter of bail, the attitude of the **Director of Public Prosecution (DPP)** is an important though not the only consideration. The court is not bound by the *ipsi dixit* of the **(DPP)** where the **(DPP)** decides not to oppose the bail application, it is still for the court to exercise its discretion to grant or to refuse bail and will do so with all impartiality and without bias or prejudice or fear or favour.

[58] In my view the *rationale* and purpose behind the 2002 Amendment is to render it “*less easier*” for an accused who has committed a *Scheduled Offence (often serious or heinous)* – to be granted bail. It is accepted as good law that the effect of this section is also to place an “*evidential burden*” on the applicant to satisfy the court that “*exceptional circumstance*” exist that justify that his release on bail shall to prejudice the interest of justice. It is in the case of **S.v.Viljoen**¹² where **Oliver JA** decidedly avoided attempting to define the term “...*exceptional circumstances*...” under the South African *Section 60 (11)* of the *Criminal Procedure Act No.51 of 1977* and the judge emphasised the fact that evidential *onus* rested squarely on the accused applying for bail of 1977 and reasoned that this meant that it was not necessary for the state to establish that the accused’s circumstances to his being a flight risk or that he would undermine the interests of justice etc. In order to pass the muster, the alleged circumstances must not only be “*unusual*” or “*compelling*” but should also justify the release on bail and this requires prioritization of interests of justice over other interests.

¹² 2002 (2) SACR 550 (SCA)

[59] Under our law, a bail application is not a trial where in the guilt or innocence of the applicant on the charge is being inquired. Having been lawfully arrested and detained, the accused person wants to be allowed his liberty pending his trial, and in deciding whether to grant bail in the exercise of its discretion, our courts are guided by certain principles and in the bail inquiry paramount issues are whether the accused is a flight risk and is likely to abscond if granted bail or there exists likelihood to interfere or influence the evidence/witnesses likely to be called. It is not an easy task to determine or forecast the future conduct of a human being standing charged with a serious offence.

[60] The court in exercising its judicial discretion has to balance holistically or cumulatively all these broad interests often unquantifiable with those of the accused person. The repute of the judicial system cannot easily be gauged or be measured with any precision or be defined with fine demagoguery.

[61] Whilst the **Constitution of Lesotho** provides for bail¹³ as stated above, the court in discharging that societal duty must exercise judicial discretion with a true sense of accountability to the Basotho people who justly expect justice not only to be done but also to be seen to be done – “*justitia fiat*”.

[62] In any given case “*exceptional circumstances*” (as opposed to *ordinary circumstances*) are often peculiar or compelling. In this case senior police officers are being charged with murder of **Police Constable Khetheng** who disappeared without trace at Leribe Police Station, and a high profile *habeas*

¹³ Section 6(5) *ibid*

corpus application and proceedings¹⁴ that aroused much public attention only to be followed by a most grisly exhumation of the corpse of **PC Khetheng** at Lepereng Cemetery.

[63] Because our *Section 109 (A) (1)* of the *Criminal Procedure and Evidence Act No. 9 of 1981* is worded similarly to *Section 60 (11)* of the *South African Criminal Procedure Act No. 51 of 1977*, the *plethora* of decided South African are very persuasive. *Section 60 (11)* provides that bail should be refused in any case where the accused has been charged with a schedule offence unless such accused can satisfy the court as to the presence of exceptional circumstances justifying the granting of bail. This judicial approach is in my view, founded on a public policy that persons who have committed heinous offences should not granted bail easily.

[64] In this inquiry, a serving policeman – a law enforcement officer – was killed and the crime is rendered more heinous by the fact that his corpse was then buried in a cemetery in most mysterious circumstances perhaps never to be found. Another factor is that if convicted, the accused is likely to be sentenced to a long term of imprisonment, yet another factor is whether releasing accused on bail will place the judicial system into disrepute. The paramount duty of every police officer is to maintain law and order, to protect lives and property of others.

¹⁴ *Thabo Khetheng v Commissioner of Police and Others – CIV/APN/276/2016*

*A Brouhaha*¹⁵

[65] The “*Brouhaha*” that has followed the grisly exhumation of the corpse at the Lepereng Cemetery on the outskirts of Maseru, demonstrated clearly the public disquiet and excitement; and there is a cry for justice not only to be done but also to be seen to be done. Of course, as **Justice Chaskalson** (former *President of Constitution Court of South Africa*) once opined “...*public outcry should not be let to instil fear or undue influence in the court of law! ...*”the court has to balance holistically at all these broad interests often unquantifiable and with those of the accused person. Also to be borne in mind is the repute of the judicial system an item that cannot be gauged or be measured with any precision or be defined with fine demagoguery!

[66] I am of the view that the Petitioner has an ambitious plan to acquire more university degrees and indeed to come and serve his beloved country and that he has orchard at Qaba with apples and pears being grown. These are laudable – but in my view are not exceptional. At best they qualify as personal circumstances unique to himself. Where a person has committed a heinous crime and has voluntarily surrendered himself and has made a confession, bail is usually granted like in a case where he shows that the charge is trumped up and he had a water tight *alibi* or that he is terminal ill with cancer!

[67] No doubt this bail inquiry is of high profile. In this case the murder is of its own kind in recent times in Lesotho. The exhumation uncovered the corpse

¹⁵ “means ...public excitement or outcry following an occurrence...,” *–Oxford Dictionary*

of PC Khetheng from Lepereng Cemetery where it had been buried and interred in circumstance as yet unknown.

[68] Procedure under *Section 109 A (1) (a) (i) (A)* of the *Criminal Procedure and Evidence Act No.9 of 1981* as amended by *Act No.10 of 2002* is *sui generis* in that it explicitly provides that a person who has been charged with a crime of murder and the victim is a law enforcement officer, that person shall be kept in custody till trial unless he adduces evidence that shows that “*exceptional circumstances*” exist which in the interests of justice permit or justify his release on bail.

[69] The Petitioner adduced evidence to the effect that he was interviewed upon his arrival at the Police Headquarters on the 4th August, 2017 and was remanded on the 7th August, 2017. The Petitioner therefore fully knows the allegations against him and having been given ample opportunity before this court it was for him to adduce evidence refuting the veracity of such allegations. He states that he has never been to Mokhalinyane on the date alleged in the indictment. He curtly says “...*hard things*...” occurred at the Police Headquarters.

[70] The court is enjoined by the *Section 109* to order that the petitioner (*Accused*) be detained in custody until he is dealt with in accordance with the law unless the petitioner “*adduces evidence*” which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release. This casts an evidential burden on the petitioner which can be discharged on a balance of probabilities.

[71] In this inquiry, the Petitioner has adduced his own evidence denying complicity in the murder but he has not satisfied the court that the charge

against him is trumped up fabricated or “*non-existent*”. He has adduced his own evidence about personal circumstances regarding his ambitious studies with **UNISA** and his horticultural projects at his apple orchards in Qaba Matelile.

[72] In my view this has fallen short of qualifying as “*exceptional circumstances*” which in the interest of justice should permit his release. Interest of justice, like exceptional circumstances may not be easily defined with precision. There is also a complementary adage; justice *must not only be done but must be seen to be done*.

[73] An objective approach and assessment of the factual matrix must holistically be weighed and balanced with the broader interest of justice. The rationale underlying the *Section 109 (A) (1)* is to render more difficult or less easier the release of accused charged with murder whose victim is a police officer [other offences scheduled are aggravated robbery and aggravated rape].

[74] Seemingly, there is no *onus* or evidential burden at all cast on the crown, or (*the DPP or the Police*) to adduce that (a) no exceptional circumstances exist that justify the release and that (b) interest of justice will not be prejudiced.

[75] I also agree that *Section 109* as amended is not unconstitutional when it places the evidential burden on the petitioner charged with murder and the victim is a police officer. The justification is clear: The purpose of the law in this context is to protect the society and law enforcement/personal against serious crimes; the law dictates that perpetrators of such crimes should be detained in custody until he is dealt with in accordance with the law; and this must be done within a reasonable time – *Section 12* of the Constitution.

- [76] It should be noted that the application of *Mr. Mokhosi* in *CRI/APN/ 2017* was not opposed at all. Circumstances between this petition and that bail application are not the same. As such that they ought to be accorded similar treatment.
- [77] That the Petitioner reported himself at Police Headquarters should be viewed from the angle that the Petitioner is a high ranking police officer and as such under duty to obey instructions to report at the Police Headquarters – this is very unlike where a “*civilian*” voluntarily on his own accord surrenders himself after committing a crime.
- [78] In the present case, the Petitioner is facing very serious charge of murder in which the victim is a police constable and the fact that the corpse of the police constable was exhumed some “*seventeen*” months after his alleged disappearance is a fact that shrouds this case with mystery. It is in such circumstances that this court should give the interest of justice due priority. The evidence that will be adduced to support the charge should “*of its own kind.*”
- [79] What is imperative in this case is maximum and speed. The police investigation team should be fast-tracked with all speed and without undue delay, because delay can at times be punitive. We have the speedy *Trials Act No. 9 of 2002*. Justice delayed is justice denied.
- [80] Whilst the petitioner may not be a “*flight risk*” and that this risk can safely be discounted possible influence of witnesses “*lurks on the wings,*” despite the fact that no evidence has been adduced about the nature and scope of the implication or incrimination of police officer charged with the murder of the police constable.

[81] The court bear in mind that it was not for the crown to show or satisfy the court that exceptional circumstances exist to justify Petitioner's release but it was for the Petitioner to satisfy the court that such exceptional circumstances exist and that interest of justice will not be prejudiced if he is released on bail. Indeed under the provisions of *Section 109* it is not necessary to oppose the application.

Conclusion

[82] I have carefully considered the *Section 6(5)* of the **Constitution of Lesotho** regarding bail and *Section 109* of the *Criminal Procedure and Evidence Act* as amended. Having carefully considered the facts and circumstances of this case; and having looked closely at the provisions of *Section 109 (A) 1* of the **Criminal Procedure and Evidence Act 1981** as amended by Act No.10 of 2002 and that the law casts an evidential burden on the petitioner to satisfy the court on a balance of probabilities that (a) exceptional circumstances exist that justify petitioner's release on bail and that interest of justice will not thereby be prejudiced. Interests of justice in this case are: the attendance of remands and standing trial and refraining from interfering with witnesses.

[83] Exceptional circumstances cannot be defined with any measure of precision save to describe them as unusual and compelling and they will differ from case to case. In this case **UNISA** studies and thriving apple orchard whilst being noble and laudable are personal circumstances outweighed by other broader interests like public interest, integrity of the administration of justice, ongoing investigation of a case of its own kind – a *sui generis* with macabre circumstances of mysterious disappearance and grisly exhumation of the corpse buried at Lepereng Cemetery. The judicial discretion that is vested in

this court should be exercised with caution and with a holistic approach to all particular circumstances of this case and to balance these important interests. The court has concluded that the evidential burden has not been discharged on a balance of probabilities especially concerning probability of influencing police witnesses directly or otherwise and indeed no exceptional circumstances have been shown to exist. The petition therefore fails and release on bail is refused.

S.N. PEETE
JUDGE

FOR PETITIONER: *Adv. Mohau KC*

FOR RESPONDENT: *Adv. Tlali and Adv. Fuma*