IN THE HIGH COURT OF LESOTHO

(HELD AT MASERU)

CRI/T/0079/2014

In the matter between;

RETS'ELISITSOE KHETSI **APPLICANT**

AND

DIRECTOR OF PUBLIC PROSECUTIONS **1ST RESPONDENT**

DIRECTORATE OF CORRUPTION AND ECONOMIC OFFENCES **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

JUDGMENT

Coram : Honourable Justice E.F.M. Makara
Dates of Hearing : 21 September, 2017
Date of Judgment : 24 November, 2017

Summary

Criminal Law – application to dismiss charges for want of prosecution-Crown having failed to prosecute its case within time prescribed under Speedy Court Trials Act – The Act affording the charged person the right to apply for dismissal of indictment where the Crown has failed to comply with its provisions – Crown having resisted the application.

ANNOTATIONS

Cited Cases

1. Directorate on Corruption and Economic Offences & Ors v Dlamini LAC (2009-2010)
2. United States v Macdonald 456 US 1 [1982]
3. United States v Loud Hawk 474 US 302 [1986]
4. Sanderson v Attorney General, Eastern Cape
5. Moeketsi v Attorney-General, Bophuthatswana, and Another1996 (1) SACR 675 (B
6. Coetzee and Others v Attorney-General, Kwazulu-Natal, and Others1997 (1) SACR 546 (D)
7. Du Preez v Attorney-General of the Eastern Cape1997 (2) SACR 357(E)
8. Director of Public Prosecutions & Another v Lebona LAC (1995-1999) 474 at 497 B – J – 499 A – I
9. Mohapi v Mohapi LAC (1980-84) 193
10. Mthembu v Lesotho Building Finance Corporation LAC (1985-89)

Statutes & Subsidiary Legislations

1. Speedy Court Trials Act Act No. 9 of 2002
2. Interpretation Act Act No. 19 of 1977

Books & articles

MAKARA J

Introduction

[1] In terms of this application, the Applicant is asking this Court to dismiss for want of prosecution, the criminal charges which the Crown has preferred against him. The basis of the intervention he is seeking for is that the Crown has failed to prosecute its case within the time limitations prescribed under S. 3 and 12 of the Speedy Court Trials Act[1] (the Act). It should suffice to be recorded that in essence

[1] Act No. 9 of 2002

the Act provides for speediness in all the phases of the criminal justice system and affords a charged person to apply for the dismissal of the indictment where the Crown has not acted within the stipulated time limitations. The time schedules cover the pretrial and trial phases. A foundational ideal is to expedite criminal justice processes. A dispensation is, however, accommodated under exceptional circumstances.

[2] A complementary picture is that the Respondents have fiercely resisted the application. Their main stay in this regard is that the application should fail because the Applicant occasioned the delays in the speedier conclusion of the investigations in the matter. They attributed that to his initial case in which he successfully contested the constitutionality of the Government decision to withdraw corruption related criminal charges against his erstwhile co accused Israeli company Nipnikuf, its employees and relatives[2]. Their subsequent resistance was that the delays in the finalization of the investigations were authored by the diplomatic complications concerning securing of some of the vital evidential documents from Mauritius.

[2] The challenge was that the decision violated his S. 18 (3) constitutional right of freedom from being unfairly discriminated against in a manner which is not sanctioned by the Constitution and so his right under S. 19 to be accorded equal protection of the law.

Common Cause Scenario

[3] There is consensus between the parties about the developments which resulted in the current litigation. This commenced on or before the 12th November 2013 when the applicant appeared before the Magistrate Court on charges of bribery and, alternatively, corruption. There he was admitted on bail and then remanded to 26th November 2013. On that date, the matter was postponed to 27 November 2013. On that date, the Crown applied for a postponement of the case to the 27 February 2014. On that day it failed to set down the case for hearing. Consequently, the Crown suggested that the Applicant could be excused from attending remands and undertook to initiate summoning him to the Court once it would be ready to prosecute its case. It has to be underscored that the matter could not be set down for hearing because the Crown was still struggling to complete its investigations.

[4] The impasse continued until on the 24 June 2014 when the matter was scheduled for a hearing on the 5th August 2014 before the Magistrate Court for the district of Maseru. On the latter date, the Respondents requested for a postponement of the hearing for the engagement of a foreign counsel to deal with the matter and advised the Magistrate Court that they were committing the case for summary trial before the High Court. It should suffice to be recorded that to date the merits of the case remain to be traversed.

[5] Subsequently, after the matter was enrolled in this Court, the Applicant discovered that criminal charges against his erstwhile co accused had been withdrawn after Government had granted them immunity from prosecution. It was then that he mounted the already described constitutional challenge against those decisions. At the end of the hearing, the High Court dismissed the case on 3 March 2016. It specifically in its judgment found that the Government had no legal authority to have technically terminated the criminal case which the Director of Public Prosecution (DPP) had instituted against NipNikuv, its employee and their relatives. The Court found that in terms of the Constitution, the DPP has exclusive authority to institute or withdraw a criminal case against anyone and, therefore, the Government had no business in the matter. It appears that this was a desperate measure to appease the company so that it could continue providing national identity cards and passport. This had seemingly been authored by a disastrously ill thought contract that the Government had originally entered into with that sophisticated international company.

Issues for Determination

[6] A synopsis of a main point of divergence between the parties hinges on whether, given the antecedent common cause developments, the admitted perpetual unreadiness of the Crown to set down the matter for hearing due to the incompleteness of its

investigations, legally justifies dismissal of the indictment for want of prosecution.

The Case of the Applicant

[7] A foundation of the case of the Applicant proceeds from the narrated history of the unreadiness of the Crown to have the matter set down for hearing and its prosecution. A complementary dimension is that the *status quo* frustrates him to ventilate his innocence to the charge. He illustrates this through reference to the fact that ever since the Court dismissed his constitutional case, the Crown has never taken any demonstrable measure towards the hearing of the case. On this basis he charges that the Crown has violated his right to a *fair trial* under S.12 of the Constitution and submit it has not complied with the procedural prescriptions set out in the Speedy Court Trials Act[3]. It is therefore, convenient to examine and discuss the statutory framework to show that the respondents have not complied with same and thus rendering the proceedings a nullity at law.

The Case of the Respondents

[8] In a nutshell, the Respondents presented a precise though comprehensive counter argument. It commenced from the premises

[3] Act No. 9 of 2002

that the application is factually and legally misconceived. To demonstrate that, they maintained that the parties differed in their recognition of the material facts upon which the Applicant relied for and that as such, the issues involved could not be resolved through motion proceedings. For that proposition they cited the famous principle enunciated in the Plascon Evans rule, which has been consistently applied in Lesotho which teaches that in that scenario, the Court would be invited to determine probabilities. [4]

[9] The Respondents blamed the Applicant to have partially contributed to the delays in the setting down of the case for hearing. They hastily attributed that to the application which he previously initiated for the staying of the criminal proceedings on constitutional grounds. This had been occasioned by the indemnity agreement which the Government had concluded with his erstwhile co accused. They estimated that the application took approximately one third of the time to be devoted to the main case.

[10] An appeal was made to the Court to realize that the case which the Applicant is facing is complex since it involves allegations of bribery between the Applicant as a former Principal Secretary in Ministry of Home Affairs and an Israeli company that was contracted

[4]Directorate on Corruption and Economic Offences & Ors v Dlamini LAC (2009-2010) 173, 181 Para 17

to provide vital passport and identity card services to the Government.

[11] The Respondents then attacked the Speedy Court Trial Act basis of the case of the Applicant, starting with S.3 by contradicting his version that it is relevant in the matter. They cautioned that it is inapplicable since it applies where the accused has not been served with an indictment or charge while in the instant matter the Applicant had already been provided with the indictment at the time he launched the initial application.

[12] As for S. 5 (3) of the Act, they contended that it is not a reliable provision for the Applicant to rely upon in his charge that his procedural rights under the Act have been violated. According to them, the section is ambiguously worded since its rationality is not conceivable particularly when it is intended to apply to cases where an accused has pleaded not guilty. Resultantly, they submitted that the section does not clearly direct that the trial should commence within 60 days of the accused appearing before a judicial officer. They, in seeking to resolve the ambiguity, advocated for a resort to S. 15 of the Interpretation Act[5] which provides for a remedial interpretation through a fair, large and liberal construction as best ensures the

[5] Act No. 19 of 1977

attainment of its objects. In that perceptive, it was submitted that the intention under S. 5 (3) was that trials should generally commence within 60 days from the first day the accused appeared before a court. Nevertheless, they acknowledged that the S. 9 provisions provide for postponements under compelling reasons[6] and that the judicial officer has discretionary powers over the subject.[7]

[13] They further recognized the fact that S. 12 (1) (b) of the Act provides for the dismissal of an indictment where a trial does not commence within the time provided for in sect 5 and that S.12 (2) sets out the factors to be considered in such an application. This legal framework is according to them, complemented by S.6 and 7 which provide a procedure to be followed in respect of dismissed charges or indictments that have been reinstated. Emphasis was made on the point that the dismissal sought for on the stated grounds, would not necessarily bring the matter to an end since the Act allows the Crown to reinstate it.

[14] A projected fear was that given the seriousness of the indictment in which a high profile State Official is alleged to have been involved in a Five Million Maluti (M5 000 000.00) bribery transaction. In that perception, it is highly inconceivable that the Crown would not in the

[6] S. 9(1)
[7] S.9 (2)

event that the Court dismisses the charge for lack of prosecution, subsequently seek its reinstatement as contemplated in the Act. This according to the Respondents, would be justified against a backdrop of the complexity and tediousness of the diplomatic related logistical challenges[8] that confronts the Crown towards the conclusion of its investigations.

[15] To further accentuate the high magnitude of the alleged offence, the Respondents referred the Court to the seriousness of the prescribed punishment upon conviction. It commands a maximum sentence of twenty (20) years imprisonment.[9] Thus, they submitted that it would be in the public interest for the indictment to be tested in the trial and that towards that destination, a meaningful way forward would be for the parties to hold a Pre Criminal Trial Planning Conference (PCTPC).[10] According to them this would help in the designing of a comprehensive way forward for a preparation of a speedier hearing and conclusion of the case. On that note, they moved that the application be dismissed and that it be ordered that PTCPC be held.

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[8]Hitherto, this remains subject to reciprocation by the Republic of Mauritius to an application from the Kingdom, for mutual legal assistance in order to complete the investigations.

[9] Penal Code Act 2010 Schedule Item 81

[10]Introduced in October 2016 under Rule 61 of the High Court Rules

Decision

[16] It transpires from the common cause material facts that a point of divergence between the parties is exclusively premised on law. So, the relevant provisions of the Constitution and the Act as amplified by would have to be explored for application on the relevant facts.

[17] S. 12 of the Constitution is the fountain of the *Fair Trial Rights* in the Kingdom. These endowments author procedural rights to the criminal suspects, detainees and the accused. They are premised upon a presumption that all such people are innocent until proven otherwise beyond any reasonable standard. A natural dimension of the rights is that the criminal justice processes must be exhausted within reasonable times so that the affected individual would know his fate. This could be through an abandonment of a charge due to insufficiency of evidence or prosecution for a final pronouncement on the guilt or otherwise of a person. The underlining philosophy is that these systems must be administered transparently and reasonably expeditiously through prescribed procedures. Thus, in rhythm with these methodological imperatives, justice would not be delayed and, therefore, subverted.

[18] A relationship of time limitations in the administration of justice processes and the constitutionally guaranteed *fair trial rights* was

articulated in a number of constitutional decisions. Selected testimonies unfold - In *re Mlambo*[11] where Gubbay J inspired by a decision in **United States v Macdonald[12] adopted in United States v Loud Hawk[13]** had this to say:

> In the opinion of the Supreme Court of the United States, the speedy trial guarantee in the Sixth Amendment to the Constitution is 'designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nonetheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

[19] The Learned Judge then recognized that the said Sixth Amendment of the Constitution of the Unite States was in *pari material* terms with S.18 (2) of the Constitution of Zimbabwe. He found that it is designed to accord the accused *fair hearing* within a reasonable time to mitigate the adverse psychological, physical health, social relationship, prejudices, stigmatization, dignity, future prospects in life etc pending trial. In conclusion, he observed that a delay in the hearing of the case would also frustrate the accused from preparing his defence to demonstrate his innocence.

[20] The timelines set out in the Act stands as a testimony of the

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[11] 1992 (4) SA 144 at 147G-148B
[12] 456 US 1 [1982] at 8
[13] 474 US 302 [1986] at 311

intention of the Legislature to operationalize the S. 12 procedural rights for the criminal suspects and accused at all the phases of the criminal justice. These delimit time for making a charge against a suspect, his first appearance before the court and setting down of the case for hearing. There are correspondingly inbuilt relieves for those whose rights could in the process be violated.

[21] All the stipulated times within which each major task in the criminal justice must be complied are important and complement each other. However, for the purpose of the present case, the initially determinative provisions would be those under S. 5 (3). They compel the Crown to prosecute criminal proceedings from the date an accused person first appears before a judicial officer pursuant to arrest or service of summons. Then, S. 6 and 12 immediately provide a redress where the Crown fails to act so within the prescribed duration by entitling the accused to apply for a dismissal of the charges.

[22] It is a recognizable from the papers before this Court that since the 3rd March 2016 when the original application was dismissed, the Crown has not taken any initiative to have the standing case against the Applicant set down. It has never even had an audacity to appraise the Court about its progress towards securing the vital documents through diplomatic collaboration with the Government of

Mauritius. In the meanwhile, the Applicant remains perpetually uncertain about his fate. Obviously, this has serious potential implication on his psychological health and plans which could further have a trajectory on his *right to life* and *human dignity.*

[23] One of the cardinal roles of the Court is to intervene where the State appears to abuse its power and authority. This is so in this case. In precise terms, the Crown is ostensibly abusing court processes by indefinitely over the years failing to prosecute its case. Its failure to prevail over diplomatic challenges cannot over the years serve as a justifiable reason for his perpetual compromise of the stated procedural and substantive rights. To avoid this, the accused should be tried within a reasonable time. This is exactly what the Act seeks to address. Otherwise, this would amount to his punishment before he could be pronounced guilty and sentenced accordingly.

[24] Appreciably, the reasonableness of the period within which prosecution should be done, depends upon the history, circumstances and dictates of each case. There can be no exhaustive answer as to what constitute the paradigm. Its determination remains a judicial prerogative which must be seen to have been so exercised. Krigler while interpreting S. 25 (3) (a) of the Constitution of South Africa which substantially resembles the *fair trial rights* under

S. 12 of the Constitution in **Sanderson v Attorney General, Eastern Cape**[14] elaborated that:

> The test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained. In some jurisdictions prejudice is presumed – sometimes irrebuttably – after the lapse of loosely specified time periods. I do not believe it would be helpful for our courts to impose such semi-formal time constraints on the prosecuting authority. That would be a law-making function which it would be inappropriate for a court to exercise. The courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us. Of the three forms of prejudice, the trial-related variety is possibly hardest to establish, and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalization that the lapse of time heightens the various kinds of prejudice that section 25(3)(a) seeks to diminish.[15]

[25] In determining the issue on the reasonableness of the time taken before the State could prosecute its case, the South African Courts formulated the *balancing test*. The innovation was embraced in **Moeketsi v Attorney-General, Bophuthatswana, and Another**[16]**; Coetzee and Others v Attorney-General, Kwazulu-Natal, and Others**[17]; **Du Preez v Attorney-General of the Eastern Cape**[18] in which the conduct of both the prosecution and the accused are weighed and the following considerations examined:

1. Length of the delay;
2. Reason (s) the State assigns to justify the delay;

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[14] 1998(2) SA 38 (CC) @ 23 para 30
[15] @ para31
[16] 1996 (1) SACR 675 (B)
[17] 1997 (1) SACR 546 (D)
[18] 1997 (2) SACR 357(E)

3. Assertion of the accused on his right to a speedy trial;
4. A prejudice suffered by the accused.

[26] On the home ground, the same jurisprudence was cited with approval in **Director of Public Prosecutions & Another v Lebona.[19]; Mohapi v Mohapi[20] and Mthembu v Lesotho Building Finance Corporation[21].** In essence, the Court of Appeal over emphasised in these cases that it is demonstrably in the public interest that litigation be brought to finality. This denotes that the right of the accused to be tried within a reasonable duration must be counter balanced with the interest of justice subject to the judicial determination of the dictates of each case. It consequently follows that the Applicant in this case bears the burden to prove on the balance of probabilities that it has taken the Crown an unreasonably long time before it could conclude its investigations to prosecute him.

[27] Realism dictates that the Court should recognize that on account of mainly ever existing manpower, financial and logistical impediments in the justice system, it takes years for the police to complete their investigations timeously and consequently for the criminal cases to be set down for hearing. Fortunately for them, due to the limitations of the public and the rulers on how the system

[19]LAC (1995-1999) 474 at 497 B – J – 499 A – I
[20] LAC (1980-84) 193
[21] LAC (1985-89)

functions, they overwhelmingly apportion the blame to the courts. This is one of the multitudes of cases which are pre maturely brought to the courts and mislead the public into believing that they are ready for hearing.

[28] In the premises, the Court in balancing the interest of justice and the procedural rights of the Applicant, concludes that the Crown has taken a perpetually and unreasonable time to complete its investigations to facilitate for the hearing of the case. This has occasioned a violation of the procedural rights of the Applicant under S. 12 of the Constitution and the identified provisions under the Speedy Court Trials Act. Accordingly, therefore, the Applicant has, on the balance of probabilities persuaded the Court to finally hold that the charges which the Crown has hitherto preferred against him in this matter, deserves to be dismissed and it is so ordered.

E.F.M. MAKARA
JUDGE

For Applicant **:** Mr. Q. Letsika of Mei & Mei Attorneys

For Respondent **:** Adv. R.. Suhr for the Director of Public Prosecutions