IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CRI/APN/0616/17

In the matter between:-

MAHANYANE PHUSUMANE **PETITIONER**

And

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

JUDGMENT

CORAM : Honourable Justice E.F.M. Makara
HEARD : 26 February, 2018
DELIVERED: 8 March 2018

ANNOTATIONS

CITED CASES

1. **S. v. Acheson 1991 (2) SA 805**
2. **Bolofo v. DPP LAC (1995-199)**
3. **R v Cregoriou1995 (1) SA 479**
4. **R v Ramakatane1979 LLR**
5. **Malefetsane Soola v Director of Public Prosecutions [19981] LSHC 40**
6. **Betlane v Shelly CC 2011 (1) SA 388 (CC**
7. **Tuoane v DPP CRI/APN/499/04**
8. **The State v Abram Mabena and Oupa Frans Bofu2006} SCA 132 (RSA)**
9. **Retela Mosothoane& Anor. V Rex LLR 1985-1990**
10. **Koning v Attorney– General1915 TPD 221**
11. **Moletsane v Rex1974-75LLR@ 272**

STATUTES & SUBSIDIARY LEGISLATION

1. **Penal Code Act No.6 of 2010**
2. **the South African second Amendment Act No. 75 of 1977**
3. **Speedy Court Trial Act Act No. 9 of 2002**
4. **Majali v S [2011] ZAGPJHC 74**

Summary

A Petitioner facing a charge of contravening S. 22 (1) R/W 109 of Penal Code Act (attempted murder); approached the Court for bail mainly on the grounds that he is a citizen with vested property and family interests exclusively in the country where he is a soldier of a rank of a Major still earning a salary; did not flee the jurisdiction when he learned that he is due for arrest in relation to the charge but cooperated with Army and Police throughout; suffers from chronic lung infection and breathing problem which are aggravated by prison conditions. Though, the charge and evidence placed him at the scene at the material time and associated him with the alleged shooting, he only responded that he is ignorant about the incidence and is innocent.

Held:

1. His answer to the charge and its supportive testimony is bad in law for amounting to a bare denial since it lacks necessary particulars indicative of any defence eg *alibi,* self defence etc so that he could discharge the burden of going forward for the Crown to respond accordingly to maintain its *prima facie* case;
2. It would not be in the *interest of justice* to allow him bail because of the heinous degree of the offence, bringing of the petition too soon while the community is still highly traumatized by the news about the arrest of the suspects;
3. His release on bail could in the circumstances render the administration of justice to fall into disrepute and the Court should in that regard exercise its judicial discretion;
4. He failed to feature an expert witness to confront evidence of a Prison Chief Officer who is a Nurse attached to a Prison clinic that they are so far competently treating his medical condition and that should there be complications, they would refer him to a hospital with advanced care and medical interventions; and,
5. An affidavit filed by the DPP against the petition does not deserve any high value than those filed by the Petitioner and that there is scepticism about the constitutionality of such a notion.

Introduction

[1] In synopsis terms, a genesis of this case is that the Petitioner who has been remanded in custody in the Maseru Central Prison against a criminal charge of contravening S.22 (1) R/W 109 of Penal Code Act[1]; has petitioned this Court to release him on bail pending trial. The charge is a statutorily codified version of a common law crime of attempted murder and is premised upon the allegation that:

[1]Act No.6 of 2010

> On or about the 9th day of July 2016, and at or near Ha Thamae in the district of Maseru, he acting alone, both or with his five co accused in pursuit of a common purpose unlawfully and intentionally, did an act which is more than merely preparatory to the commission of the offence to wit: By firing gun shots at Lyoyd Mutungamiri and inflected upon the said Lioyd serious injuries as such committed an offence of Attempted Murder and thus contravening the provisions of the aforesaid Act.

[2] From the onset, the Court feels obliged to register its displeasure in the manner in which the Crown delayed to respond to the petition and thereby undermine the constitutional fact the bail is by its very nature urgent since the liberty of the subject is at stake. This is attributable to the fact that this petition was filed and served as far back as the 14th December 2017.On the other hand, opposing affidavits were served only on the 23rd January 2018. Nobody deserves to be subjected under such unnecessary anxiety while waiting for the hearing of a bail petition. Resultantly, the matter was only heard on the 26th February 2018.

[3] It should suffice at this stage to be simply recorded that ultimately the Crown vehemently opposed the petition. Thus, in support of its stance, it filed the affidavit of Lance/Sergeant Thamae who is one of the members of the Lesotho Mounted Police Service (LMPS) investigating the case. In addition, it filed that of the Acting Director of Public Prosecution Adv. Hlalefang Motinyane which sought to buttress the point that it would not be in the interest of justice to have the Petitioner released on bail. The last such affidavit was filed by Chief Officer Putsoane of the Lesotho Correctional Service (LCS) who refuted the averment by

the Petitioner that prison conditions pose a serious threat to his already challenged medical condition.

[4] So, in response to the Crown's opposing affidavits, the Petitioner filed his replying affidavit to reinforce the position he maintained in his petitioning papers. He subsequently by consent with the Crown filed a supplementary affidavit in which he factored a health based ground for bail and annexed thereto medical reports in its support. It is precisely in response to same that the Chief Officer filed her counter affidavit.

The Case of the Petitioner

[5] The petitioner has in his petition under oath systematically presented the grounds upon which he motivated his release on bail. A foundation of them is that he qualifies for the dispensation because he is innocent since he did not shoot the victim of the offence in question. In this regard, he cautioned that the Court should be mindful of his constitutional right to a presumption of innocence and complemented same with statement that his release would not be detrimental to the interests of justice.

[6] In a nutshell, the details of his justification to be admitted on bail proceeds from a basic denial that he ever shot the Lyoyd Mtungamiri who is in these proceedings described as a victim of the shooting incidence. This notwithstanding, he maintains that he is eligible for admission on bail primarily on the constitutional presumption of the innocence of the accused pending evidential

proof of his quilt at the requisite scale and a conviction by the Court.

[7] The Petitioner then having stated the elementary legal position which qualifies him for the indulgence he is seeking for, traversed the grounds intended to demonstrate that this would not in any manner whatsoever, jeopardize the interests of justice. In that endeavour, his revelations under oath are:

- He is a citizen with his assets and family including minor children in the Kingdom and with no intention to leave the country;
- He is hitherto employed in the Lesotho Defence Force (LDF) and continues to earn his monthly salary from it;
- He cooperated with the LDF officials in their processes towards handing him over to their Lesotho Mounted Police (LMPS) counterparts to mount their investigations concerning the allegation of his involvement in the incidence;
- He will not evade trial or interfere with the Crown witnesses or intimidate them;
- He will not disturb public order, peace or security; and
- He is above all not a flight risk.

[8] It was in the mist of the above illustrative grounds for bail, that the Petitioner introduced a dimensional one which constituted of his lamentation that his continued detention in prison would be detrimental to his already compromised health condition. He attributes this from his chronic lung and breathing condition that is aggravated by gastric and peptic ulcer sickness. Consequently, medical reports were duly tendered to support that picture.

Secondarily, the Petitioner associated the worsening of his medical condition to the fumes of the perpetually burned coal within the prison. He specifically drew to the attention of the Court that it would be in the best interest of his health if he were to be released on bail so that his wife who is a nurse by profession and knows how to handle him could be accorded the opportunity to do so.

[9] In persuading the Court to recognise that the afore listed factors are indicative of the unlikelihood of him being a flight risk, reference was made to the case of **S. v. Acheson**[2] which has been cited with approval in **Bolofo v. DPP**[3]. Here guidance was detailed that the Court should attach significance to the following questions:

- The depth of the Petitioner's emotional, occupational and family roots within the country where he is to stand trial;
- The nature of his assets in the country;
- The possible means of his flight from the country;
- The consequences of a forfeiture of the bail deposit;
- The travel documents at his disposal to flee the country;
- The existence or otherwise of the arrangements to extradite him if he flees to another country;

[2]1991 (2) SA 805 (Nm)
[3]LAC (1995-199) 231, 252-253

- The seriousness of the offence in respect of which he is charged;
- The strength of the case against the Petitioner as an inducement for him to flee the jurisdiction to avoid standing the trial;
- The possibility of a severity of the punishment should the man be convicted;
- The stringency of the conditions of his bail to render it difficult for any Petitioner to evade the police monitoring of his movements;
- The prospects of interference with the Crown witnesses or the evidence;
- The prejudice (including financially and securing of a legal assistance) which a petitioner would suffer when kept in custody and the duration of the detention before the completion of the trial; and
- The health of the accused.

[12] At this juncture, the Petitioner tendered suggestions on how his right to liberty could be balanced with the consideration of the best interests of justice particularly by ascertaining that he will not flee the jurisdiction and, therefore, stand trial. The objective could according to him be addressed through a monitoring of his movements by reporting himself daily to the office of the Military Intelligence (MI). In addition he proposed the adoption of the

customary bail petitions that he be released on bail on the following conditions:

- That he be released on a bail deposit of one Thousand Maluti (1000.00)
- That he reports himself at the Police Headquarters on his remand day between 6 am and 6 pm ;
- That he should not interfere with the Crown witnesses;
- That he stands trial and attends remands;
- That the Court may add additional conditions it may deem appropriate.

[13] He further in motivating the success of his petition, cited a Namibian of case **S v Acheson**[4] in which Mahomed AJ (as he then was) stated that:-

> 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 unless this is likely to prejudice the ends of justice[5].

[14] Against the backdrop of the jurisprudence which the Petitioner narrated, he submitted that he has made a *prima facie* case that he cannot flee the country and that he would if allowed bail, stand trial. To highlight the point he charged that the Crown has not contested the basic averments that indicate otherwise. These are that he has from the onset cooperated with the law enforcement agencies, he is rooted in this country, has so far remained a disciplined soldier and never attempted to flee the country despite being aware of his pending arrest. To crown it all,

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[4]1991 (2) SA 805 (Nm)at 822A-C
[5]*Ibid*

he stated that he is mindful that if he were to do so, he would be dishonourably discharged from the Force. On that note, he submitted that the view held by the Crown that he would flee to evade the trial, is not based upon concrete facts but sheer speculation.

[15] A controversy raised by the Petitioner on the question of the readiness of the case to be heard soon calls for concern. He maintains that according to the prosecution office the police have not completed their investigations since they have not secured forensic evidence. To reinforce his fear concerning the uncertainty of the hearing date, he complained that so far he has not been served with a police docket understandably to prepare for his defence and that its hearing date itself has not been identified.

The Case of the Crown

[16] A thrust of the case of the Crown is straightforwardly that it would not be in the interest of justice to release the Petitioner on bail. It then submitted that the contents in its three set of opposing affidavits are indicative of that position. An identified preliminary technicality is that he has in the face of a *prima facie* case established by the Crown, simply responded with a bare denial that he did not shoot the victim. The submission made is that the *prima facie* case is represented by the attestation through which Lance Sgt. Thamae subscribed to the charge and his revelation therein that the Petitioner had even 'tendered' an informal admission of his involvement in the incidence.

[17] Also reference was made to affidavit of the Director of Public Prosecution (DPP) which was intended to throw weight on the point that in recognition of the seriousness of the offence charged, it would not be in the interest of justice to admit the Petitioner on bail. It was cautioned that the Court should give a serious consideration to this affidavit. A decision made in **R v Cregoriou**[6] was relied upon in imploring the Court to accept the proposition. Here it was stated that:

> ..... the court must be very careful not to lightly override the opinion of the Attorney General[7].

[18] The Crown conceded that the Petitioner has a constitutional right to be presumed innocent until it proves otherwise and the Court pronounces so. However, it hastily warned that there are incidences where the seriousness of the offence and the possible severity of the punishment after conviction would militate against the application of that constitutional right for the accused to be released on bail. The impression given is that the right is, in bail cases, applied relatively in that it is circumscribed by the material merits of each case. A submission was made that despite the Petitioner being a citizen and a member of the LDF, the heinous nature of the charge preferred against him and its propensity to attract a heavy sentence in the event of conviction, renders him to be a flight risk and, so, ineligible for bail.

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[6] 1995 (1) SA 479
[7] *Ibid* @ 480

[19] A fear was expressed that if he is released from custody, he could use his standing within the LDF to interfere with the witnesses and destroy the evidence against him. In the circumstances, the Crown maintained that to admit the Petitioner on bail would be detrimental to the interests of justice.

[20] On the issue of the uncertainty of the hearing date of the case, the Crown responded by explaining that this could be associated with the limited number of judges and the congestion of the Court roll. It was, however, argued that this could be circumvented by making a special arrangement for the matter to be heard soonest.

[21] In reaction to a special plea to the Court to realize that the continuance of the incarceration of the Petitioner would be detrimental to a healthy maintenance of his children, the Crown contended that his wife who is a nurse would, in the meanwhile, shoulder the task.

[22] As for the Petitioner's health condition challenges and their aggravating factors that he complains about, the Crown in seeking to maintain the *status quo* relied upon the affidavit of Chief Officer Putsoane who also happens to be a nurse attached to the LCS Clinic. Its relevant averment appears where she creates a perception that the clinic has the medical facilities and expertise to deal with the health complications confronting the Petitioner and that the best is being done to handle that. She complemented the statement with a reassuring one that in the event of any health

complication beyond the capacity of the clinic, they would automatically refer him to hospital for advanced medical interventions. She gave the impression that this is a normal practice with other sick inmates who may need a referral.

Decision

[23] In principle every accused person including the present Petitioner naturally qualifies to be considered for bail. This is so in recognition of a sacrosanct common law edifice which has now transcended into our Constitution[8] that an accused deserves to be presumed innocent until he is pronounced otherwise by a court of competent jurisdiction. The notion is a dimension of the Godly created natural right of a human kind to be heard before an adverse decision could be imposed upon him. Even God Himself observed this principle by according Adam a hearing before pronouncing him guilty and thereafter determined an appropriate punishment upon him and the rest of the human kind[9]. God did likewise to Cain who had killed his brother Abel by asking him three questions before He could deliver His verdict and then imposed the sentence[10].

[24] The notion is also traceable from the reality that an innocent man could be falsely, mistakenly or genuinely charged in relation to an offence in which he could be snow white innocent. There is abundance of this testimony including that of people whom it emerged after they were executed that they were innocent. This

[8]Section 12 (2) (a) of the Constitution of Lesotho 1993
[9]Genesis 3:8-14
[10]Genesis 4:10-16

is demonstrative of the profundity and the sacredness of the philosophy underlying the recognition of the presumption of innocence in our law.

[25] Notwithstanding the salutariness of the presumption in our justice system, it does not apply absolutely. Its existence and limitations are paramountly inscribed under S. 6(1) of the Constitution which reads:

> Every person shall be entitled to personal liberty that is to say, he shall not be arrested or detained save as may be authorized by law in any of the following cases, that is to say:
> ..... Upon reasonable suspicion of having committed, or being about to commit a criminal offence under the law of Lesotho.

[26] On the practical level, the Court has a discretionary power to maintain the liberty of a person who is on reasonable grounds suspected of having committed a criminal offence or deprive him of it pending conclusion of trial over the offence charged. Either decision is circumscribed by the merits of each case, the context within which the offence was allegedly committed.

[27] The considerations between the right of the liberty of a criminal suspect and what emerges to be the indispensable material factors which may call for its curtailment precipitated the common law innovation of the concept of the *interest of justice*. A philosophy underlining the phenomena was to balance the constitutional right of the liberty of the suspect and the *interest of justice.* The ingenuity itself resonates the inherent jurisdiction of the courts to protect and develop the law through the instrumentality of its interpretative powers in order to harmonize

the *fair trial rights* under S. 12 of the Constitution with the rest of objects of the rule of law. These *inter alia* include maintaining of the confidence of the public to the courts where they make decisions relating to bail petitions. In the same vein, they should be seen to recognize the realities prevalent within their jurisdictions when dispensing bail justice. In simple terms, justice should not be administered *in vacuo.*

[28] Resultantly, there is no definite or exhaustive definition of what constitute *interest of justice*. Instead, there is an endless catalogue of examples that serve as guidelines towards its determination. This has rendered the concept versatile since its meaning is dictated by the exigencies of each case which include a variety of factors including legal and factual considerations. Some of such basically common law contemplations are whether the:

- Nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the **community** where the offence was committed;
- Sense of peace and security **among members of the public** will be undermined or jeopardize **the confidence of the public** in the criminal justice system; or
- Court would identify any other factor which projects a fear that it would not serve the interests of justice if the petitioner is released on bail[11].

[29] Though the Court should take into account the interests of the public, as it has been elaborately stated, it does not mean that

[11]These have incidentally been incorporated into S. 60 (8A) (a) – (f) of the South African second Amendment Act No. 75 of 1977

it must subject its judicial authority under the court of the public opinion, however, its misguided sentiments that may not be in rhythm with the law or the basic tenants of justice. Also, It should, however, be emphatically cautioned that the *interest of justice* should not be mistaken for the *interest of the State.* Otherwise, courts would seriously compromise their independence and neutrality.

[30] Mofokeng ACJ (as then was) acknowledged the imperativeness of the Court to complement the normal requirements that a petitioner should satisfy by interfacing them with the consideration of the interest of justice[12]. Accordingly, in **R v Ramakatane[13]** it was cautioned that bail should not be granted where the ends of justice could be defeated by allowing a petitioner bail.

[31] It appears that the courts in considering the *interest of justice* must ideally complement the adversarial conduct of bail proceedings with the inquisitorial approach. In that way, the victims of the crime, the chiefs and the community could be called to testify in the matter so that the scenario could be perceived holistically in the *interest of justice.* This would be a realistic strategy to fight the Schedule 1 crimes especially murder[14]. In my view, though the present charge of Attempted Murder is not statutorily scheduled as a serious offence, it nevertheless, subject

[12]Malefetsane Soola v Director of Public Prosecutions [19981] LSHC 40 at page 4
[13]1979 LLR at page 535
[14]The observation was wisely articulated by Mzwandile R Masthsoba in his LLM thesis Bail and the Presumption of Innocence: A Critical Analysis of the Section 60 (1- 11) of the criminal Procedure Act 51 of 1977 as Amended.

to the material factors around its commission, remains as such under common law. A *prima facie* impression given before the Court is that the offence in question was committed against the complainant under outrageous circumstances and in cold blood.

[32] The content of the charge and the evidence tendered by Lance Sergeant Thamae are of a determinative significance in this case. This is so, when considered side by side with the reply that the Petitioner has presented to them. The comparison reveals that the charge as supported by the sworn testimony of Thamae clearly places the Petitioner at the scene at the material moment of the night on which the incidence happened and accuses him personally together with his colleagues as the culprits. All he says in his reply is simply that he knows nothing about the said shooting. Understandably, he is pleading innocence to the charge and its supportive evidence. The Court regards this response to be insufficient since it is just a bare denial. This is bad pleading to a basically papers founded litigation[15]. Accordingly, in **Betlane v Shelly CC**[16] it was explained that:

> It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit.

[33] The identified deficiency in the response proffered by the Petitioner is made well mindful that he does not bear the *onus* to prove that he qualifies for admission on bail. Instead, his is simply to discharge the burden of going forward by challenging the Crown

[15]The cases of both sides are in the main founded upon papers in the form of petitions. This is analogous to an approach in a case initiated by way of a Notice of Motion.
[16]2011 (1) SA 388 (CC) para 29

to sustain its *prima facie* case. In the light of the seriousness of the charge, he could achieve that by advancing some indications of any of the competent defences to it. To illustrate the point, he might have passed the test by pleading:

- *Alibi,* explain his whereabouts at the relevant times and on a lighter note demonstrate that;
- Self defence;
- A pursuit of a lawful arrest;
- Execution of lawful orders;
- Mistaken identity of the complainant as someone who had committed a scheduled offence; or a deserter from His Majesty's Forces who resisted arrest.

[34] Then the Crown would have to throughout discharge its obligation to evidentially maintain a *prima facie* case that it would not be in the *interest of justice* for the Court to admit the Petitioner on bail. It is precisely in that *status quo* that the Petitioner had to respond by presenting a comprehensive counter explanation which would relatively constitute basis for his account of innocence and ignorance about the incidence. Monapathi J in **Tuoane v DPP**[17] postulated the law by stating that it suffices for the Crown to make a *prima facie* case by featuring sworn evidence of the police investigators that a petitioner acting with a common purpose with others committed the crime charged. In conclusion, he stressed that this is all that is required and that there was no need for the details to be traversed.

[17]CRI/APN/499/04

[35] It transpires to have been a technically fatal omission for the Petitioner to have tendered a general plea which does not with specifism respond to the content of the charge and its supportive testimony by Lance Sergeant Thamae in particular. In that approach, he could have exposed the weakness of the charge or its limitations in maintaining a *prima facie* case. So, the issue concerning *interest of justice* could have logically become irrelevant.

[36] At this stage of the judgment, the Court revisits some of the common law prescribed criterion for admitting an accused on bail. These are the nature of the offence, the circumstances surrounding it, its likelihood to induce a sense of shock and outrage in the community, sense of peace and security within the community, likelihood that granting bail would jeopardize the confidence of the public in the criminal justice system. Moreover, the Court is said to be at large to factor in any other relevant consideration concerning whether the admission of a petitioner on bail may not *defeat the ends of justice*. This would be in harmony with thinking in **R v Ramakatane** that:

> ..... Where there are indications that the proper administration of justice may be defeated if an accused is let out on bail a court would be fully justified in refusing bail[18].

[37] On the strength of the narrated common law standard, the Court takes judicial notice that the complainant was a Zimbabwean national who worked as the editor of the renowned Lesotho Times and Sunday Express newspapers respectively.

[18] *Supra* @ 536

They are a print media investment in the Kingdom that has created employment opportunities for the nationals. The readership of the papers covers the whole country and transcends into the Republic of South Africa and have ever since their inception relatively game changed the print media industry in Lesotho.

[38] The complainant has by virtue of his position as the editor of the famous newspapers, over the years gained popularity throughout their circulation territories of his newspapers. This is also attributable to his relatively professional editorship. As a testimony there were times when his editorial column was courageously devoted on a constructive criticism of both Government and the Opposition irrespective of who was in power at the time.

[39] A true fact is that the shooting incidence which is a substratum of this petition occurred at the time this country was going through one of its seriously testing times and so was the rule of law itself. It was in that environment that his paper reported allegations of incidences which undermined the rule of law and some acts of impunity. Without necessarily saying that the reporting was true or otherwise, he appeared to strive towards presenting himself as an 'Apostle of truth', advocate of transparency and accountability throughout the institutions of Government.

[40] The shooting episode was widely reported in the print, electronic, radio and television media internationally. It was

lamented therein that the man was shot at in cold blood as he approached his home at around mid-night after leaving office, he sustained life threatening injuries which caused him to be referred abroad to receive more advanced medical interventions. The picture given was that it was through a divine intervention that he survived. Due to mainly his high profile standing, the revelations emotionally devastated multitudes of the readers of his edited papers and the media world. The inference made wrongly or correctly by some public sectors was that he was a victim of the courageous reporting of the developments during those critical times. Thenceforth, there has been a hope that the culprit would one day be found and brought to justice.

[41] In the circumstances, it is worth noting that it took almost eighteen months (18) before the suspects were apprehended. Understandably, substantial numbers of members of the public are enthusiastically expecting the trial to commence **soon**. It would, therefore, in the view of this Court, be simply **too soon** to release the Petitioner on bail. That could, in the eyes of the community risk landing the administration of justice into disrepute. Besides, the community might not feel safe if the Petitioner who is alleged to have committed the described heinous offence is **soon** after his arrest freed on bail. A dangerous precedence could contextually be created. The conclusion is *inter alia* inspired by a statement made by Nugent JA who wrote the judgment for a panel of three in **The State v Abram Mabena and Oupa Frans Bofu**[19] that:

[19]{2006} SCA 132 (RSA)

> Five grounds are listed upon which if established, the interests of justice do not permit the release from detention of an accused. Two of those grounds concern the impact that the granting of bail might have upon the conduct of the particular case. The remaining three concern the impact that the granting of bail might have upon the administration of justice generally and **upon the safety of the public**[20]. (Court's Emphasis)

[42] Theoretically, as already stated, the seriousness of the offence serves as one of the basis for balancing the liberty of a Petitioner for bail and the *interest of justice*. The underlining understanding is that the seriousness of the charge may fortify a fear that he is more likely to flee the jurisdiction to avoid a conceivably commensurate punishment. The *prima facie* case established against the Petitioner, is suggestive that he has committed a grievous offence especially that he insufficiently pleaded to it. At the end, the apprehension that there are prospects for him to leave the Country to avoid trial sounds somehow to have some foundation. There is abundance of evidence that Lesotho soldiers are no exception when facing serious criminal charges irrespective of whether they were genuine or otherwise. It appears that they are intimidated by fear of a possible imposition of heavy sentences and scepticism concerning prospects for the fairness of the trial. In **Retela Mosothoane& Anor. V Rex**[21], this Court cited with approval the test adopted in **Koning v Attorney– General**[22] at 224 commenting that:

> ..... The court must ascertain, as far as it can from the circumstances, what the penalty is likely to be which will be imposed on the applicant. If the penalty is likely to be a severe term of imprisonment, then the courts ought not to grant bail[23].

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[20]Para 4
[21]LLR 1985-1990
[22]1915 TPD 221
[23]@ p.224

[43] In a nutshell, the seriousness of the offence charged, the deficiency in answering it, the likelihood of the trial to culminate in the imposition of a heavy punishment and the untimely **immediateness** of the petition during the crescendo of the public attention including its fears, conflicts with the interest of justice. Though bail petition is for understandable reasons urgent, it could in the light of the merits of the case at hand, been strategic to have timed it accordingly.

[44] Surprisingly, the Crown in its further endevour to persuade the Court not to admit the Petitioner on bail relied upon an affidavit filed by Acting DPP Adv. H. Motinyane. In essence it radiates an impression that it would not be in consonance with justice for the petition to succeed. It was submitted that the Court should attach weight to that affidavit as it was so decided in **Ramakatane (*supra*)** and in **Moletsane v Rex**[24]. It should suffice for the Court to express its scepticism about the constitutionality of assigning significant weight to the affidavit of the Acting DPP than to the other testimonies including those filed by the Petitioner himself. In principle, all witnesses and their individual evidence must be treated equally. The value of each would only be assessed during trial or at the end of it. It would not rhyme with the *fair trial rights* in the Constitution if the evidence of the DPP is given preferential treatment yet she is a party in all criminal proceedings. She should be content to be *dominis litis* and to execute her constitutional mandate from that premise.

[24]1974-75LLR@ 272 para B

[45] Lastly, the subject to be addressed is the health related ground upon which the Petitioner is asking the Court to release him on bail since prison environment especially the continuous burning of coal aggravates his already failing health condition and threatens his life. He specifically attributes his ailment to *a chronic lung and breathing condition*. According to him this needs constant medical attention. The Court appreciates the health challenge which the Petitioner says he is experiencing in prison.

[46] However, the complexity is firstly introduced by the evidence of Chief Officer Putsoane who is a nurse by profession and is attached to the clinic of the Correctional Service. Her testimony is that hitherto the clinic has the expertise, facilities, medication and personnel to constantly attend to his health condition. She even sought to assure the Court that in the event that the Petitioner could develop a health condition beyond the competency of the clinic, they would refer him to a hospital with advanced health care and medical interventions. Secondly, the complexity is aggravated by the fact that the Petitioner did not feature an expert witness to contradict the evidence of Putsoane. This would have enabled the Court to make its judgment on the assessment of the versions presented by professionals on the controversy. A focus would be on the prospects of an efficacious management of the health condition of the Petitioner within the described prison conditions.

[47] The Court ventured to read the medical history of the Petitioner which is recorded in his health booklet. It deciphered some message from it though this was compromised by the

hieroglyphic style of writing by the doctors, incomprehensible words and in my humble view disjointed sentences. To complicate the matter, there was no specific reference inherent health danger that the Petitioner would face if he remains in prison and a recommendation of a relatively healthy living environment for him. This is indicative of a need for a comprehensible medical record to have been tendered as evidence to support a proposition that home care would in the circumstances be the only healthy place for him to stay pending trial. Ideally, an expert should have been called to testify on the issue. There should in this regard be recognition that the man is facing a serious charge of attempted murder.

[48] En route to a final decision in this petition it would be remiss for the Court not to highlight the imperativeness of the trial to commence within a reasonable time. Adherence to that time limitation would accord the Petitioner his constitutional *fair procedural rights*[25] and under Sections 3, 4, 5 and 12 of the Speedy Court Trial Act[26]. In that way, the equilibrium of *the interest* of justice between the Crown and the Petitioner would be maintained because if bail refused, his guiltiness or innocence would be speedily determined to circumvent his perpetual imprisonment before being found guilty. This was accurately cautioned against in **Majali v S**[27]. Consequently, an underscored message is that if the Crown fails to prosecute its case within a reasonable duration, the reasons upon which the decision would be made may not necessarily still hold.

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[25]S.12 of the Constitution
[26]Act No. 9 of 2002
[27][2011] ZAGPJHC 74 para 35

[49] In the premises, it is held that it would not be in the interest of justice if the petition succeeds. Bail is, accordingly, refused.

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E.F.M. MAKARA
JUDGE

For Applicant : Adv. Molise instructed by Mukhawana Attorneys

For Respondent : Adv. Hoeane instructed by DPP's Chambers