IN THE HIGH COURT OF LESOTHO

(Constitutional Jurisdiction)

HELD AT MASERU

CC/10/2019

In the matter between

MOTSIELOA LEUTSOA	**1st APPLICANT**
TS'ITSO RAMOHOLI	**2nd APPLICANT**

And

DIRECTOR OF PUBLIC PROSECUTIONS	**1stRESPONDENT**
COMMISSIONER OF LESOTHO CORRECTIONAL SERVICE	**2nd RESPONDENT**
MINISTRY OF JUSTICE	**3rdRESPONDENT**
ATTORNEY GENERAL	**4thRESPONDENT**
TRANSFORMATION RESOURCE CENTRE	**5th RESPONDENT**

JUDGMENT

Coram: Chaka-Makhooane, Moahloli and Banyane JJ

Date of Hearing :05/12/2019

Date of Judgment : 10/09/2020

SUMMARY

Human rights - Right to personal liberty - presumption of innocence and pre-trial detention - constitutional validity of section 109A of the Criminal Procedure and Evidence (amendment) Act No.10 of 2002 requiring the accused person to show exceptional circumstances which in the interest of justice permit his release from detention - whether the limitation

constitutes a radical encroachment upon the right to personal liberty - Section 109A certainly has the effect of limiting the suspects' right to personal liberty - it does not however prohibit release on bail but only restricts it in serious offences - it is thus a justified limitation in a democratic society.

Section 6(5) of the Constitution - a person arrested on the basis of a reasonable suspicion of having committed an offence must be brought to trial within a reasonable time - what constitutes - guiding principles stated.

Annotations

Cases

1. Bolofo and Others v Director of Public Prosecution LAC(1995-1999) 231
2. Rex v Emmanuel Ntoli CRI/APN/20/77
3. Attorney General v 'Mopa LAC (2000-2004)427
4. Ramakatsa v Commissioner of Police const. case No.22 of 2018
5. Lesotho National General Insurance Company Limited v Nkuebe C of A (CIV) 18 of 2003
6. Commander of Lesotho Defence Force and Others v Rantuba C of A (CIV) No.33 of 98
7. Matsoso Ntsihlele & 127 Others v IEC & others C of A (CIV) 57/19
8. Mothobi v Director of Prisons CIV/APN/252/96
9. Thabo Tsukulu v Director of Public Prosecutions CIV/APN/431/17
10. July v DPP CRI/APN/219/04
11. Letsie v DPP CRI/APN/596/2004
12. R v Oakes (1986) 26 DLR (4th) 200 (SCC)
13. Smyth v Ushewokunze, Zim SC 262
14. S v Acheson 1991 NR 1 (HC) (Namibia)
15. RE C T 2018 VSC 559
16. Letellier v France application number 12369/86(ECHR)
17. Wemhoff v Germany application number 2122/64(ECHR)
18. Van der tang v Spain application number 19382/92(ECHR)
19. Cloth v Belgium application number 12718/87(ECHR)
20. S V Dlamini; S V Dladla and others; S V Jourbert; S V Schietekat 1999(4) SA 623(CC)

21. S v Petersen 2008(2) SACR 355
22. S v Scott-Crossley 2007(2) SACR 470(SCA)
23. S v Mokotje 1999(1) SACR 233(NC)
24. S v Jonas 1998(2) SACR 677
25. S v Bruintjies 2003(2) SACR 262(SCA)
26. Motsepe v Commissioner of island Revenue [1997] ZACC 3
27. S v Lawrence; S v Negal; S v Solberg 1997(4) SA 1176(CC)
28. S v Geretis 1966(1) SA 753 (W)
29. Sanderson v Attorney General, Eastern Cape (CCT10/97) [1997] ZACC 18
30. S v Makwanyane & Another (CCT3/94) [1995] ZACC,3,
31. Conjwayo v Minister of Justice and Others 1992(2) SA 56

Statutes

The Constitution of Lesotho, 1993

Criminal Procedure and Evidence Act 9 of 1981

Criminal Procedure and Evidence (amendment) Act No. 10 of 2002

Speedy Court Trials Act 9 of 2002

The Prison Proclamation and Rules 1957

Books

J. Van der Berg; Bail; a Practitioner's guide, 1st edition, 1986, Juta & Co

BANYANE AJ

Introduction

[1] In this multifaceted application, the applicants mainly seek an order declaring the constitutional invalidity of section 109A (impugned provision) of the Criminal Procedure and Evidence (amendment)Act No.10 of 2002; alternatively, that the impugned provision be accorded a constitutionally compliant interpretation or meaning. This provision empowers the court to detain an arrested person in custody unless exceptional circumstances justifying their release are shown to exist.

[2] The basis of the attack of the impugned section is that the requirement for exceptional circumstances is irrational and arbitrary and infringes on the right to be released if not tried within a reasonable time in terms of section 6(5) of the constitution, lacks clarity and/or certainty and therefore unconstitutional.

[3] The reliefs sought are captured in the founding affidavit of the 1st applicant as follows;

1. It is declared that section 109A of Criminal Procedure and Evidence (Amendment) Act 10 of 2002 violates sections 4(1)(b) and 6(5) as it is irrational and arbitrary and therefore unconstitutional.

2. That Applicants be released on bail on such terms and conditions that may be stipulated by this Honourable Court.

[4] **ALTERNATIVELY, TO THE ABOVE PRAYERS:**

2.1 it is declared that the common Law position of bail is not, by Criminal Procedure and Evidence (Amendment) Act 10 of 2002, altered save insofar as the onus is reversed to accused person to

prove on a balance of probabilities that the interests of justice will not be prejudiced by release on bail.

2.2 It is declared that exceptional circumstances, as appear in section 109A of Criminal Procedure and Evidence Amendment Act 10 of 2002, does not require the accused to prove something ***out of ordinary*** but ordinary bail requirements available under common law.

2.3 It is declared that the Court's discretion is not fettered by Section 109A of Criminal Procedure and Evidence (Amendment) Act 10 of 2002 to consider ordinary and personal circumstances as constituting exceptional circumstance.

2.4 It is declared that Section 109A of Criminal Procedure and Evidence (Amendment) Act 10 of 2002 shall be interpreted in line and within the confines of guidelines provided for by **Justice Steyn P** in the case of **Bolofo and Others v Director of Public Prosecution LAC (1995-1999) 231 at 2511-2531.**

3. (a) It is declared that the Applicant's rights in terms of section 4(1)(g) read with section 11(1) and (3) of the Constitution have been infringed by the 1st, 2nd and 3rd Respondents through the prolonged delay in the prosecution of their case and inhuman treatment they are subjected to at the Maseru Central Correctional Institution.

(b) It is declared that the applicants' rights in terms of section 8(1) read with section 27(1) of the Constitution have been infringed by the 2nd and 3rdRespondents through inhuman conditions prevalent at Maseru Central Correctional Institution (Maximum Security Prison cells) consequently this amounts to exceptional circumstance for the purpose of bail application.

4. It be declared that the Applicants' rights in terms of section 18(3) of the Constitution have been infringed by the 2nd and 3rd Respondents by treating them in a discriminatory manner by subjecting them to restrictions and or treatment which fellow detainees who are similarly placed are not subjected to.

5. Costs of suit are awarded to the Applicants. Such costs to include the costs of two Counsel.

6. Further and or alternative relief.

Factual background

[5] The applicants are members of the Lesotho Defence Force. They, together with their co-accused were arrested in November 2017 on a charge of murder of the lieutenant general commander Maaparankoe Mahao and police officer sub-inspector Mokheseng Ramahloko. The 1stApplicant has been denied bail while 2nd applicant has not applied for bail. Their co-accused have also been denied bail and have been detained to await their trial. It is against this denial that they now seek the court to interpret the provisions of the amendment and to release them on bail.

[6] Averments which form the basis for some of the declaratory orders sought can be distilled from the 1st applicant's founding affidavit. They are as follows;

Denial of medical assistance and treatment

[7] The first applicant avers that at the beginning of January, he experienced back pains and had to seek medical attention routinely. This resulted in his referral to both Queen Elizabeth II and Queen Mahohato (Ts'epong) Hospital respectively. He avers that the examining Doctor at Ts'epong referred him for further treatment and operation in Bloemfontein due to the seriousness of his condition.

Regrettably this was not recorded in his health book because the said Doctor declined, reportedly following directives from the Ministry of health banning doctors from referring patients across the Border. The reason for this declination to record, so he was told, was that an estimated cost of his operation is M400.000 and the Government is not willing to fund treatment of patients since referrals across the border are made in the name of government.

Overcrowding and other conditions prevailing at Maseru central Correctional institution

[8] The applicants' further averments are that the conditions at the correctional institution are not conducive for human habitation by reason of;

a) *Overcrowding in the cells*; that occupants in one cell far exceed the carrying capacity of a given cell;
b) *Unhygienic conditions*; that a toilet available has no running water, as a result, they are forced to 'sleep with' urine and excrement in the same cell in which they also keep food parcels. Over and above these, the cells are infested with ticks rendering prisoners prone to diseases or infections.
c) *Scarcity of basic bedding and linen and other necessities*: They complain that a mattress a size to accommodate one person is shared by three inmates and the blankets are scant, they use cold water for bathing due to unavailability of geysers for warm water whereas other detainees at the other block of the same prison have access to warm water.
d) Lack of enough access to medical assistance.
e) *Scarcity of food supply*: Poor diet due to scarcity of nutritional food often allegedly attributable to budgetary constraints by the Government.

f) Denial of privacy during visitation by family members to an extent that their conversation with their spouses are recorded.

[9] The application is opposed by 1st and 2nd Respondents. They specifically deny the factual allegations regarding detainees being denied medical care or assistance. On the averments of lack of geysers, running water, blankets etc. at the facility, they plead that the judicial process is inept to deal with these issues on account of prison security.

[10] Before I consider the constitutional validity of the impugned provision, it is necessary to set out the position of the Bail Law prior to the amendment.

Presumption of innocence and the general position of Bail prior to the amendment

[11] The operation of the presumption of innocence of any person accused of having committed a crime is constitutionally recognised as a substantive principle of fundamental justice. It underlies the concept of bail and it implies that until a man is proved guilty, he is entitled to be treated as innocent. This should constantly be borne in mind in dealing with persons kept in custody pending trial. This presumption acts as a restraint on the measures that may be taken against suspects in a period before trial.

[12] Section 12 of the Constitution 1993 which deals with the Right to a fair trial encapsulates the presumption thus;

> 12(2) (a); *every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty*

[13] Our bail system entitles the accused to bail unless there is sufficient indication that his release threatens to subvert the orderly processes of Criminal Justice. *J Van der Berg*, in his work; *Bail; a Practitioner's guide, 1st ed,1986, Juta & Co*, at p6-10, describes this as a Due process model of bail as opposed to the Crime Control Model interms of which the accused will be granted bail *only* if he persuades the Court that the interests of justice will not be prejudiced by his release. The Former Position is evident from the remarks of Cotran CJ in ***R V Emmanuel Ntoi CRI/APN/20/1977*** (unreported) at p3 where he states as follows;

> *"In an application for bail pending trial it has often been said that the Courts must start with the premise that every accused person is presumed innocent until the contrary is proved and should lean towards the granting of bail rather than refusing it. This Rule is of course subject to certain qualifications based on the principle that it will not be granted if the interest of justice will be prejudiced"*

[14] This general approach has always been adopted and applied by our Courts in Bail applications. The case of ***Bolofo v DPP***, ***LAC (1995-1999)231*** provides a comprehensive guide on principles of bail and or the factors to be considered in Bail applications. It is significant to extensively quote the following passage from the Namibian case of **S v Acheson 1991 NR 1 (HC)(at 822A-B),** adopted in *Bolofo**;***

> *"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 grant bail to an accused person unless it is likely to prejudice the ends of justice. The considerations which the Court takes into account in deciding the issue include the following;*

a) *It is more likely that the accused will stand trial, or it is more likely that he will abscond and forfeit his Bail? The determination of this*

issue involves a consideration of other sub-issues such as, how deep are his emotional, occupational and family roots within the country where he is to stand trial, what are his assets in the country, what are the means that he has to flee from the country, how much can he afford the forfeiture of his bail money, what travel documents does he have to enable him leave the country, what arrangements exist or may later exist to extradite him if he flees to another country, how inherently serious is the offence in respect of which he is charged, how strong is the case against him and how much inducement there would therefore be for him to avoid standing trial ,how severe is the punishment likely to be if he is found guilty.

b) *The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will temper with the witnesses or interfere with the relevant evidence or cause evidence to be suppressed or distorted. This issue again involves an examination of other factors such as whether he is aware of the identity of such witnesses or the nature of such evidence, whether or not the witnesses concerned have already made statements and committed themselves to give evidence or whether it is still the subject matter of continuing investigation, what the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him, whether or not any condition preventing communication between such witnesses and the accused can effectively be policed.*

c) *A third consideration to be taken into account is how prejudicial it might be for the accused in all circumstances to be kept in custody by being denied bail. This would involve an examination of other issues such as, for example, the duration of the period for which he has already been incarcerated, if, any, the duration of the period during which he will be in custody before his trial is completed, the cause of the delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such a delay, the extent to which the accused needs to continue working in order to meet his financial obligations, the extent to which he might be prejudiced in engaging legal assistance for his defence and in*

effectively preparing his defence if he remains in custody, the health of the accused.

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

Constitutional Validity of the impugned provision

[15] The Criminal Procedure and Evidence Act of 1981 was amended in 2002, by inserting a new section after section 109. The constitutional challenge is focused on this amendment. The impugned Act describes itself as an Act "*to amend the criminal procedure and evidence Act 1981, to make provision for the power of the Court to detain, in custody, an accused person who is charged with murder, rape, robbery, stock theft and other serious offences and for related matters*"

[16] The impugned provision reads as follows;(quoted in part)

Power of Court to detain accused on a charge of murder, rape, robbery etc.

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 premeditated, and the victim was-

(A) A Law enforcement 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 holing 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.

ii) The death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit rape, robbery, stock theft, theft of a motor vehicle, and indecent assault on a person under the age of 16 years.

iii) The crime was committed by a person, group of persons or syndicated acting in the purported execution of furtherance of a common purpose or conspiracy …

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 being given a reasonable opportunity to do so, adduce evidence which satisfies the Court that exceptional circumstances exists which in the interest of Justice permit his or her release".

[17] For brevity and for the avoidance of overburdening this judgement by reproducing all provisions verbatim, it would suffice to sum up the offences to which the impugned provision applies. They are;

a) Planned or premeditated murder of a law enforcement officer, potential witnesses in Part II of schedule 1 offences, the death of the victim occurred during commission (or attempt thereof) of rape, robbery, stock theft, motor vehicle theft, indecent assault on a person below the age of 16 years, the crime was committed by a group of persons acting in execution or furtherance of common purpose or conspiracy.

b) Rape; where the victim was raped by more than once whether by the accused or co-perpetrator or an accomplice, the victim was raped by more than one person, the victim was raped by a person who is charged with having committed two or more offences of rape or the victim is raped by a person, knowing that he has acquired Human immunodeficiency virus(HIV), the victim is under the age of 16 years, a person with disability or mentally incapacitated, the rape involved infliction of grievous bodily harm.

c) Robbery; where it involved the use of a firearm by the accused or other participants in the robbery, the infliction of grievous bodily harm, theft of a motor vehicle.

d) Indecent assault on a person below the age of 16

e) An offence referred to in part II, of schedule 1; where an accused has previously been convicted of an offence referred to in the schedule; or where the offence was allegedly committed while he or she was released on Bail in respect of an offence referred to in the schedule.

[18] Offences listed under schedule I, part two include; treason, sedition, murder, culpable homicide, sexual offences against minors, robbery, fraud and others.

[19] This impugned provision empowers the Court to detain a person accused of these offences unless they satisfy the Court by adducing evidence, that exceptional circumstances exist to justify their release.

[20] The quoted provisions elucidate the fact that the restriction on Bail is imposed on serious and violent crimes; being premeditated murder of law enforcement officers and potential witnesses, murder of a person during commission of other serious offences, sexual offences against minors and other vulnerable groups (people with physical disability and those mentally incapacitated), gang-rape, persons with previous convictions and those who commit the alleged crime while on release on bail. Some of these offences attract capital punishment upon conviction.

Attack against section 109A

[21] There are two main constitutional arguments raised: firstly, that the introduction of exceptional circumstances in section 109A is in breach of section 6(5) of the Constitution; second that the limitation of the right is irrational and arbitrary.

[22] Advocate Mafaesa for the applicants contended that the amendment does not have a limitation on how long one can be detained if their trial does not proceed and this is in violation of section 6(5) of the

Constitution which is clear that if the trial does not commence within a reasonable time, a detainee has to be released. He contended that deprivation of liberty can only be justified if an accused person is brought to trial within a reasonable time.

Issues

[23] The main issues that arise for determination should therefore be whether the impugned provision, to the extent that it provides for exceptional circumstances deprives and or encroaches on the right to liberty under section 6(5), and by doing so; whether the limitation on the enjoyment of this right is arbitrary or justifiable. If the provision infringes (limits) enjoyment of the section 6 right, and such cannot be justified, that is, does not pass scrutiny of the justifiable limitation test, then the impugned provision is unconstitutional.

Analyses

[24] It is well established that the methodology adopted in the interpretation and application of the constitution is to first establish the content and scope of the right as entrenched in the constitution, then proceed to consider whether the impugned provisions limit the protected right. After finding the provision to deprive or to limit the right under review, then justification for the limitation must be inquired into. That is to say; whether the infringement is justifiable ***Attorney General v 'Mopa LAC (2000-2004)427,*** *at para 17****, Ramakatsa v Commissioner of Police (const. case No.22 of 2018),*** *at Para 14.*

[25] The general principle regarding the interpretation to be accorded constitutional provisions protective of Rights is the purposive, broad or generous approach, involving the recognition and application of constitutional values. ***Mopa (para 17***), ***and Lesotho National***

General Insurance Company Limited v Nkuebe C of A (CIV) 18 of 2003, (7 April 2004), para [3], and earlier cases there cited).

[26] In order to arrive at a proper meaning and content of a Constitutionally guaranteed Right, the Supreme Court of Zimbabwe, per Gubbay CJ in ***Smyth v Ushewokunze***, ***Zim SC 262***, remarked as follows;

> *"...The endeavour of the Court should always be to expand the reach of a fundamental Right than attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as the letter of the provision. The aim must be to move away from the formalism and make human rights provisions a practical reality for people"*

[27] In the determination of the issues identified earlier, I propose to first consider the purpose and scope of the Right enshrined under section 6 of the constitution.

The scope and content of the Right to personal liberty

[28] Section 4(1) (b) read with section 6(1) of the constitution guarantee the right to personal liberty. Section 6 reads (in part);

> *"every person shall be entitled to personal liberty, that is to say, he shall not be arrested or detained save as may be authorised by Law in any of the following cases; that is to say;*
>
> *….*
>
> *(e) Upon reasonable suspicion of having committed, or being about the commit, a criminal offence under the Law of Lesotho.*
>
> *….*
>
> *6(5) if any person arrested or detained upon the 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".

[29] In Lesotho, there is no explicit constitutional provision enshrining the right to Bail, but the right to be tried within a reasonable time as an incident of a fair trial and of the right to personal liberty as well as the recognition of the presumption of innocence are clear in our constitutional scheme.

[30] Section 6 has three components; firstly; it safeguards the individual's fundamental Right to personal liberty against arbitrary deprivation. Secondly; it sets forth circumstances under which the enjoyment of this right may be validly limited, including the state's duty to enforce the Law and or control crime; thirdly, it proscribes continued incarceration or detention pending trial. I deal with each of these aspects below.

Protection of liberty

[31] The purpose of section 6 must be seen both as protecting the right to personal liberty as well as serving public interest by limiting such a right. As stated in *Ramakatsa* (para 18), the section protects, among others, all persons against factually baseless, rumour driven deprivations of liberty.

Limitations of the Right

[32] Section 6 is evidently clear that freedom from physical constraint is not an absolute Right but subject to limitations encapsulated therein. This ought to be borne in mind when construing section 109A. In terms of this provision, the enjoyment of this right may be limited

under circumstances inclusive of the following; first; where a person is detained in execution of a sentence or order of Court in respect of a criminal offence of which he has been convicted. Second, upon a reasonable suspicion of having committed, or about to commit a criminal offence under the Laws of Lesotho. For purposes of this case, the relevant portion is 6 (1)(e); dealing with deprivation resulting from an arrest vis-à-vis the allegations on commission of an offence.

Prohibition of continued detention

[33] Although deprivation of liberty is sanctioned where there is a reasonable suspicion that the person arrested has committed an offence, pre-trial detention should not exceed a reasonable time as stated under section 6(5), the main thrust of the applicants' case.

[34] Section 6(5) is designed to prevent unreasonable delay and to expedite trials of individuals detained, that is to say, to prevent accused persons from languishing in pre-trial detention and to ensure a prompt trial. It makes it clear that a person cannot be held in detention for an indefinite time without proceeding with his/her case expeditiously. The person detained is thus entitled, in terms of this provision to release, if he is not tried within a "reasonable" time.

[35] The European Court of Human Rights,in interpreting article 5-3 of the Convention for the protection of Human Rights and fundamental freedoms, which reads; *everyone arrested or detained in accordance with provisions of paragraph 1(c) of this article… shall be entitled to trial within a reasonable time or release pending trial*, Stated in the case of ***Letellier v France, application number 12369/86 ECHR*** *at para 35* that;

> *"…a reasonable suspicion that a person arrested committed an offence is a condition sine qua non for the validity of a continued detention. After lapse a certain lapse of time, it no longer suffices;*

the Court must then establish whether there exist grounds justifying the continued detention" see also ***Clooth v Belgium application number 12718/87 ECHR****.*

[36] It is obvious in this provision that there is a time-limit for deprivation of a person's liberty following his arrest. Of significance however is the fact that the provision does not indicate the maximum length of time an unconvicted person can be confined to detention prior to completion of his trial. It is for the Courts to therefore determine the exact meaning of the words "reasonable time".

[37] Because the expression is lacking in precision, it is not possible to determine its exact meaning. The reasonableness of an accused person's continued detention must therefore be assessed and or evaluated in the light of circumstances or special features of each case because the factors which may be taken into consideration are extremely diverse. ***Wemhoff v Germany 2122/64 ECHR(para 10).*** Circumstances arguing for and against existence of a genuine requirement for public interest justifying, with due regard to the principle of presumption of innocence must all be examined ***(Clooth v Belgium, supra)***.

[38] Having outlined the scope and content of section 6, I proceed now to the main issue before court; the constitutional validity of section 109A. I am mindful that an enquiry into the constitutional validity of legislation is an objective one. This is to say, the enquiry into the validity or inconsistency of a statute should not be restricted to the position of one of the parties to determine the validity of a Law. In other words, the subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the

provisions of a statute under attack. ***Ferreira v Levin1996(1) SA 984(CC) (para 26).***

[39] The Act does not contain an absolute prohibition against release of accused persons charged with offences specified therein but provides that release of an accused person is dependent on him adducing evidence satisfying the court on existence of exceptional circumstances that permit his or her release. The Act places a reverse onus on the accused to prove circumstances which justify his release. In other words, it places an evidential burden on the bail applicant to satisfy the court that exceptional circumstances exist to justify his release.

[40] The Act does not however define what constitutes exceptional circumstances. The notion of exceptional circumstances has to be interrogated in order to determine the tenability or validity of some arguments raised by the applicants. I deal with them below.

The notion of exceptional circumstances

[41] It is common cause that the applicants face serious charges, one of which is murder of a Law enforcement officer. Several persons (inclusive of the applicants) are allegedly involved in the commission of these offences. The offence therefore falls within the ambit of section 109A and therefore exceptional circumstances had to be proven why they are entitled to release on bail.

[42] Adv Mafaesa contended on behalf of the applicants that the notion of exceptional circumstances is vague and as such gives too much leeway for subjective interpretation; and that there is no certainty in the application, scope and content, hence decisions on the subject are disharmonious.

[43] He argued further that exceptional circumstances as envisaged under section 109A make an inroad to freedom to liberty contrary to section 6(5) and that the court ought to interpret strictly such provisions to favour the liberty of an individual.

[44] Further that exceptional circumstances envisaged under the impugned provision do not mean something out of the ordinary for purposes of admitting an accused to bail. The case of ***Letsie v Director of Public Prosecutions CRI/APN/596/2004*** was said to have adopted a proper approach on the interpretation of the requirements of the impugned Act. Attention of this Court was drawn to the remarks of the Court adopted from ***Monare v DPP CRI/APN/170/04*** that; What is required in terms of the amendment is clear and satisfactory proof on a balance of probabilities that the interests of justice will not be prejudiced; that the amendment was not intended to fetter the Court's discretion but rather codifies what the Court has always held, as bail could still be allowed even where the crown opposes, if the Court is satisfied that the interests of Justice would not be prejudiced**.**

[45] The notion of exceptional circumstances, properly conceived, so the argument went, does not mean that the legislature has made it impossible for accused persons to be released on bail but merely reversed the onus in bail applications to the accused to show on the balance of probabilities that his release will not prejudice the interests of justice. Adv Mafaesa therefore submitted that the proper construction of the impugned provision is that the detainee is only required to prove on the balance of probabilities that his or her or their release will not prejudice the interests of justice.

[46] The issues raised by these arguments necessitate examination of case law, both national and foreign, on the interpretation of the notion of exceptional circumstances.

[47] The starting point of this examination is this; exceptional circumstances cannot be defined with precision that fits all cases. This was observed by Peete J in ***Thabo Tsukulu v DPP CRI/APN/431/17*** (para10) where he stated that each case must be treated *ad hoc* upon its own particular circumstances. This approach has been applied in other jurisdictions whose bail law vis-à-vis serious offences is to a certain extent similar to our own.

[48] Section 60(11) (a) of the Criminal procedure Act No 51 of 1977 of South Africa is similarly worded as our section 109A. the former provides;

> *"notwithstanding any provision of this Act, where an accused is charged with an offence referred to in schedule 6…the court shall order that the accused be detained in 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".*

[49] The following are some of the cases in which the notion of exceptional circumstances was considered or interpreted**;**

49.1 The South African Constitutional Court in ***S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999(4) SA 623(CC)***when addressing a similar argument on alleged vagueness of the term exceptional circumstances, stated thus at para 75;

> "*I am not persuaded that there is any validity in the complaint raised in argument that the term "exceptional circumstances" is so vague*

that an applicant for bail does not know what it is that has to be established. An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent. The contention was moreover that if one adds that those circumstances must "in the interests of justice permit . . . release", the subsection becomes an insurmountable obstacle in the way of bail. In my view the contrary is true. In as much as we are not dealing with the obstacle itself but with ways of bypassing it, the wider the avenue, the more advantageous it is to freedom. A related objection that the requirement is constitutionally bad for vagueness falls to be rejected for basically the same reason. In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional".

At para 76; Likewise I do not agree that, because of the wide variety of "ordinary circumstances" enumerated in sub-ss (4) to (9), it is virtually impossible to imagine what would constitute "exceptional circumstances", and that the prospects of their existing are negligible. In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond, and generically different from those enumerated. Under the subsection, for instance, an accused charged with a schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to the his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case…In the final analysis, the evaluation is to be done judicially, which means that one looks at substance, not form".

49.2 *In* ***S v Petersen 2008(2) SACR 355****,* the full bench interpreted exceptional circumstances as follows*;*

"generally speaking exceptional is indicative of something unusual, extraordinary, remarkable, peculiar or simply different…this may, of

course, mean different things to different people (exceptional circumstances), so that allowance should be made for a certain measure of flexibility in the judicial approach to the question…in essence the court will be exercising value judgement in accordance with all relevant facts and circumstances, and with reference to all the applicable criteria"

49.3 Personal circumstances which are commonplace cannot constitute exceptional circumstances for purposes of section 60(11)9(a)***S v Scott-Crossley 2007(2) SACR 470(SCA) at para12.***

49.4 In ***S v Jonas 1998(2) SACR 677 at 678 e-g*** the Court stated;

"*… There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as exceptional circumstance. When a man is charged with the commission of a schedule 6 offence when everything points to the fact that he could not have committed the offence, e.g. that he has a cast-iron alibi, and this would likewise constitute exceptional circumstances"*

This was cited with approval in ***July v DPP CIV/APN/219/04***

49.5 In ***S v Bruintjies 2003(2) SACR 575(SCA****), Shongwe AJA* had the following to say at 577*;*

"What is required is that the court consider all the relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence…If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to

be deemed exceptional have been established by the appellant and, which, consistent with the release, warrant his release, the appellant must be granted bail."

49.6 The Supreme Court of Victoria in ***RE C T 2018 VSC 559*** held at para 64 and 65 that; in order to be exceptional, the circumstances relied on must be such as to take the case out of the normal, so as to justify the admission of the applicant on bail; that the hurdle confronted by the applicant in establishing exceptional circumstances "is a high One" however it is not an impossible standard***.*** Exceptional circumstances may, in an appropriate case be established through a combination of factors including matters involving the nature of the crown's case, including its strength or weakness, undue delay in bringing the matter to trial or unusual features of the alleged offending or the investigation, and the applicant's personal circumstances, which might either solely, or in combination, make the circumstances exceptional.

[50] I reproduce these quotations to show that, it is judicially unwise if not impossible to furnish or attempt to give a comprehensive definition of exceptional circumstances. What may constitute exceptional circumstances in any case depends, as reflected in the cases cited above, on the discretion of the presiding officer and the facts peculiar to a matter. Put another way; in the context of section 109A, exceptional circumstances may exist because of a single exceptional circumstance or a combination of circumstances, none of which might individually be considered exceptional, but viewed as a whole can be taken as exceptional to the extent that bail is justified, even considering the very serious nature of the charge. These may include the strength of the prosecution case, an applicant's personal circumstances, absence of factors showing that the applicant poses a

threat/danger to witnesses or is likely to abscond. It might also include a case in which the applicant needs an urgent medical attention or has an intellectual disability or some special vulnerability. The list is not exhaustive.

[51] The Court, in view of the conclusion above, refrains from attempting an exhaustive meaning of the expression in order not to abridge or fetter the wide discretion of the Court to consider all relevant circumstances in each case.

I proceed to the next inquiry.

Does the introduction of exceptional circumstances limit the section 6 Right?

[52] The traditional approach as stated earlier is that pre-trial liberty is the norm and the crown demonstrates why the accused should not be released. Under the impugned Act, the accused is required to discharge the burden to satisfy the Court that exceptional circumstances exist, which, in the interests of justice permit his release. This means he must show that it is likely that he will stand his trial, and likely that he will not tamper with state witnesses or otherwise interfere with the administration of justice. If not discharged, bail is denied. I conclude therefore that the reverse onus and the requirement of exceptional circumstances envisaged by section 109A interfere or limit to a certain extent, the release of a detainee on bail and this has an impact on the right to liberty guaranteed under section 6. In other words, the impugned provision render bail more difficult to obtain than it was under due process model of bail. The question to which I now turn is whether the limitation is justified.

Is the infringement justifiable?

[53] In ***R v Oakes [1986]1 SCR 103***, the Supreme Court of Canada describes the criteria against which justification for limitation of rights must be measured. The case presents a two step test in this regard; first, the objective must be related to concerns which are pressing and substantial in a free democratic society, second it must be shown that the means chosen are reasonable and demonstrably justified. This second aspect is described as the proportionality test, which requires a party averring justification to show three components of this test (proportionality); viz;

a) The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective
b) The means, even if rationally connected to the objective in the first sense, should impair as little as possible the right in question
c) There must be proportionality between the effects of the measures which are responsible for limiting the right and the objective which has been identified as of sufficient importance.

[54] In ***S v Makwanyane & Another (CCT3/94)[1995] ZACC 3,*** it was held that, the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. The requirement of proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose for which the right is limited, and the importance of that purpose to such society; the extent of the

limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired results could reasonably be achieved through other means less damaging to the Right in question.

[55] This approach has been adopted in many cases in our jurisdiction. It is clear therefore that the limitation of a right is constitutionally authorised where it passes the test stated above. I proceed to apply this criterion to the impugned provisions.

The purpose of the impugned Legislation

[56] Every enactment shall be deemed remedial and shall be given a fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This is in terms of *section 15* of the *Interpretation Act of 1977.* The impugned Act introduced in our bail system the Crime control model of bail (referred to under para 13 of the Judgement) in relation to serious offences. Under this model, emphasis is put on the interests or protection of society and pre-trial liberty is kept to the minimum. Pre-trial release is not the norm under this model. The line of reasoning under this model is that if an accused is released, there is a risk that he will not appear at trial and therefore positive indications that he will stand trial are required. (Van der Berg; p10).

[57] Because of an increase in violent crimes, measures have been taken in the form of the impugned legislation whose purpose has ordinarily to be established from the context of its provisions, including the language of this statute and its background. (***S v Lawrence; S v Negal; S v Solberg 1997(4) SA 1176(CC)*** (para 52).

[58] The object of the impugned legislation is to supress and control serious crime. It does so by empowering the court to detain an

accused person where there is likelihood of risk/ prejudice to public interest posed by the accused person's release. Its effect is to restrict, without abolishing or prohibiting, the release of an accused on bail vis-à-vis serious crimes through the introduction of exceptional circumstances requirement in order to safeguard the administration of justice. If the intention was to abolish or ban the granting of bail to any accused person by virtue of being charged with the specified offences, the Act would have simply had as its long title, "prohibition of Bail for certain offences".

[59] There cannot be any doubt that a planned deliberate taking of life, personal violations of vulnerable groups in our society and interference with the administration of justice is every citizen's concern. Protection of public interests is thus of paramount importance in a democratic society.

[60] The next question is therefore whether there is a rational connection between legislative measure (means) and the purpose it is intended to achieve (ends)for the impugned Act to escape arbitrariness. In other words, is the purpose of legislation so compelling to prevent the measure from being arbitrary?

[61] To answer this, we need to fully examine the grounds for the limitation of the Right to liberty under the impugned legislation, which according to the applicants' Counsel are non-existent because the amendment does not contain justification in its provisions.

[62] While it is true that there is no specific provision in the Act listing the grounds for the limitation, these must be derived or read from the context of the provisions of the Act.

[63] The main factors that can be distilled from its provision as grounds for the limitation/ restriction on the right to liberty are as follows;

a) suspected involvement in a serious and violent crime
b) Risk of relapse into crime.
c) Perpetrating further offences while on bail.

I interrogate each one of these grounds in order to establish whether they justify pre- trial detention in crimes outlined under section 109A.

Suspected Involvement in serious crime;

[64] Seriousness of the offence is a relevant factor to be considered in assessing whether it is likely that an accused would stand trial by reason of severity of sentence risked in the event of conviction. It is worth mentioning however that danger of absconding cannot be gauged solely on the basis of severity of sentence risked but must be assessed with reference to a number of factors inclusive of those outlined at para 15 of this Judgement. In short, the likelihood of absconding must be based on reasonable apprehension. ***July v DPP*** (supra). In ***Letillier v France (para 51)***, the European Court of Human Rights stated that certain offences, by reason of their gravity and the public reaction to them, may give rise to social disturbance capable of justifying pre –trial detention, at least for a time. where facts exist to support an allegation that an accused person's release would actually prejudice public order, this may be a factor to be taken into account to determine the legitimacy of continued detention, however, the strong suspicion of involvement of the accused person in serious offences cannot alone justify a long period of pre-trial detention. See also ***Van der tang v Spain (application number 19382/92) ECHR***.

[65] ***Risk / danger of repetition***

Risk for repetition of offences is another ground that may justify detention on remand, however, courts should take into account the nature of earlier offences and the number of sentences imposed as a result to establish whether there could be reasonable fear that the accused would commit new offences. In other words, past convictions should be comparable, either in the nature or in the decree of seriousness to the charges preferred. ***Clooth v Belgium***(supra)

[66] ***Perpetrating further offences while on bail***

A deprivation of liberty in order to prevent the accused from committing further offences would generally be pre-mature evaluation of the accused's guilt, but where he is again charged of similar offence after his previous release on bail, there is reason to think that he is likely to commit further offences. Previous failure on the part of the accused to comply with bail conditions might indicate that there is a likelihood that he or she will not comply with any bail conditions. It is necessary however that there should be evidence that the danger is plausible in the light of the circumstances of the case and in particular the past history and the personality of the person concerned.

[67] I am of the view, on the basis of the above, that the object of the Act(to suppress and control Crime by restricting the granting of bail) is rationally connected to control of serious crime(a pressing and substantial concern in a free democratic Society). I proceed now to the proportionality analysis.

Is the limitation arbitrary or unfair?

[68] The enactment does not envisage an outright denial of bail by virtue of being charged of an offence within the ambit of section 109A. The

provision is designed to enjoin the presiding officer at the bail hearing to afford an opportunity to an accused person to present evidence before a decision on his release is made. This procedural safeguard ensures that pre-trial liberty is not simply denied on the basis of the grounds discussed above without an inquiry on their application in a given case. Since bail proceedings are sui generis, investigatory and inquisitorial, as observed in *Bolofo*, the presiding officer then excises his or her judicial discretion based on the information placed before court to make a determination whether or not it is in the interests of justice to grant bail. Differently put, the Court retains the discretion, which of course must be exercised judicially, to assess circumstances of each case. The provision is not an automatic licence for denial of bail where the suspect faces charges listed therein. An inquiry, regardless of whether an accused person is represented or not, should be made into the question whether the interests of justice permit the release of the person charged. This means the provision is not arbitrary.

[69] The next enquiry is the balancing of interests process in considering whether the impugned provision withstand constitutional scrutiny. The following are pertinent considerations in this regard;

Nature of the Right limited by the impugned Act

[70] Our constitution provides for a basic but circumscribed entitlement to pre-trial release. Section 6 enlists circumstances under which curtailment of liberty is justified but clearly protects person against lengthy incarceration pending trial. Indeed, an accused person deemed to be innocent is entitled, once indicted to be tried with expedition (***S v Geretis 1966(1) SA 753 (W) at 754***). The continued detention without a speedy trial is an arbitrary form of punishment unacceptable in a civilized state (*Bolofo v DPP*). This is

indeed what section 6(5) is intended to guard against. Section 109A should not therefore be interpreted to mean that an accused person may be detained in prison until finalization of the trial regardless of the delay. Peete J in Ts'ukulu neatly puts it thus;

> "*The introduction of exceptional circumstances does not take away the considerable power vested in the officer presiding to determine whether a person should be detained pending his trial or not particularly where the process of criminal justice is dilatory and proceedings are constantly delayed; In applying section 109, the courts have judicial discretion whether other interests and circumstances justify release or refusal of bail* (para 14). See also ***Letsie v DPP CIV/APN/596/2004***

The extent and effect of the limitation

[71] Bail, under the impugned provision is only denied in a narrow set of circumstances because not everyone falling within the specified categories will be denied bail, but rather, it is only denied to those, who after having been given an opportunity, are unable to demonstrate that the interests of justice permit their release. In addition, the restriction only covers qualified offences, all of which are undoubtedly serious and aggravated forms of murder, rape and robbery; offences committed against administration of justice, enforcement of Law and order and protection of vulnerable groups in our society. It should be noted that for an unqualified murder, robbery or sexual offences, the general approach in bail discussed at para14 of this judgement applies.

71.1 Of significance too is the fact, as stated earlier, that the impugned provision is not an out and out prohibition to the granting of bail where the suspect faces charges specified under the Act. This means the interference or limitation of the Right is not total but only partial.

71.2 In addition, the fact that the circumstances of an exceptional nature are not defined means there is no blanket circumstances or cast in

stone list of circumstances which are regarded as exceptional. The Provision thus affords flexibility that exceptionality of circumstances be assessed on distinctive aspects of each case in deciding whether an individual concerned poses a threat to public safety, thus the judicial discretion to assess individual circumstances remains intact. (*Dlamini para 74*). This also lessens the impact or effect of the limitation.

[72] A further argument was raised that the impugned amendment does not have a limitation on how long one can be detained before his or her trial commences unlike the speedy Court Trials Act No9 of 2002 which imposes a period of within an accused should be released from custody, hence the argument that the impugned provision encroaches on the constitutionally entrenched right to be released from custody where the trial does not commence within a reasonable time.

[73] These two pieces of legislation should not be read in isolation in order to establish their rationale. The Speedy Court Trials Act (SCTA) of 2002, speaks, as the title says, to give effect to the constitutionally guaranteed Right to be tried within a reasonable time. The Act, as I understand it, is a legislative measure enacted in order to realize speedy trials guaranteed under clause 6(5) of the Constitution and to curb prolonged incarceration of suspects pending trial. It contains remedies such as dismissal of charges where a trial does not proceed within a reasonable time. This Act as well as the Criminal Procedure and Evidence Act (C. P & E), when dealing with release of an accused person are qualified. The only difference between the (SCTA) and the impugned provision is the question of onus. Section 4 of the SCTA prohibits detention on remand beyond a period of sixty days unless there are compelling reasons justifying continued detention. In terms of this provision, the crown clearly bears the onus of proving

existence of compelling reasons objecting to the release/ justifying further detention, whereas the impugned provision requires evidence from the accused to prove existence of exceptional circumstances. In either instance, the interests of justice criterion is the test that has to be satisfied by the party on him the onus lies, before an accused may be released from custody. This means, under both statutes, an accused person would be released where the Court is satisfied that the interests of justice permit their release from detention.

[74] The fact that the impugned provision does not specify an allowable period of pre-trial detention should not be construed to mean a suspect would be detained indefinitely. Clearly, section 6(5) endorses deprivation of liberty subject to certain qualifications, *viz*; while arrest upon reasonable suspicion is a legitimate ground for deprivation of liberty, the suspicion does not justify indefinite detention. It seems plain from the provisions of Subsection (5) that derogation from the right to personal liberty on grounds of arrest following reasonable suspicions should be for a limited period. Put another way, it casts limits on continued detention of a person arrested on suspicion of having committed an offence. I may add that Whether or not a person was rightly or wrongly refused bail does not absolve the crown from the obligation to try him within a reasonable time.

[75] As stated earlier, the failure by Crown to have him tried within a reasonable time might constitute an exceptional circumstance, after a consideration of all relevant factors that caused the delay. I may reiterate that the reasonableness or otherwise of the time within which a trial ought to commence and be concluded will differ from case to case depending on the peculiar circumstances of each. What constitutes reasonable time is a matter left in the Discretion of the Criminal Court. Such judicial discretion is not an arbitrary one but one

which must be excised upon consideration of all the relevant factors which have a bearing on the matter. Such factors will usually include;

a) The period an accused has already been in custody since arrest
b) The possible period of detention until disposal or conclusion of trial if the accused is nor released on bail
c) The reason for the delay in commencement, disposal or conclusion of the trial and any fault or conduct of the detained person for such a delay (***Clooth v Belgium***)(supra). If an accused has been the primary agent of delay in the prosecution of the matter, he should not be allowed to vindicate his Right under the protective constitutional clause. ***Sanderson v Attorney General, Eastern Cape, (CCT10/97) [1997] ZACC 18 (Para 33).*** He simply should be allowed to complain about delays authored by him.
d) Whether the delay is attributable to the complexity of the case, number of witnesses and co accused
e) Whether the reasons advanced for the delay by the crown are relevant and sufficient to justify the continued detention. Absence of satisfactory explanations from the state party as to why an accused has been detained on remand without being tried would lead to a conclusion of an unreasonable delay and thus violation of 6(5). (the list is not exhaustive; refer also to para 15 of this judgement).

[76] Taking the above factors cumulatively, the Bail Legislation which requires an applicant to satisfy the Court that exceptional circumstances exist, is a justified limitation to the release on Bail. I am in agreement with the remarks of Kriegler J in *Dlamini* that;

> *"The impugned measure, of introducing exceptional circumstances is carefully designed to simply limit without prohibition an arrested person to bail. This means the right in question is only partially impaired. The exceptional circumstances have not been defined*

therein thereby limiting the scope of judicial discretion, it is thus, not arbitrary nor irrational".

[77] It follows therefore that the impugned provision withstands constitutional scrutiny and prayer 1 must fail.

Release on Bail

[78] In view of the conclusion reached above, the question is whether this Court should re-consider the application for bail as requested under Prayer 2.The answer to this should be in the negative. The basis for making a fresh application before this Court, as i understand, was the constitutional challenge against the amendment. Having decided as I did, I refrain from dealing with this issue. This decision does not however constitute a bar to a fresh application for release before the Criminal Court which may be made on the basis of new grounds, which in the applicants' opinion constitute exceptional circumstances that were not in existence at the time their initial bail application was made.

[79] Section 22(2) of the Constitution, empowers this Court to decline exercising its constitutional Jurisdiction under this subsection if satisfied that adequate means of redress for the contravention alleged are available to the person concerned, under any other Law. ***Matsoso Ntsihlele & 127 Others v IEC & Others C of A (CIV) 57/19.***

Other aspects of the case

[80] Other complaints, in respect of which specific declaratory orders are sought, relate to conditions prevailing at Maseru Central Correctional Institution. They include absence of running water for use in the toilets at the facility forcing inmates to sleep with urine and excrement at night, no access to warm water, scarcity of mattresses

forcing inmates to share a mattress meant for one individual, overcrowding and lack of privacy during family visits.

[81] Not only do the applicants fail to give details specific to their cell (if they share one), i.e. how many are they in their cell, but also do not say anything about the size of the mattress, whether they are forced to share, if yes, with how many other inmates? They simply make general statements on prison conditions.

[82] They claim to find support in their averments from the Truth and Reconciliation (TRC) Report on its findings after it conducted a study at prison facilities throughout the Country. This report is not however of assistance because it is deficient as regards alleged conditions at the Maseru Central Prison. On p 4 of the report, under the heading "limitations", (wherein challenges or constraints during the survey are recorded), it is recorded as follows;

> *"…. another challenge was that the researchers were denied access to Maximum Prison under the pretext that it is restricted and only Lawyers and families of those detained therein could have access due to security and legal issues*"

Freedom from discrimination

[83] In relation to lack of access to warm water, the 1st applicant avers at para 6.4 of his founding affidavit that they are forced to use 20 litres buckets to bath themselves with cold water as there are no geysers, but other detainees at the new block, have own beds and cell rooms with running water and geysers for warm water, thus they are discriminated against. He does not say whether since incarceration, they bathed with cold water, or whether in the absence of geysers, they are absolutely denied access to warm water etc.

[84] Although this complaint would be valid, it is unwise to decide it on insufficient factual basis placed before Court. We do not know the structural and equipment differentiation between the two blocks, and regrettably, there is no explanation in the commissioner's affidavit to assist this Court.

Right to respect for private life and family life

[85] The Applicants sought an order to the effect that their rights in terms of section 4(1)(g) read with section 11(1) and (3) of the Constitution have been infringed by 1st, 2nd and 3rd Respondents through the prolonged delay in the prosecution of their case and inhuman treatment they are subjected to at Maseru Central Correctional Institution. Their complaint is this connection is that they are not afforded an opportunity to talk in private with their spouses and their conversations are recorded by an officer in whose sight it takes place.

[86] The relief is couched in a manner as to require the Court to make a positive finding that there has been prolonged delay in the prosecution of the applicants' case and that the applicants are inhumanly treated. I am constrained to make such a determination because of Lack of sufficient evidence on the delays to the prosecution of their case (its cause etc) and treatment specifically affecting the applicants herein. However, the question whether there has been prolonged delay would best be ventilated in the Criminal Court before which the trials are to proceed.

[87] I should add that Prisons are administered in accordance with the Prison Proclamation 1957 and the Rules (No.28) made thereunder. Visitation of prisoners whether convicted or untried are governed by Rules 66 and 104, 96 and other relevant Rules, in terms of which visitation Rights are subject to certain restrictions determinable by the Director of Prisons.

[88] I conclude that it would not be wise for this Court to issue declaratory orders on issues identified above on insufficient information given by the applicants. These however are valid complaints which are claimable under the very Prison Rules with enjoin the Director of Prisons to ensure that inmates are accorded enough bedding for warmth, the prison facility adheres to acceptable hygiene and sanitation standards, prisoners are accorded basic needs etc. In my view adequate redress is available under prison Laws. I'll illustrate this point by quoting some of the Prison Rules.

88.1 Rule 9 provides that every prisoner should be provided with a separate bed, or separate board or sleeping mat and with separate bedding adequate for warmth and health.

88.2 Rule 83 provides; the medical officer shall supervise the hygiene of the prison and of the prisoners, including arrangements for cleanliness, sanitation, heating, lighting and ventilation and shall advise the gaoler thereon. This, the medical officer of Maseru prison is required to do on daily basis. Section 89 mandates the medical officer to inspect food, while 88 and 91 deal with quality and quantity of food. *Rule 80* empowers the medical officer to draw attention to the condition of any prisoner on medical grounds and make a written report to the officer in charge, making such recommendations as he thinks necessary, for the alteration of the diet or treatment of the prisoner, for his separation from other prisoners, or for the supply if additional clothing, bedding or other articles. The officer in charge shall then direct the gaoler to carry such recommendation into effect as far as may be practicable.

[89] I should however comment on the Assistant's Commissioner's unacceptable approach to these complaints. He pleads security reasons to justify his failure to address the complaints before this

Court and that the Court is proscribed from dealing with these kinds of matters.

[90] Although it is not clear how a complaint about cold water, hygiene and differential treatment has to do with security, the averment is flawed. The fact that the liberty of a prisoner has been legally curtailed by legal process, cannot afford an excuse for a further illegal encroachment on it. Prisoners are entitled to claim not only the Rights as the Prison Laws allow but all their personal Rights and personal dignity. ***Commander of Lesotho Defence Force and Others v Rantuba C of A (CIV) No.33 of 98.***

[91] In ***Conjwayo v Minister of Justice and others 1992(2) SA 56,*** *G*ubbay CJ said at p 60 J:

> *Fortunately, the view no longer obtains that in consequence of his crime forfeits not only his personal Rights, except those which the Law in its humanity grants him. For while prison Authorities must be accorded latitude and understanding in prison affairs, and prisoners are necessarily subject to appropriate Rules and Regulations, it remains the continuing responsibility of Courts to enforce constitutional Rights of all persons, prisoners included*"

[92] Further in ***Mothobi v Director of Prisons,*** **CIV/APN/252/96** Maqutu J remarked as follows;

> "*…it should be emphasised that awaiting trial prisoners are suspects not convicts. The state is obliged to keep them in reasonably healthy and comfortable surroundings than they do. In these days when there are water flush toilets, there is no conceivable reason why any human should stay in a cell measuring 8 paces by 8 paces with a bucket or pail containing his excrement and that of others for fourteen hours. Staying with one's excrement might be understandable but stating with others is simply torture".*

[93] An awaiting trial prisoner's treatment is necessarily different from that of a sentenced prisoner. The former is imprisoned merely to ensure that he attends his trial and his incarceration should not degenerate into a form of punishment" ***Goldberg & Others v Minister of Prisons 1979(1) SA 14 at 40, Mothobi v Director of Prisons*** *(supra*). Keeping awaiting trial prisoners in filthy and crowded cells degenerate into punishment. Although prison can never be like a person's home, care has to be excised that violation of a prisoner's human Rights, bodily integrity, mental and intellectual well-being does not occur. (*Mothobi*, supra).

[94] While the Director of Prisons administers the prison Rules in his own discretion; he must guard against injustice, bias or discrimination. ***R v Moeko CRI/T/59/2002.*** The Director should act fairly and reasonably. He is not entitled to simply disregard, without any justification, the needs of prisoners under his guard.

Costs

[95] As a general Rule, in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs unless the litigation is frivolous and vexatious. The rationale for this rule being an award for costs, might have a chilling effect on the litigants who might wish to assert their constitutional Rights. ***Biowatch Trust v Registrar, Genetic Resources and Others. 2009(6) SA 232(CC) at para 21.***

[96] In ***Motsepe v Commissioner of Island Revenue [1997] ZACC 3,*** Ackerman J puts it thus;(at para 30)

> "*one should not be cautious in awarding costs against litigants who seek to enforce their constitutional Right against the state, particularly where the constitutionality of the statutory provision is*

attacked, lest such orders have an unduly inhibiting or chilling effect on other potential litigants in this category".

[97] In this case, although the applicants failed to establish the constitutional claim, they will not be mulcted with costs.

Order:

[98] In the premises, the following order is made:

a) It is declared that section 109A of the Criminal Procedure and Evidence (Amendment) Act No.10 of 2002 is not unconstitutional.
b) The applicants may consider raising the claims pertaining to the inhabitable or poor conditions prevailing at the Maseru Central Prison, with the trial Court.
c) There is no order as to costs.

P. BANYANE
JUDGE

I concur: **----------**
K. L. MOAHLOLI
JUDGE

For Applicants: Adv. Mafaesa, Adv. Molati

For Respondents: Adv. Lephuthing