IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/T/0098/2017**

In the matter between: -

MAMPHONO KHAKETLA **1st APPLICANT**
THABO NAPO
2ND APPLICANT

And

DIRECTOR OF PUBLIC PROSECUTIONS

Neutral citation: Mamphono Khaketla & Anor v Director of Public Prosecutions [2022] LSHC 121 Crim (2 June 2022)

JUDGMENT

Coram : Hon. Mr. Justice E.F.M. Makara
Heard : 17th December 2020
Delivered : 2nd June 2022

Summary

Application for permanent stay of the prosecution – Applicants having faced the charges of corruption and attempted bribery for plus/minus

five years without the case against them proceeding – Pre-trial Planning Session (PTPS) having been held with the counsel for Applicants having unusually and disturbingly placed everything under contestation and not disclosing their defence – This having the effect of defeating the whole purpose of PTPS – The prosecution having been initially conducted by the Directorate on Corruption and Economic Offences (DCEO) institution instructing counsel from South Africa (SA) – The case having been postponed for several times mostly at the instance of prosecution – The SA counsel having withdrawn from prosecuting the matter by writing a letter to the Director of Public Prosecutions (DPP) asking her to find his replacement quickly to avoid interfering with the proceeding of the case at the appointed date – The letter of withdrawal of a counsel having been copied to the defence team – DCEO having eventually advised the Court of its intention to withdraw the charges against the Accused persons due to lack of evidence to sustain them after the death of its star witness – The DCEO having asked for last postponement to enable it to finalise the discussion concerning the withdrawal of the charges against the accused persons with the DPP – On the scheduled date, the DPP having replaced the SA counsel and DCEO with a counsel from the DPP's chambers and asked for yet another postponement for the new lawyer to acquaint himself with the matter – The defence having vigorously opposed this application for postponement on the ground that the DPP is deliberately delaying the finality of this matter thereby making it difficult for the accused persons to pursue their life endeavours.

Held:

1. The objection against the application for the postponement sought for by the Crown is sustained;
2. The prosecution against the Accused persons is permanently stayed as prayed for.

ANNOTATIONS

CITED CASES

1. **Halemakale Molapo Motsoene v Rex** (CRI/A/84/86) (CRI/A/84/86) [1990] LSCA 126
2. **Sankatana Masupha v Regina** 1963-66 H.C.T.L.R. 102, 104
3. **Rex v Kennedy Tlali Kamoli and Others** CRI/T/0001/2018
4. **Ntaote v. Director of public Prosecutions** CRI/APN/515/2007
5. **Khetsi v Director of Public Prosecutions** (CRI/T/0079/14)

6. **Sanderson v Attorney General, Eastern Cape** (CCT10/97) [1997] ZACC 18; 1997 (12) BCLR 1675; 1998
7. **Rex v Moseme and Others** CRI/T/02/2012
8. **Myburgh Transport v Botha t/a SA Truck Bodies** 1991 (3) SA 310
9. **S v Van Westhuizen** (266/10) [2011] ZASCA 36
10. **Fikilini v Attorney-General** 1990 (1) ZLR 105 (S)
11. **Barker v Wingo** 407 U.S. 514 (1972

STATUTES & SUBSIDIARY LEGISLATION

1. the Constitution of Lesotho 1993
2. Criminal Procedure and Evidence Act No. 9 of 1981
3. Speedy Court Trial Act Act No.9 of 2002
4. Prevention of Corruption and Economic Offences Act No.5 of 1999

MAKARA J

Introduction

[1] The genesis of this case arises from the effectively mutually destructive incidental applications introduced by the parties respectively. This was on the 17th December, 2020 which was the date scheduled for the hearing of the criminal case in which the Accused are in the main and in paraphrased terms charged of corruption and attempted bribery. It should suffice to be recorded that the narratives upon which the charges are founded are in both form and content well indicative of serious offences committed by the accused through corruption, misrepresentations and acts of dishonesty.

[2] On the 13th September, 2018 the Court in preparation of the trial held a **Pre- Trial Planning Session (PTPS)** primarily to impress upon the counsel the wisdom in cooperating towards the speedier hearing and the resolution of the trial. It superintended over the session. To that end, the content of the charges was discussed and the legal implications were thoroughly discussed to facilitate for the mutuality of the understanding. In the process, the counsel were led towards the identification of the points of convergences and divergences between them and whether they were of a legal or factual nature.

[3] During the session the Court underscored the pre-trial importance for the Crown to provide the defence with the police statements so that the defence could timeously prepare for its defence including possible raising of legal points or proposing some concessions. The defence was specifically cautioned about the necessity to correspondingly relatively indicate its defence without prejudice to the defence avenues which may emerge during the course of the trial and to avoid the adverse consequences of raising the defence at the eleventh hour. The case of **Halemakale Molapo Motsoene v Rex**[1] was referred to for the illustration of the point. It was impressed upon the counsel that each of them should avoid to surprise each other with any fact or

[1] (CRI/A/84/86) (CRI/A/84/86) [1990] LSCA 126

point of law without firstly drawing that to the attention of the other.

[4] The matter was postponed to the next date to enable the Crown to furnish the defence with all the statements, for the latter to appraise itself about the documents or any form of evidence it may rely upon for its defence. Subsequently, the Crown reciprocated accordingly and the Court later presided over the last phase of the PTPS for the mutual designing of a meaningful way forward. At that sitting, the Crown acting in tune with the direction given on the preceding session, gave a clear progress report. It detailed what it considered to be the common cause facts and the consequent issues. To simplify the picture, it presented to the defence a series of questions to be considered by the defence as a way establishing a logically comprehensive foundation towards a determination of a way forward.

[5] Surprisingly to the Court, the defence did not present a comprehensive response to the assignment that it gave to both sides or constructively reacted to the questioning format tendered by their counterpart. The most frustrating dimension was that they could not present any intelligible line of defence. Their position was somehow interpretable of indicating that they were denying everything contained in the police docket inclusive of matters in relation to which the

Court could take judicial notice without any contemplatable prejudice to the accused. In the circumstances, the Court developed a *prima facie* impression that the defence counsel had unwittingly adopted a simplistic tactic intended to frustrate the purpose of the session. There was a predominant uncertainty how that could ultimately serve the interests of the accused. The understanding is that it would be in the best interest for the accused to be declared innocent and thereby leaving no implications.

[6] In the above posture, the Court at the onset, cautioned the defence about its *prima facie* disquietness on the manner in which it appeared to have prepared for the event. It appeared not to have been thoughtfully designed to facilitate for any speedier, logical and comprehensive conducting of the trial then to be held in due course. The most disturbing dimension was a realization that this would result into a case where unnecessary multitudes of witnesses would be called to testify even upon matters that should be of a common cause nature or where the Court could simply be made to take judicial notice of. It should suffice to indicate that the defence did not appear to have any clear defence plan. Resultantly, it would take years to complete the matter at uncalled for substantial expenses, resources and time.

[7] The Court, notwithstanding the frustration it experienced at the preparatory phase, decided that it would be judicially prudent to schedule the matter for hearing on the 16th November 2020. At that time, there was optimism that things would play out as planned innocently unconscientious of the coming of Covid/19 *supervening evil* and its catastrophic consequences that included restrictions on cross-border travelling.

Emergence of Obstacles on the 1st Day of the Trial

[8] On the said date set down for the commencement of the proceedings, Crown Counsel Adv. Mafelesi who, at the moment, represented the DPP interjected by applying for its postponement. She justified the indulgence she sought for upon the reasoning that the sudden emergence of Covid pandemic rendered it impossible for Adv. Z. Woker, initially featuring for the Crown, to come to Lesotho for the continued prosecution of the case.

[9] In conclusion, she took the Court into confidence by candidly disclosing to it that the progress in the matter, has suddenly been militated against by the emergence of a conflict of views between the office of the Directorate on Corruption and Economic Offences (DCEO) and the DPP on the legal prosecutability of the case. She attributed that to the misfortune that the key witness in the matter has died and

that the existing ones were not cooperative if not somehow unreliable to sustain the prosecution. Interestingly, she, nonetheless, assured the Court that in consequence of this conflicting positions, the DCEO has returned the investigation documents to the DPP who has already determined that there are still promising prospects for a successful prosecution.

[10] Most significantly, for the purpose of signalling future progress in the matter, Adv. Mafelesi advised the Court that despite the obtaining legal and logistical challenges, the DPP has finally prevailed over the impasse by assigning the prosecution of the case to Crown Attorney Adv. W. Joala. The latter is one of the senior most lawyers in her chambers. Incidentally, he was at the time present in Court though not robed and, therefore, invisible. Appreciably, this could, in the subsequent course of the judgment, command some moment.

[11] In response, the Defence vigorously jointly opposed the indulgence sought for and moved that the hearing should thenceforth proceed as planned. In the alternative, they asked the Court to consider their application for the dismissal of the case and resultantly for the liberation of the accused from the prosecution. Their application was premised upon the history of the case commencing from the moment they were charged before the Magistrate Court. They charged that the developments towards the readiness

of the hearing have been dominated with delays in the conclusion of the investigations and that consequently, the Crown perpetually instigated series of successive postponements. They highlighted the fact that this has never been initiated by the Defence.

[12] At the end of the verbal representations made for the parties respectively on the justification or otherwise of the postponement asked for by the Crown, the Court directed them to file comprehensive heads on the controversy. The hearing was then postponed to the 17th December 2020 to enable the counsel time for working on the assignment and submit it on the appointed day.

[13] On the day scheduled for the encounter on whether the postponement applied for should be allowed, the defence vigorously resisted the indulgence sought for by the Crown. It based this upon the reasoning that the delays occasioned by the Crown at the pre charge and trial phases of the case, amounted to the violation of the procedural rights of the accused to a fair trial. To illustrate the point, reference was made to the long period of time that the DCEO took to conclude its investigations in the matter and to the series of postponements of the trial that the Crown has asked for at the trial stage. Here, emphasis was specifically made upon what became a common cause fact that there was, for a

considerable period of time, an uncertainty on the actual counsel to whom the DPP had assigned the task of prosecuting the matter on its behalf. Understandably, the time factors under consideration, would, ultimately in the circumstances, have a telling effect.

The History of Progression and Postponements in the Matter

[14] It is common cause that the accused appeared before the Maseru Magistrate Court for the first time on the 14th September 2017 when the charges were then formally read out to them. This is self-explanatory that this judicial transaction had been preceded by the charges initially preferred against them by the operatives of the DCEO or that of their counterparts in the Lesotho Mounted Police Service (LMPS). The development reflects the picture that the investigations in the case were completed and, therefore, that as at that stage, the case was, thenceforth, mature for prosecution.

[15] Later during September 2017, the case was transferred from the Magistrate Court to the High Court. This was in recognition of the serious magnitude of the matter. Thereafter, the accused appeared for the first time before this Court on the 28th May 2018 and it was, thereafter, postponed on several occasions. This renders it important for the reasons behind that to be revisited so that the record should be straightened out. Thus, this should be done against the backdrop of the key assertion by the Applicants that the Crown has violated the fair trial rights of the accused in the pre and post-charge and the trial stages of the case.

[16] The defence has presented the Court with an undisputed pre- trial scenario that the charges against which

the Accused stands before it, are founded upon the developments alleged to have occurred sometime around 17th March 2016. The resultant indication is that since the Accused appeared for the first time before the Magistrate Court against the charges on the 14th September 2017; it had taken the investigators about six (6) months to complete its investigations over the matter. It would appear, however, that the main protestation is over the delay for the Crown to have prosecuted its case since the 17th November 2020 which was the first date set down for commencement of the proceedings. This was complemented with a lamentation that at the time the Crown applied for the presently contested postponement, it shall have taken it around five 5 years to prosecute its case.

[17] The critical development which has occasioned the encounter *in casu,* is in the main, founded upon the fact that at the end of all the preparatory phases, the case was postponed on the 12th May 2020 to the 17th November 2020 for the commencement of its hearing. It simultaneously identified several other days for the same purpose. The Court did so well mindful of the logistical obstacles introduced by the defence during the PTPS and already prepared to deal with what it perceived to be the resultant possible prospective challenges.

[18] It is of foundational importance in this case to be highlighted that the Crown had, from the beginning and at all material times, entrusted the prosecution of this matter upon Adv. H. W. Woker to prosecute the case. There was no lawyer, either directly from the chambers of the DPP or the private bar, assisting him or attached to him for whatever conceivable apprenticeship. This is being noted against the understanding that the Crown would only engage a foreign counsel who commands expertise in the prosecution concerned and, therefore, attach to such a professional, a local counterpart for whichever transfer of technology. This notwithstanding, Adv. Woker featured as the sole representative of the Crown in the matter.

[19] The reliance upon a foreign counsel was suddenly interrupted by the sudden emergence of the Covid 19 pandemic that effectively terminated the contract through which the DPP mandated Adv. Woker to prosecute the case on her behalf. This was specifically authored by the same counsel who terminated his contract with the DPP upon his expressed fear and safety concerns on the pandemic.

[20] In the circumstances, it would be worthwhile to revisit the COVID related historical developments for the appreciation of how it adversely impacted upon the progress in the hearing of the matter. This commenced on the 30th January 2020 with the declaration made by the World Health Organization (WHO) about the eruption of the COVID 19 pandemic as a health emergency of international concern.

[21] On the 11th March 2020; Lesotho reciprocated accordingly by imposing a set of restrictive measures limiting movement and gatherings of people throughout the private and public spaces. Some few weeks later, this impacted upon the administration of justice since the courts started experiencing Covid 19 related infections and deaths particularly in the High Court. Resultantly, the sittings of this Court including in the present case were negatively affected. Correspondingly, there were general delays in the hearing of cases.

[22] During what appeared to be the epoch of the infections of the epidemic, disruption of business, travelling and deaths of people, progress in the matter was suddenly directly disrupted by the withdrawal made by Adv. Woker from continuing as the prosecutor for the Crown in the matter. He attributed that to the need for him to protect himself from the adverse impact of the pandemic. This is attested to by the copy of the letter he addressed to Adv. Molati who is one of the defence counsel in the proceedings. It is dated the 27th July 2020 and reads:

> Dear Adv Molati,
> After careful consideration and being in the vulnerable group in the context of the coronavirus pandemic having recently turned 63, I have decided to retire after 36 years of practice.
>
> In my email dated the 17th of July 2020, I have communicated this decision to the Director of the DCEO at the same time requesting him to advise me who replacement counsel will be so that I can arrange to hand over the brief.
>
> While the DCEO has by return email acknowledged my retirement, to date I have not been advised of who replacement counsel will be. Notwithstanding, I am in the process of arranging for the return of my brief to the DCEO so that the DCEO will have more than enough time to hand over to replacement counsel so that he/she can take over without any disruption to the trial. I anticipate that my brief will be back with the DCEO within a week or so of date hereof, depending on the ease with which the papers can be taken across the border. I will let you know once the papers have been successfully delivered.
>
> The above being so, I trust that there will be no disruption in the matter.

> For the rest, I thank you for your collegiality over the years and I look forward to maybe hearing from you at some time in the future.
>
> Yours sincerely and stay safe.
>
> Hjalmar Woker

Analysis of the Developments at the Time the Application was Made

[23] This should be made in the light of the interlocutory application initiated by the defence for the Court to order for a permanent staying of the prosecution of the accused on the basis that it has inordinately procrastinated exercise that basic duty within reasonable times prescribed by the law. This would be consistently considered with a focus on the question on whether, in the circumstances of the developments in the matter, it could be concluded that the Crown violated the *fair trial rights* of the Accused.

[24] The analysis would have to commence from the pre-charge stage for a determination if there was any undue delay and then examine the developments initiated by the Crown to facilitate for expediency towards its prosecution of the case. Secondly, assistance would be provided by the revelations of the steps it embarked upon since the charges were preferred against the Accused by the law enforcement structures. The last phase for consideration would be on the dedication and consistency demonstrated by the Crown to

execute its prosecutorial duty after the case was assigned the hearing dates.

[25] It appears from the papers before the Court that the controversy before it is mainly founded upon the developments that happened after the matter was scheduled for hearing before this it. This notwithstanding, the pre-trial developments would also be considered for the determination of the commitment and consistency that the Crown showed from the commencement of the criminal justice measures it initiated against the Accused.

[26] The merits of the application and the relief sought for, are determinable from the developments that occurred after the trial was postponed for its first hearing on the 12th May 2020 to the 17th November 2020 and on the subsequent number of dates thereafter. In precise terms, the application is founded upon a recognizable and uncontested fact that the DCEO had not reacted to the notification addressed to it by its erstwhile counsel Adv. Woker who had at all material times prosecuted the matter under the authority of the DPP.

[27] The letter referred to bears contents of material significance that resolves the impasse. These commence from the fact that it was authored by Adv. Woker on the 17th of July 2020, addressed the DCEO with its copy served

upon the DPP. It unambiguously advised both authorities that it serves to terminate the contractual mandate that the counsel had to represent the Crown in the matter and cited covid based health reasons for the decision. It was specifically concluded with a request for the DCEO to identify a new counsel who would take over the assignment from him so that he could pass the brief to that newly appointed counsel.

[28] Tellingly, the prosecution of the proceedings on behalf of the Crown had initially and substantially been executed by the Directorate on behalf of the DPP. This is by operation of the CPEA read in conjunction with Section 43 of the Directorate on Corruption and Economic Offences Act. The bottom line is that both are the agents of the Crown. Thus, whatever delays occasioned by any one of them, would be attributable to the Crown.

[29] The disturbing delays by the Crown to prosecute the matter, commences from its failure to appear before the Court on successive number of dates on which the Court had scheduled the case for hearing. This indicated its lack of commitment and readiness to prosecute its case. To demonstrate this, it was only on the 19th November 2020 when the Court was sitting for hearing of the matter, that Adv. Mafelesi informed it for the first time that the Director

General of the DCEO, had resolved to stop prosecuting the Accused persons. She explained that this is attributable to the realization that the key witness for the Crown has died and that resultantly, it would not sustain its case. In the same vein, however, she told the Court that the DPP has, nonetheless, studied the investigation statements and decided that despite the death of the said key witness for the Crown, there would still be evidence to sustain its case. She concluded her statement by telling the Court that the DPP has further resolved to stop prosecuting the matter through the DCEO and for her office to directly do so. This was complemented with the statement that resultantly, the DPP has reassigned the prosecution task to Adv. Joala who is a Crown Attorney in her chambers.

[30] It is, worthwhile to be highlighted that at the moment the Court was informed about the decision of the DPP and the appointment of Adv. Joala to take over the prosecution, the latter was present in Court though not ready to prosecute the matter. To attest to this fact, he was not robed and, therefore, unrecognizable. He could not even assist the Court in any manner, whatsoever. In the circumstances, the Court directed the counsel to file their respective heads of argument on the subject and to interrogate them on the 17th December, 2020. In the meanwhile, the Court attended several other cases already scheduled for hearing. Some of

them were high profile matters that deserved urgent attention. This obtained until the Court closed for the Christmas holidays.

The Legal Landscape on the Postponements of Cases

[31] In principle, parties in a litigation have a right to access the courts and for their dispute to be speedily tried towards a resolution of the dispute between them. This is recognized as a human procedural right and it obtains throughout the pre- trial, trial and post- trial phases in litigation. In criminal justice, it applies from the moment one is suspected of having committed a criminal offence, at the time arrest is made, when the charge is preferred against such suspect and throughout the trial and post the event.

[32] Procedural rights are primarily authored under Section 12 of the Constitution where they are expressed as *the fair trial rights.* They are provided for through the fabric of several legislative provisions, in particular, the Criminal Procedure and Evidence Act[2] (CPEA), the Speedy Court Trial Act[3] (SCTA) and the case law. The latter enactment is specifically intended to operationalize the *fair trial* by scheduling the time frameworks within which the pre-charge, pre-trial, trial and post- hearing phases should be executed. This has a telling from the long title of the Act and even more

[2] Act No. 9 of 1981
[3] Act No.9 of 2002

expressive by detailing its intention thus, “An Act to provide for criminal court trials within a reasonable time and for incidental matters”.

[33] Section 5(1) schedules the foundational methodology for the managing of the trial by prescribing that it shall, upon its commencement, proceed on a continual progression from day to day until it is concluded **unless there are compelling reasons to the contrary and they shall be recorded in writing.** This is complemented by sub-section 2 which directs what should be done after the Accused has tendered a plea to the charge. It requires the Presiding Officer to collaborate with the parties in the identification of the days during which trial would proceed. The idea is to ascertain the achievement of the contemplated consistency and expediency. The scheme is, in the main, intended to protect the interests of the accused while simultaneously balancing them with those of the Crown. This is well captured by Watkin Williams C.J.in **Sankatana Masupha v Regina**[4] in these words:

> …Whether a person is guilty or not guilty, the period awaiting trial and its outcome is often of anxiety and strain and is a punishment in itself additional to that which may be passed by way of sentence…but if delays are great, the merited punishment may be less than that which has already been suffered.

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[4] 1963-66 H.C.T.L.R. 102, 104

[34] The predicament in which the accused are in this case and their corresponding procedural rights, should be perceived within the context of the gravity of the charge preferred against them by the Crown and its potential consequential sentence upon each of them. To demonstrate this, they are facing several charges of corruption explained elaborately in 7 paged indictments. The seriousness of the offence is also perceivable from the fact that they were released on bail deposit of M5000.00 which is not normal in this jurisdiction when it comes to the individually charged persons. The usual bail deposit in a murder charge would be between M500.00 and M1000.00 without surety.

[35] It is significant to be recognized that the accused automatically acquire procedural right to a *fair trial* from the moment the law enforcement agencies confronted them on a suspicion that they committed the said corruption and economic offences.

[36] The pivotal development in considering the application for postponement and its resistance, should be judged against the fact the encounter emerges after the Accused have pleaded not guilty to the charges and, therefore, challenging the Crown to evidentially prove otherwise beyond any reasonable doubt. The constitutional and the legislative scheme already referred to, especially the SCTA, consequently obliges the Crown to consistently and expeditiously prosecute its case since it is *dominis litis* and in that regard hurled the Accused into the Court. The background understanding being that the Crown demonstrated its readiness to do so from the moment it preferred the charges against the Accused and even identified the hearing dates with them.

[37] It has become an entrenched principle of law that an application for postponement is a search for an indulgence as opposed to asking for a right or the application for a normal trajectory in the proceedings. Thus, this renders it explainable that for the dispensation to be given, whoever seeks for it, must justify it with a compelling reason. Actually, the Section 5 of the SCTA, mimics the common law expectation for the consistency and expediency in the hearing and disposal of the criminal case. Unfortunately, typically of some of our lawyers, the counsel for the Accused appear to have supported this position by simply downloading the relevant case law from the South African courts decisions and pasting them in his heads. This is embarrassing since there is a catalogue of decisions developed within the jurisdiction over the same subject matter and compromises the appropriate assistance to the Court.

The Ruling

[38] The determination here should primarily be inspired by the common cause historical revelation that at the time the present application was made, it was almost 5 years after the Accused were arrested and charged with the offences. These had happened on/or about the 14th September 2017. Thereafter, the matter was, on account of its seriousness transferred from the Magistrate Court to the High Court- hence their first appearance before this Court on the 28th May 2018. Thereafter, the case was postponed to the other subsequent days in preparation of the hearing dates.

[39] Though the pre-trial and the trial rights of the Accused are, given the legislative scheme of concern to the Court and should be factored into the picture, it should equally be realized that the thrust of the application originates from the developments after the eruption of the pandemic. It is precisely traceable from the impugned behaviour of the Crown towards the letter addressed to it by Adv. Woker. In essence, the Accused complain that it acted indifferently to the correspondence and committed an act of dereliction of duty which caused unnecessary delay towards the hearing of the matter and, therefore, violated their *fair trial rights* including in particular, *right to a speedy trial.*

[40] In all fairness to the Crown, there is no record that the Accused ever complained about the one (1) year and six (6) months period taken in the investigation of the offence alleged to have occurred sometime around 17th March 2016. This notwithstanding, the Crown should be seen to have throughout been conscientious of the time from which the Accused were arrested and confronted with the charges since their procedural rights operated from those moments.

[41] The question on postponement of cases has, for years, dominated the courts and the legal scholasticism since it represents an important feature in the administration of criminal justice. This originates from the fact that it is instrumental in balancing the competing interests of the Crown and that of the accused in their encounter before the Court. In the process, as it has already been stated, the rights of the accused to a fair trial through a relatively speedier administration of justice, is ascertained. Thus, there is a wealth of case law jurisprudence that gives guidance over the subject-matter.

[42] The foundational teaching on how a postponement should be considered is premised upon the acknowledgement that in principle, the hearing of a criminal case, should be scheduled for the nearest possible days, be consistent and expeditiously concluded. It is in this key background that the party that applies for its postponement, should advance valid reasons since it would be seeking for an indulgence which would be strictly judiciously considered. This is suggestive that in the context of the instant case, the Court is obliged to consider if regard being had to the developments upon which the dispensation was applied for, the Crown has satisfied the test.

Exploration of the Case Law on Postponement

[43] In the recent criminal case of **Rex v Kennedy Tlali Kamoli and Others**[5] Sakoane CJ emphasized on the importance of a judicial discretion that does not allow the Crown to have a laissez-faire leverage when applying for the postponement of a case. In the same vein, he over-emphasised on its obligation to advance a convincing and truthful for that since it would be seeking for the indulgence that could, in the circumstance of each case, impact adversely upon the fair trial rights of the accused.

[5] CRI/T/0001/2018

[44] The same jurisprudence was articulated by the late Mofolo J in **Ntaote v. Director of public Prosecutions**[6] in these terms:

> In Connolly v DPP (1964) N.C. 1254, H.L. at pp. 1354-1355 it has been said power to stay proceedings for abuse of process includes power to safeguard an accused person from oppression and prejudice; that the guidelines have been developed by the common law to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so (Attorney-General of Trinidad and Tobago v Phillip 1955 1 AC, 396 P.C). An abuse of process was defined in Hui Chi-Mingv R (1992) A.C 34 P, C. as Something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding.

[45] In **Khetsi v Director of Public Prosecutions**[7] this Court recognized that the Crown had, in bringing the accused before it against the corruption and economic offences charges, violated his fair trial and procedural rights under Section 12 of the Constitution which should have consequences. So, in consideration of the time delays taken by the Crown to prosecute him and the fact that this was being exacerbated by the fact that he was unprocedurally being arraigned before the Court, the Court declined to postpone the matter and granted the application for the permanent staying of the proceedings. The Court captured the applicable jurisprudence as follows:

> Appreciably, the reasonableness of the period within which prosecution should be done, depends upon the history, circumstances and dictates of each case. There can be no

[6] CRI/APN/515/2007(unreported) at para 18

[7] (CRI/T/0079/14)

> exhaustive answer as to what constitutes the paradigm. Its determination remains a judicial prerogative which must be seen to have been so exercised. Krigler while interpreting S. 25 (3) (a) of the Constitution of South Africa which substantially resembles the *fair trial rights* under S. 12 of the Constitution in **Sanderson v Attorney General, Eastern Cape**[8] elaborated that:
>
> The test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained. In some jurisdictions prejudice is presumed – sometimes irrefutably – after the lapse of loosely specified time periods. I do not believe it would be helpful for our courts to impose such semi-formal time constraints on the prosecuting authority. That would be a law-making function which it would be inappropriate for a court to exercise. The courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us. Of the three forms of prejudice, the trial-related variety is possibly hardest to establish, and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalization that the lapse of time heightens the various kinds of prejudice that section 25(3)(a) seeks to diminish[9].

[46] The Court has also considered the case of **Rex v Moseme and Others**[10] in which it was determined that there be a permanent staying of the proceedings under the analogously similar delays by the Crown to prosecute its case. It, however, finds it befitting to record in passing that the matter was originally before me. The unfortunate occurrence in that case at the time the PTPS was held, was that the Crown acting in collaboration with the Defence frustrated the endeavour towards an expedient and efficient management of the case. The Crown in particular, insisted

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[8] (CCT10/97) [1997] ZACC 18; 1997 (12) BCLR 1675; 1998 (2) SA 38

[9] *Ibid* @ para 30

[10] CRI/T/02/2012

on leading quite a large number of witnesses though it appeared from the police statements that it would be superfluous to do so. Moreover, the approach would not be in the interest of justice. Furthermore, the Defence supported by the Crown asked for my recusal and in the circumstances, I found it befitting to recuse myself from hearing the matter and realised from that moment that it was destined towards a dead-end. It was my first experience of a case where the Crown supported the Defence in its stratagem to delay the proceedings by featuring uncalled for numbers of the witnesses at the unnecessary expense of the tax payer.

[47] Interestingly, during the PTPS stage of the instant case, the same counsel who acted for Crown admirably cooperated with the Court by strangely identifying a limited number of witnesses who would provide materially relevant evidence. It became clear from that moment that it would take a short while for the case to be concluded. Unfortunately, the Defence elected to complicate the matter and thereby prolonging the proceedings. Unfortunately, further, the Crown relinquished its *dominis litis* status by subsequently introducing its dimension of the delays.

[48] The significance of the judicial discretionary powers of the court in its determination of the application for

postponement was accentuated by Mahomed AJA in **Myburgh Transport v Botha t/a SA Truck Bodies**[11] in these words:

> An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if the members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.

[49] To this end, the legislative architecture and the case law project a clear picture that a party that applies for a postponement of the hearing should do so with the appreciation that it is seeking for a dispensation from orthodox trend and, therefore, must justify that with well-supported basis for it to be allowed. Otherwise, the hearing should proceed as scheduled. This should be complemented with the show of *bona fides* and professional neutrality by the lawyer concerned. These would have to be attested to by the material developments and the prevailing circumstances.

[50] Impartiality, fairness, restrain and some relative measure of human kindness are the integral qualities in the office of the DPP. This originates from the fact that it is a creature of the Constitution[12] and entrusted with the enormous authority to solely consider instituting criminal proceedings against anyone alleged to have committed a criminal offence or to direct otherwise and to prosecute such

[11] 1991 (3) SA 310 (Nm), 314-315

[12] Section 99 of the Constitution of Lesotho 1993

persons on behalf of the Crown. In that regard, she has the authority to withdraw[13] or discontinue[14] the prosecution at any stage of the proceedings before the judgment. Thus, its constitutional standing alone obliges it to be exemplarily instrumental in facilitating for the speedy, dedication and consistency in the progression of the hearing in criminal proceedings. This holds true especially that she is *dominis litis* in those matters. The professional impartiality which is the integral component of her office would naturally provide a conducive environment for the attainment of the stated ideals. These lends support from the case of **S v Van Westhuizen[15]** where the Court relying upon The International Association of Prosecutors' Standards affirmed thus:

> On Impartiality-Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:
>
> carry out their functions impartially;
>
> remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity;
>
> **have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;** (Court's highlight)
> always search for the truth and assist the court to arrive at the truth and to do justice between the community, the

[13] *Ibid*
[14] *Ibid*
[15] (266/10) [2011] ZASCA 36

> victim and the accused according to law and the dictates of fairness.[16]

[51] The decision of the DPP and the justifiability of her application for the postponement of the proceedings should be objectively determined in recognition of the stated applicable regimen of laws and the material developments in the case. In this respect, the Court recognizes the *bona fides* of the DPP to salvage the case through the use of the person she identifies as the remaining witness. This notwithstanding, the Court remains obliged to objectively resolve the legal justification of her persistence to pursue the prosecution of the Accused. This should primarily be done in recognition of the following defining considerations:

1. The decision of the DPP emerges after the DCEO has resolved that all the witnesses of significance have regrettably died and, resultantly, that the case is now not viable for a successful prosecution;
2. The application for the postponement of the case is simply intended to afford the Crown the opportunity to reorganize itself so that it could resuscitate its prosecution against the Accused;

[52] It must primarily be recognized that the DCEO is created under Section 3 of the Prevention of Corruption and

[16] *Ibid* @ para 6

Economic Offences Act[17]. Its terms of reference are prescribed under Section 6 as follows:

(a) to receive and investigate any complaints alleging corruption in any public body;

(b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;

(c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue law laws of Lesotho; (d) to investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;

(e) to prosecute, subject to section 43, any offence committed under this Act;

(f) to assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public;

(g) procedures which in the opinion of the Director, may be conducive to corrupt practices;

(h) to instruct, advise and assist any person, on the latter's request, on ways in which corrupt practices may be eliminated by such person;

(i) to advise heads of public bodies of change in practices or procedures compatible with the effective discharge of the duties of such public bodies which the Director thinks necessary to reduce the likehood of the occurrence of corrupt practices;

(j) to educate the public against the evils of corruption;

[17] No.5 of 1999

(k) to enlist and foster public support in combatting corruption; and

(l) to undertake any other measures for the prevention of corruption and economic offences.

[53] It is of great significance in this proceedings to be reiterated that in tune with Section 99 of the Constitution read in conjunction with Section 5 of the CPEA, the DPP exclusively commands the supreme authority to charge anyone with a criminal charge and to prosecute the person concerned under the name of the King. In the meanwhile, the DCEO constitutive Act, has created a special dispensation for the DCEO authority to investigate and prosecute the economic and corruption offences exclusively. This is, however, without prejudice to the superintendence of the supervisory authority of the DPP.

[54] The above said, the common denominator is that the DPP and the DCEO constitute the prosecutorial agencies of the Crown. So, the acts and/or omissions attributable to each of them in the execution of the prosecutorial tasks are, at the end of the day, ascribable to the Crown.

[55] In all fairness, the Court finds it obvious that the letter addressed to the DCEO by Adv. Woker on the 17th of July 2020, copied to the DPP and to the Defence counsel marks a turning point for the determination of the application. This is the reasonable thesis when considered against the developments that unfolded right from the moment the DCEO confronted the Accused about the suspicions it had that the Accused committed the offences and the time taken to complete the investigations. The picture is further elucidated by the post-charges developments and above all by the perpetual unreadiness of the Crown to prosecute its case up to the 17th November, 2020. This was the day when its application for a postponement of the case was made and complemented with that of the permanent staying of the proceedings.

[56] Besides, the stated unreadiness of the Crown to prosecute the matter, should be viewed against its delay to respond to the letter addressed to it by Adv. Woker. This was urgently material to facilitate for the ascertainment of its substitute counsel towards the resuscitation of the prosecution. It is obvious from the papers that both prosecutorial operatives did not respond to the correspondence. This obtained despite the urgency it deserved for the ascertainment of the Crown counsel who would replace its retired one and, most importantly, for the facilitation of the identification of the dates scheduled for hearing of the matter. On this note, it should be recalled that this is a high profile case founded upon criminal charges that the Accused have fraudulently stolen huge amounts of moneys to the prejudice of the country and its economically struggling citizens.

[57] Though it has effectively taken 5 years for the Crown to be ready to prosecute the case and demonstrate any consistency to do so, it remains fair to be acknowledged that the COVID 19 episode disorganized the general schedule of the cases for almost one year and some few months. So, in all fairness to the Crown, the Accused and the defence, the Court itself was not functioning normally throughout those testing times. It would, therefore, be just to estimate that it has hitherto effectively taken the Crown four years and not five to have organized itself to be ready to prosecute the matter. A typical evidence is the long time it took to effect the request made by Adv. Woker for the appointment of his substitute counsel for the handing over of the task to him and then work on the way forward. Though the latter was addressed to the Crown on the 27th July 2020, it was only on the 19th November 2020 that it was brought to the attention of the Court by the defence.

[58] The climax of the developments in the proceedings is that even on the day the application was made, the Crown was still not ready to execute its prosecutorial task. Resultantly, it emerged that the move was not surprising since the matter could not be perpetually postponed to give the Crown the opportunity to be ready to prosecute its case.

[59] As it has already been projected in **S v Van Westhuizen**[18] with reference to the International Association of Prosecutors' Standards, the virtues of the prosecution were almost exhaustively pontificated over. In this respect, the Court reiterates its attitute that the intervention of the DPP appear to be intended to salvage the case of the Crown from just collapsing as a result of the decision of the DCEO that there is no evidence left for the sustainance of the prosecution. Her *bona fides* in that intervention are not questionable. Instead, in the circumstances of the developments in the matter, the Court does not percieve its objectivity and sound basis. It must primarily be realized that the DCEO is the one that investigated the case and prepared for its prosecution. This is by operation of the law and its legislatively trusted expertise in that task as a specialized agency.

[60] The Court finds no reason to doubt the professional determination of the DCEO that the death of the **key** witnesses for the Crown has left it with no arsenal to fight its battle and therefore, it is a moment for a tactiful surrender. Unfortunately for it, this came at a critical time when the Accused had already pleaded innocence to the charges. Thus, the Accused have lodged this application as a consequence of that and accordingly, the law has to take its cause.

[18] *supra*

[61] Nowardays, there is a phenomenal reality that witnesses in criminal cases die in the process of long delays in the detection of crime, conclusion of the investigations, prosecution and hearing of cases. In this case, it took the DCEO 1year 6 months to complete its investigations. This is attributeable to the fact that the concerned charges are founded upon the developments alleged to have happened sometime around 17th March 2016. Thereafter, on/or about the 14th September 2017, the Accused appeared before the Magistrate Court. Understandably, it was at that stage that they were appraised about the charges and their corresponding procedural rights.

[62] A rather phenomenal and unfortunate trend in cases where holders of political offices are concerned is that it takes suspiciously long time before the law enforcement agencies dare to take legal measures against them. As it is the case here, they are usually confronted with charges after the negative changes in their political fortunes. It is precisely on account of the dereliction of duty by the law enforcement apparatus that in the process of the delays, the material evidence disappear and the witnesses die.

[63] On the 28th May 2018 the matter was, on account of its seriousness, transferred to the High Court-hence the Accused appeared before this Court for the first time on that day for it to prepare for its hearing dates in collaboration of the lawyers appearing for both sides. Consequently, the 12th May 2020 and the 17th November 2020 were identified as the initial hearing dates. This was complemented with the appointment of a number of a series of other dates to be dedicated for the purpose.

[64] It must be appreciated that the procedural rights of the Accused which operated from the moment the DCEO confronted them about its suspicion that they committed the offence, became enhanced when they featured before the Magistrate Court where they were formally charged and, before this Court. This is so by operation of the *fair trial procedural rights* upon the criminal suspects and the accused under Section 12 of the Constitution, the SCTA and the common law principles referred to.

[65] The factual and the legal scenario presented calls for the determination of the merits of the application with particular reference to the charge advanced by the Defence that the Crown has not expeditiously prosecuted the matter and has on several times asked for the postponements without compelling reasons. In that exercise, the Court should, from the onset, acknowledge the fact that the hearing of the case was, as it has already been stated, frustrated for over a year by the COVID 19 pandemic.

[66] Besides the recognized impediment imposed by the COVID 19, it nevertheless, has to be similarly recognized that this was seriously worsened by the failure of the Crown to have timeously responded to the letter addressed to it by its original counsel. This occasioned a significant delay in the progress towards the prosecution and hearing of the matter. To attest to this, the Crown did not react to the message e-mailed to it on the 17th July 2020 and on the 27th of the same month had to be reminded to respond accordingly. This amounted to a dereliction of duty over the subject-matter that warranted for an urgent reciprocation. The pathetic part is that the Crown simply accepted the retirement of Adv. Woker but did not appoint his replacement counsel. To worsen the scenario, the Crown maintained its passiveness to the letter up to the 19th November 2020 when the Defence brought it to the attention of the Court and the Crown acknowledged its receipt.

[67] Interestingly, however, even as late as on the 19th November 2020 and on the subsequent dates thereafter, the Crown was still not prepared to execute its task. It is for that reason that it applied for the postponement of the hearing for it to prepare itself for it. So, in the circumstances, the Defence resisted the application and moved the application for the permanent staying of the prosecution citing a violation of the procedural rights of the Accused.

[68] The narrative on the developments which evidences the delays caused by the Crown towards the hearing of the matter do not render the grounds upon which the Crown seeks for the postponement of the case, not *prima facie* reasonable and justifiable. This would be so when the interests of justice are balanced with the right of the Accused to a speedy and fair trial, especially when it has the State resources at its disposal. In any event, the provisions of the SCTA, prohibit postponement without justification[19] and as already said, this is not in consonance with the *fair trial rights* under the Constitution.

[69] The application launched by the Crown for the postponement was simply made from the bar. This is contrary to the Practice Directive[20] which provides that good grounds for a postponement such as ill-health or the disappearance of a witness will have to be proved by evidence under oath, either viva voce or by way of a duly motivated affidavit. The rationale behind the instrument is to timeously provide the other side with the intention to apply for the indulgence so that it could reciprocate accordingly. It would be after the deliberations over the matter that the Court would be in a reliable situation to make the determination. In the instant case, the Crown by

[19] Section 5
[20] Practice Directive No1 of 2005

virtue of its *dominis litis* status, failed to be exemplary by complying with the important directive and, thereby violating the rights of the Accused.

[70] In the instant case, it would suffice for the Accused to demonstrate to the Court that the delay complained of exceeds what is reasonable. This was asserted in **Fikilini v Attorney-General**[21] where it was explained that the degree of persuasion required of him is to show that the delay is *prima facie* unreasonable, and adopted the elaboration by Powell J in **Barker v Wingo**[22]**.** Here, the version presented was that it must be "presumptively prejudicial"[23].

[71] Lest it escapes the mind at this eleventh hour, it should be reiterated that the Court has found that the DCEO and the DPP are both the agencies of the Crown and that as such the delays or obstacles caused by each in the progress towards the hearing of the case, are attributable to it. Thus, it is found that in the posture of the identified logistical impediments occasioned by each of them, the Accused have established a *prima facie* case and the Crown has, failed to satisfactorily demonstrate otherwise.

[72] Just prior to the final conclusion of the mater, it is found judicially wise to be highlighted that the Court is here seized

[21] 1990 (1) ZLR 105 (S) @ 117D-E
[22] 407 U.S. 514 (1972)
[23] @530

with the question concerning whether the delays occasioned by the Crown in the prosecution of the mater, justifies the granting of the application. It is not, in any manner, whatsoever, seized with a case for the determination of the question on whether or otherwise the evidence of the said remaining Crown witness could sustain its case. It also has nothing to do with the exercise of the powers of the DPP.

[73] In the premises, the objection against the application for the postponement sought for by the Crown is sustained and consequently, it is ordered that the prosecution against the Accused be permanently stayed as prayed for.

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E.F.M. MAKARA
JUDGE

For 1st Applicants : Adv. L.A. Molati instructed by M.W. Mukhawana
For 2nd Applicant : Adv L.D. Molapo instructed by C.T. Poopa and Attorneys

For Respondents : Adv. Joala from DPP's Chambers