IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 728/2009

In the matter between:

PHUMZILE MYEZA	**1st APPLICANT**
MUSA NGWENYA	**2nd APPLICANT**
P.P.C. ELECTRICAL (PTY) LTD	**3rd APPLICANT**
AND	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**RESPONDENT**
THE ATTORNEY-GENERAL	**INTERVENING PARTY**
CORAM	**OTA J.**
FOR THE APPLICANTS	**MR. S. GUMEDZE**
FOR THE RESPONDENTS	**MR. M. VILAKATI**

JUDGMENT

[I] The applicants herein are crying "foul". They are crying that their Constitutional Right of a fair and speedy hearing is being infringed by the learned Director of Public Prosecutions. The applicants have therefore come to this court seeking redress, in consequence of which they contend for the following reliefs:-

1. Directing the Director of Public Prosecutions to prosecute the Applicants within twenty one days of receipt of this order.

2. In the event of the Director of Public Prosecutions failing tp Prosecute the. Applipants within twenty one days, directing the Director of Public Prosecutions to withdraw charges against the Applicants within (14) days.

3. In the event the Director of Public prosecutions electing to withdraw the charges, that she be ordered to confirm such withdrawal in writing and that such withdrawal be served on the Applicants.

1. That the Respondent pays costs of this application in the event it is unsuccessfully opposed.

2. Granting any further and/or alternative relief.

[2] I find it convenient at this juncture to state that the Attorney General is an intervener in this proceedings. The facts that elicited the cries of the applicants herein are stated in the founding affidavit of the 1st applicant. **Phumzile Myeza** as follows:- The 1st and 2nd applicants

are both directors in the 3rd applicant company. The 1st applicant was, . arrested by members of the Royal Swaziland Police on the 20th of June 2006. The 2nd applicant was arrested by members of the same Law Enforcement Agency on 22nd of June 2006. Consequently, a charge of fraud was laid against both applicants by the police. The police caused both applicants to appear before the Magistrates Court Mbabane. Subsequently, the applicants were admitted to bail by the High Court of Swaziland, where at, the 1st applicant was granted bail in the sum of E 50,000-00 and the 2nd applicant in the sum of E 30,000-00. That the Director of Public Prosecution (DPP) has failed to prosecute the applicants since they posted bail in 2006 until date. That this is a violation of their Constitutional Right of a fair and speedy hearing within a reasonable time as provided for in Section 21 (1) of the Constitution of the Kingdom of Swaziland Act, 2005, as the time lapse from June 2006 to date, is not a reasonable period under any circumstances. The applicants therefore enjoin the court to. compeli t ^ei,.DIJP,(tQ. try$_t$ them, to avoid the ill consequence of having the charge preferred hanging over their heads forever, like the sword of damocles.

[3] The Respondents who are opposed to this application filed an affidavit in opposition, sworn to by one **Nkosinathi Maseko,** who is described therein, as the Deputy Director of Public Prosecutions. In the opposing papers, the deponent re-iterated the intention of the DPP to prosecute the applicants in due course. That the applicants face charges of fraud which require documents to be transmitted to the Forensic Science Laboratory in the Republic of South Africa, where they are analysed as per their order of arrival. That this same laboratory affords forensic examination to all the countries in Southern Africa and beyond. It is therefore impossible to rush them since long periods pass before results come back. That these are circumstances beyond the control of the Respondents. That the investigation also involves massive documents which need extensive scrutiny. That the applicants will be afforded a fair hearing as they are currently out on bail, which bail the Respondents never opposed from the outset. That in terms of the Director of Public Prosecutions order 1973, the power and prerogative to prosecute criminal offences, vests in the office of the DPP. That the court can only interfere with this power in the event that it is exercised in a grossly unreasonable manner. That

Section 21 (1) of the Constitution does not precisely define what a fair and speedy trial within a reasonable time is, therefore, each case turns on its peculiar facts and circumstances. That the circumstances of this case do not demonstrate that the prosecution has been unreasonable in handling the case, therefore, the application must fail. When this matter served before me for argument on the 10th of February 2011, the applicants were represented by Mr. S. Gumedze, and the respondents were represented by Mr. M. Vilakati.

[4] I wish to interpolate at this juncture to consider a preliminary issue raised by the Respondent' in casu. That is the question of the relevance of citing the 3rd applicant as a party to these proceedings. I do not wish to embark on any winding or long drawn out analysis of this issue. Suffice it to say that I agree with the Respondents, that there is no fact demonstrating that criminal proceedings were instituted against the 3rd applicant to warrant its presence as a party to this proceedings. I notice that **Mr Gumedze** offered no argument in challenge of the contention of Respondents on this wise. I therefore

hold in the circumstances, that the 3rd applicant has been wrongly cited in this proceedings and ought, therefore, naturally be stuck out.

[5] The foregoing said and done, let us now consider the substance of this matter. The parties herein urge upon me a constitutional issue. They call on me to interprete the meaning of a section of the constitution of The Kingdom of Swaziland Act, 2005. Before getting into the nitty gritty of the task at hand, I must of necessity remind all and sundry of the sacredness of the instrument at stake in this application.

[6] A Constitution generally and strictly speaking is an organic and fundamental document embodying the spirit, the values, aspirations, expectations, the earthly identities and cosmological views of life of a people. It is defined in Blacks Law Dictionary as the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles, to which it's internal life is to be conformed, organising the government and regulating, distributing and limiting the functions of its different departments, and prescribing

the extent and manner of the exercise of sovereign powers. A charter of Government, deriving its whole authority from the governed. It expresses the free agreement of the people to live together and the terms of that agreement, which is a result of the open and free concensus of the people. It derives its excellence and authority, from the.people. It is a consensus that is the consequence of consultation and free expression of the interest of the various constituents of the society. It is the will of the people. That is why it is the Supreme Law of the land. The grandnorm . The Alpha and Omega of all laws, to which all other laws of the land pay obeisance The constitution of the Kingdom of Swaziland Act 2005 is also the Supreme law of the land. Section 2 of Chapter 1 thereof, declares that it is the Supreme Law of the land and any other law inconsistent with it, is to the extent of that inconsistency void. It is this sacred instrument that confronts me in this application. The court is vexed with the onerous task of interpreting a section of that instrument. The, bone of contention is the Fundamental Right of fair hearing enshrined in that instrument vide Section 21 (1) thereof, in the following language :-

[7] " *In the determination of civil rights and obligations or any criminal charges a person shall he given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by Law*".

[8] It goes without gainsaying, that the foregoing legislation creates rights both in civil and criminal proceedings, which although related are separate and distinct. Thus, there is a right to a fair hearing within a reasonable time, a right to a speedy hearing, a right to a public hearing and a right to a hearing by an independent and impartial court or adjudicating authority established by law. For the purposes of this exercise, I shall concern myself with the aspect of that instrument that creates a Right to a '*fair and speedy public hearing within a reasonable time*' in criminal proceedings and in particular what constitutes a "*reasonable time*'" in the context of that legislation. This is an onerous task when one considers the sacredness of the instrument that embodies that legislation, and the fact that the constitution itself is silent on an interpretation, of or a time frame, as to what constitutes a "*reasonable time*" and regard being had to the fact that there is a dearth of local case law on the interpretation of this legislation, due to the relative infancy of the constitution itself. **Mr S Gumedze** for the

applicants, has urged the court, citing the case of **Nyamakazi V President of Bophuthatswana 1992 (4) SA 540 (Ba)** A, to adopt a generous and purposive approach in interpreting the constitution. He urged the court to give an interpretation that will stand the test of time, assist and ensure, that the provisions of the constitution to be relied upon in ages to come, are put in proper perspective.

[9] I agree with him. As judges we bear the exclusive responsibility for the interpretation of our Constitution and other laws. It is obvious that the interpretation of legislation by judges will have an impact on the effectiveness of the legislation attaining its object. Therefore, how we interprete the law will bear on whether the law can be used to transform the society. We must not engage in the approach of choosing and picking of one interpretative criteria to the exclusion of others. The approach that has proven most useful and acquired universal application is to progressively analyse the various interpretative criteria, and apply the one that enables the law yield a just and practicable result. In my view, a purposive teleological approach to the interpretation and appreciation of a statute, an

approach which enables. the judge(confronted with a problem of interpretation to ascertain the true object and purpose of the statute, and to give effect thereto, will best ensure, that the exercise of the legislative function to bring about change in our society is not frustrated.

[10] The principle therefore, is that the judge must endeavour to discover the intention of the legislature from the words of the enactment itself, and interprete it, according to the intent of them that made it, with reference to the prevailing socio -economic and cultural atmosphere of the society.

[11] The great Lord Denning had blazed the trail of purposive construction of statutes, in the Court of Appeal three decades earlier, in the case of **Seaford Court Estates Ltd V Asber (1949) 2KB 481 at 498 - 499,** when he declared thus

[12]_" *Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from*

ambiguity — A judge must set to work on the constructive task of finding the intention of parliament, and he must do this not only from the language of the statute, but also from a consideration of the social cQndition..which gave rise to it, and of the mischief it was passed to remedy, and then he must supplement the written word so as to give 'force and life" to the intention of the legislature".

[13] Case law in the former Independent South African Republic of Bophuthatswana, whose case law is of high persuasive authority in this jurisdiction, demonstrates that the courts also applauded the purposive approach to the interpretation of states. A case in point is Nyamakazi v President of Bophuthatswana (supra) where the court held as follows, in 4 and 14 respectively:-

> " *4 it is recognised and settled that a Constitution is to be liberally construed, according to its terms and spirit to give effect to the intention of its framers, the principles of government contained and to the objects and reasons for its legislation.*

[14] *A 'purposive' construction of a bill of rights is necessary in that it enables the court to take into account factors other than mere legal rules. These are the objectives of the rights contained therein, the circumstances operating at the time*

when the interpretation has to be determined, the future implications of the inter pretations, the impact of the interpretation on future generations and the taking into account of new developments and changes in society".

[15] I agree entirely with learned counsel for the applicants citing the privy council case of **A-G of The Gambia V Momodou Jobe (1984) AC 689,** that this self same approach to the interpretation of statutes has gained judicial approval in other Commonwealth countries. In that case, Lord Diplock declared thus:-

" *a Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in state are to be entitled, is to be given a generous, and purposive construction*".

[16] From the foregoing, it is established beyond any peradventure, that the intention of the legislature in passing a law, plays a pivotal role in the interpretation of that law.

[17] The question that begs for determination at this juncture is Svhat then is the intention of the legislature by the right created vide Section 21 (1) of the Constitution of Swaziland Act, 2005, to wit "*Right to a Fair*

and, speedy public hearing within a reasonable time"*?* Apart from denoting that the right is a component of a fair trial, the section gives one few clues. Recourse must therefore of necessity be had to.,other jurisdictions where case law has interpreted similar provisions in their constitution, in ascertaining the intent of legislature.

[18] **A case in point is the South African case of Sanderson v Attorney General Eastern Cape (1998) 2 SA 38,** where the court declared thus, concerning this issue.

> " *These issues have been constitutionally scrutinised in* ***Canada and the United States,*** *both of which have constitutional provisions (Section 11 (b) of the Canadian Charter and the Sixth Amendment to the United States Constitution) affording a right to a speedy trial. There has also been some consideration in* ***Australia*** *and* ***England*** *of the status of the right to a speedy trial at common law. In the main the rights primarily protected by such speedy trial provisions are perceived to be liberty, security and trial related interests. In* ***R V Morin,*** *these various interests are defined as follows:-" The right to security of the person is protected in Section 11 (b) by seeking to minimise the*

> *anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimise exposure to the restrictions on liberty which result from pre-trial incaceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh*"

[19] It would appear therefore from the foregoing, that the intention of legislature lies in the interest which the right seeks to protect. Which is to ameliorate the harshness caused by pre-trial detentions, protect the trial related interests of the accused person - such as the evidence to be tendered and the availability of the witnesses to testify taking into consideration that the longer it takes to testify, the weaker the memory of the event, and the more likelihood the destruction of vital evidence, as well as to lessen the anxiety, concern and in some cases, hardship, caused *by* having the threat of criminal charges hanging over ones head see **United States V Mac Donald 456 US1 (1982) at 8,** The intendment of legislature demonstrated ante portray it as time oriented.. If one therefore construes that legislation literally, one will hold the view, that a "*reasonable time*" is ascertained only by the

lapse of time. However, the purposive approach to interpretation, which is recommended, must take into consideration the peculiar facts and extigencies of each case.

[20] That is why Lord Denning declared in Seaford Courts Estate (supra) that the intention of parliament is gathered '*not only from the language of the statute but also from a consideration of the social conditions which gave rise to it*----------"

[21] It is obvious to me therefore, that even though S21 (1) of the Constitution requires a person charged with a criminal offence to be afforded a fair hearing within a reasonable time, what constitutes reasonable time, should not only be judged by the lapse of time. There is no doubt that if the trial were to end within a relatively short time, that the presumption will be that it was concluded within a reasonable time. However, the shortness of the trial even though generally suggestive of reasonableness, is however not conclusive. This is because there are certain cases that will require a longer time to deal with the issues, if the principles of fair hearing must be upheld. If such

cases are heard within a shorter time, that does not allow for relevant materials, including, relevant witnesses and in some cases the prosecution may not be afforded adequate opportunity to conduct their case. Thereby, sacrificing justice on the altar of expediency and in that vein, violating the same Fundamental Right of fair hearing, which that provision seeks to protect.

[22] The test of a "*reasonable time*" does not therefore rest in the lapse of time alone, but must be weighed against the peculiar facts and circumstances of the case, in ascertaining whether the length of the time that has lapsed can be regarded as unreasonable. It follows therefore, that a declaration that one's right to a fair hearing within a reasonable time is infringed, cannot be had just for the asking. Case law has in consequence, evolved certain parameters that must guide the court in ascertaining whether the time that has lapsed is unreasonable. Respondents counsel **Mr Vilakati,** in his oral submissions before court, catalogued these parameters to be as follows:-

1. The length of the delay
2. Reasons for the delay
3. Assertion of the right to a speedy trial by the applicant
4. The interest that the right is designed to protect.

[23] The foregoing factors were given judicial approval in **Re Mlambo** (1992 (4) SA 144 (25), where the court declared thus:-

"In Fikilini V Attorney - General 1990 (1) LIR 105 (SC) at 112G, *this court approved of the factors identified by Justice Powell in his landmark judgment in* ***Baker V Wingo (supra),*** *as amongst those to be taken into account in assessing whether an accused has been deprived of his constitutional right to a speedy trial. He stated them at 530-2, as follows:-*

> *"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but example, the delay that can be*

tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

[24] *Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should he assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the Government. A more neutral reason such as negligence or over crowded courts should be weighed,,less.heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the defendant. Finally a valid reason, such as a missing witness, should serve to justify appropriate delay. .*

[25] *The third factor, the defendants responsibility to assert his right. Whether and how a defendant asserts,his right is closely related to the other factors we have mentioned. The strength of his effort will be affected by the length of the delays, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not*

always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasise that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

[26] *A fourth factor is prejudice to the defendant. Prejudice, of course should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This court has identified three such interests: (1) to prevent oppressive pretrial incarceration (11) to minimise anxiety and concern of the accused, and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in*

the record because what has *been forgotten can rarely be shown*" **See Baker V Wingo 407 US 514 (1922) at 519 - 20, 1992 (4) SA P 149. See also Sanderson V Attorney General Eastern Cape (supra).**

[27] Furthermore, in Bell V Director of Public Prosecutions of Jamaica and Another (1985) 2 ALL ER. A (pc) page 591, The privy council declared thus, per Lord Templeman:-

> "*Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in* ***Barker V Wingo.*** *Their Lordships also acknowledge the desirability of applying the same or similar criteria to any Constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must, however, vary from jurisdiction to jurisdiction and from case to case*"

[28] The poser here is: Have the applicants demonstrated the foregoing parameters to their advantage to warrant the reliefs sought? I will now proceed to consider these parameters ad seriatim to

find out whether if same are juxtaposed with the facts and circumstances of this they case, vindicate the veciferous cries of the applicants herein.

[29] 1. **The length of the delay**

It is common cause that the 1st applicant was arrested on the 20th of June 2006, and was brought to court on the 21st of June 2006, and the 2nd applicant was arrested on the 22nd of June, 2006, and brought to court on the 23rd of June, 2006. **Mr Vilakati** for the respondents, conceded that "*the clock started to tick when the 1st and 2nd applicants made their first appearance in court*".

[30] Implicit from this is that counsel conceded that the period of assessment of delay stated to run for the 1st and 2nd applicants, from the 21st and 23rd of June 2006, respectively.

[31 I beg with respect to differ from this proposition. I hold the view that the clock, as it were, began to tick for the 1st and 2nd applicants, on the 20th and 22nd of June 2006, respectively, the dates of their

respective arrest. This is because the dates of arrest, signify, J:he.,start of the impairment of the applicants interests in the liberty and security of their persons. I say this because the concept of "security" is not restricted to physical integrity, but includes stigmatisation, loss of privacy, anxiety, disruption of family, social life and work. As the court said in **Re Mlambo (supra):-**

" *Arrests are not, and certainly ought not to be, investigating procedures. Rather they are vehicles to court and fall within the same category as the issuance and service of a summons citing the crime the accused is alleged to have perpetrated. For a warrant for the arrest of a person will only be granted on the laying of information that there are reasonable ground to suspect him of having committed an offence. And whenever an arrest is made without a warrant, it is obligatory that the police officer effecting it informs the person forthwith of the cause thereof-—It was just such a situation that inspired Justice White in* **United States V Marion 404 US (1971) to observe at 320:**

[33] "*To legally, arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not,*

and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obliquy, and create anxiety in him, his family and his friends so viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the sixth amendment"

[34] I therefore hold, that the period of computation of delay in this case, started to run from the 20th and 22nd of June 2006, the dates of arrest of the applicants. The period that has elapsed therefore, between those dates and this date, is a period of 4 years and 8 months.

[35] The question then is : Have the applicants demonstrated that this period of delay is prima facie unreasonable or presumptive prejudicial? This is because it is only on this platform that the court can look to the respondents for an explanation. Here again learned counsel for the respondents, whilst tendering oral argument in court, conceded that this period of delay is presumptive prejudicial. In the words of counsel.

" I *am prepared to accept that the delay in this particular case is presumptive prejudicial*".' Let me say categorically here, without more ado, that I agree with counsel. This conclusion gives me ; the latitude to consider the next factor to wit:-

[36] 2. **Reasons for the delay**

> As I have already demonstrated ante, citing the case of **Fikilini V Attorney General (supra),** that a deleberate attempt to delay the trial to hamper the defence should weigh heavily against Government. A more neutral reason such as negligence or over crowded court should weigh less heavily. But a valid reason such as a missing witness should serve to justify appropriate delay.

[37] In this case, the reasons advanced by the respondents, are that the charge against the applicants, is one of fraud a serious offence, which requires transmission of some documents to the forensic science laboratory in the Republic of South Africa, where they are analysed as per their order of arrival. That the laboratory provides forensic examination to,, all the countries in Southern Africa and beyond.

Therefore, the respondents cannot rush them. Thus, long periods pass before results come back. That these are circumstances beyond the control of the Respondents...-More to,this is that the investigation involves massive documents which need extensive scrutiny.

[38] The question is, should these reasons weight for or against the respondents? Here again, learned counsel for the respondents, conceded that the reasons advanced by the crown for the delay are, in his words, "*unsatisfactory*"

[39] The reasons advanced by the respondents show clearly that investigation is still on going in this case. It is arguable as contended by the applicants, that the respondents should have concluded investigations before arresting them. That is arguable. In fact, that would be the more prudent course, to avoid a situation where a charge is left hanging over a person's head, whilst the DPP embarks on a long drawn out investigation. However, practice ; has M demonstrated it beyond disputation, that this course is not always practicable in criminal trials. This is due to the fact that situations may arise where the stage of investigation has revealed enough facts.to disclose a

reasonable basis that a person has committed an offence, in such a situation, an arrest can be made as part of the criminal process, but must be in accordance with the law and Constitution. It is prudent in such situations, that the fundamental rights of the accused to a trial bail be strictly observed and the investigation concluded speedily. We cannot shut our eyes to the reality that in some situations, it may be necessary for the investigating agency to arrest a suspect, as a precautionary measures, to prevent an action that might frustrate the ensuing criminal process, like escaping from the jurisdiction.

[40] In casu, although the reasons for the pre trail arrest have not been demonstrated by the respondent, it is however clear that the applicants were brought before a court for fraud and granted bail, prior to transmission of the evidence to the forensic laboratory in South Africa, for analysis. It was thus incumbent upon the respondents, since they deemed it expedient to arrest before concluding investigation, to take steps to ensure that the investigation is concluded expeditiously and the applicants tried, in other not to infringe on their constitutional right of fair hearing. As the case lies, the respondents have failed to

demonstrate to the court what actual steps they had taken to ensure that the forensic analysis are concluded expeditiously. Did they telephone the laboratory enquiring about the situation of things? Did they write to the laboratory on this issue or best, did the DPP dispatch any of the numerous staff in her law chambers to South Africa to guage the situation of things?. If so when and where?

[41] In casu, there is no evidence to show that the respondents did take steps to ensure that the evidence is analysed and sent back expeditiously. It is my humble, but considered opinion, that it is undesirable for the applicants to be left to walk about with the threat of litigation hanging over their heads, whilst the actual trial is allowed to go into a sleeping slumber, left to languish in a near forgotten land.

[42] The foregoing not withstanding however, I am still convinced that the respondents should be given the benefit of the doubt and that this factor should not weigh greatly against them, when one takes into consideration the peculiarities of our socioeconomic and cultural

environs, especially the circumstances that gave birth to the delay in this case. This brings us to the 3rd factor namely:-

[43] 3. Assertion of the right to a speedy trial by the applicants

> In honour of this factor, it was contended by learned counsel for the Respondents, that the applicants failed to assert their rights, prior to the institution of this action, not withstanding the fact that they have had legal representation from the very out set. Therefore, so goes the argument, f " *the fact that the applicants did not assert their right prior to institution of proceedings, counts against them in the determination as to whether their Section 21 (1) right is violated*".

[44] I must say that I am confounded by the very proposition, that this factor is a precondition, to the enforcement of the fundamental Right of fair hearing enshrined in the Constitution. I am of the firm conviction, that this factor resides more in the realm of forms and formalities, rather than substance, and therefore, should not count

greatly in the determination of this matter. I say this irrespective of the reasons advanced by case law in honour of it. *The.* questions that have greatly agitated my mind are:-

[45] Why should the enforcement of a fundamental human , right,.guaranteed , by the Constitution be subjected to such a procedure as to require aggrieved persons to assert their rights first, prior to institution of litigation? Is not the violation of fundamental rights and freedoms so grave, and their enforcement so central to the delivery of justice, that the legal system should loosen its procedures to enable aggrieved persons come before a competent court freely, and without any requirements as to forms or formalities? I hold the view, that to rely on forms and formalities to harmstrung the very constitutional right which Section, 2,1.. $(1)_0$,strives.. to. protect, is in itself unconstitutional. The universal trend is that courts are interested in substance rather than mere form. This is because the spirit of justice does not reside in forms and formalities , nor in technicalities, nor is the triumph of the administration of justice to be found in successfully, picking ones way between the pitfalls of technicalities . Justice can only be done, if the substance of the matter is considered. Reliance on

technicalities leads to injustice. The court will.,therefore, ..not. ensure that mere form or fiction of law introduced for the sake of justice should work, a wrong, contrary to the real truth or substance of the case before it.

[46] In coming to this conclusion, I am guided by the pronouncement of the court in **Sanderson (supra),** where the court considered this factor and declared:-

[47] " *The accused, unlike in other jurisdictions, should not have to demonstrate a genuine desire to go to trial in order to benefit from the right, provided he could establish any of the three kinds of prejudice protected by the right. Of course, it would be difficult to establish actionable prejudice if the accused had constantly consented to postponement— However there was no need for the accused to assert the right or actively compel the state to accelerate preparation of the case (paragraph 32 -33 at 55G - 56C/D*"

[48] I agree with **Sanderson** on this issue. I also agree with **Sanderson,** that this principle if it must be applied, can only hold

sway in concert with the peculiarities of the societal issues and criminal justice system of each jurisdiction. In the words of the court:-

[49] " -----*a need for circumspection in relying on foreign pecedent without recognising that the South African Society and criminal justice system differed from those of other jurisdictions: for instance the vast majority of accused in South Africa were unrepresented and to deny the relief— because they did not assert their rights would be to strike a pen through the right as far as the most vulnerable members of South African Society were concerned*"

[50] I find it imperative to state here, that the South African situation is very much akin to that of The Kingdom of Swaziland. It appears to me therefore, that this factor is clearly impracticable, when juxtaposed with the peculiarities of the socioeconomic and cultural circumstances that pervade our society. I am of the opinion, that it is immaterial that in this case the applicants are represented by counsel in the circumstances. The same brush, in my view, must taint all the cases. And in any event, the question I consider pertinent in these circumstances is: Can the court visit the sins of counsel on the applicants on this Constitutional question? I think not.

[51] On these premises, I hold, that the failure by the applicants to assert their right, should not count greatly against them in enforcing this fundamental right as enshrined in the Constitution. Now, let us consider the final but most important factor to wit

[52] 4. The interest that the Right is designed to Protect

This factor is also termed prejudices. The judicial consensus, is that, the more serious the prejudice suffered by the accused on a continum from incarceration, through restrictive bail conditions, and trial prejudice, to mild forms of anxiety, the shorter had to be the time within which the accused was tried. Therefore, awaiting - trial prisoners, in particular, had to be the beneficiaries of the right. **See Sanderson (supra) and Re Mlambo (supra).** The focus is not on the seriousness of the charge faced by the applicants and the prejudices flowing therefrom, but rather on the delay and the prejudice it caused.

[53] I agree entirely with learned counsel for the respondents, **Mr. Vilakati,** that this factor has to be determined in relation to three interests that the right is intended to protect, namely:

1. To ameliorate-the harshness caused by pre trial detention.

2. To protect the trial related interests of the applicants.

3. To protect the security of the applicants by lessening the anxiety and concern caused by having criminal charges hanging over their heads. See **Re Mlambo (supra).** Let us now examine these interests ad seriatim, vis a vis, the case stated by applicants, to see if the prejudice, if any suffered, vindicate the reliefs sought, instant.

[54] I**. To ameliorate the harshness caused by pre trial detention**

It was suggested in argument by learned counsel for Respondents, that in the case at hand this factor is inapplicable, because the applicants are not in custody. Let me say it categorically here, but with respect to counsel, that I disagree entirely with his posture on this subject matter. I say this because the mere fact that the applicants are admitted to bail, is not a carte blanche for an unending delay of the case, in

flagrant disregard of Section 21 (1) of the Constitution, We must not lose sight of the fact that a person admitted to bail suffers impairment of his liberty imposed by the bail conditions. I am thus compelled to examine the prejudice the applicants contend they have suffered under this head, to see if same entitles them to the reliefs sought. In paragraph 11 of the replying affidavit, the 1st applicant avers as follows :-

[55] "----------*it is my submission that being admitted to bail does not make void the fact that we have a right to a speedy and fair hearing.* ***Though we have been admitted to bail, our lives have been disrupted . We can not leave the country as we surrendered our passports.' We report with the police from time to time*** " emphasis mine.

[56] The foregoing deposition of the applicants is not controverted, throughout the tenure of this application. It is thus taken as established.

[57] There is therefore no doubt that the applicants have suffered some form of prejudice by the delay inspite of being on bail. This is due

to the fact that the bail conditions imposed, have restricted their life style, in that they surrendered their passport to secure the bail and consequently cannot travel. There is also the factor of having to report to the police from time to time. It is obvious to me therefore, that the applicant's right to liberty is impinged as a result of this matter. *At* is also obvious, that this situation will persist in so far as the matter is not concluded. There is thus some degree of prejudice suffered. The question however is whether the prejudice suffered, when pitched against the interest of the state to bring suspected criminals to book, warrants the orders sought? I will come to these matters anon. But let us now proceed to look at the next interest to wit:

[58] 1. <u>The trial related interests of the applicants</u>.

Under this head the 1st applicant deposed thus in paragraph_6.2 and 7.1 respectively, of the replying affidavit:-

> " *6.2 It is my humble submission that the respondent is aware that memories fade with time and that witnesses are likely to be more reliable to testify to the events in the immediate past as opposed to the events that transpired*

many months or years ago. Witnesses that assist the court to dispense with justice they pass away as time passes by. The Respondent has not furnished me and my co-applicants with statements of his witnesses. It might be possible that our witnesses who could counter the testimony of the respondent's witnesses have passed away.

7.1. As already stated, witnesses are people and people sometimes get incapacitated by all sorts of misfortune. In our country there is a high prevalence of HIV/AIDS which render people too sick to an extent of failing to testify in court. It might be possible that, an important witness for me by the time the matter is heard will be incapacitated".

[59] I find the foregoing allegations of fact too general and speculative. Whilst the applicants allege, that there is a high prevalence of HIV/AIDS in the country, there is no allegation to show that a witness of the applicants has actually contracted the disease, is very sick and is expected to pass away. We must not lose sight of the fact that a vast majority of Swazis are still HIV/AIDS free. There is also no allegation that a vital witness has passed away, has left the jurisdiction, or is about to leave the jurisdiction, or that any vital evidence is missing, is destroyed or is likely to be destroyed. There is also no allegation that any of the witnesses has lost or is likely to lose

their memory before the trial is concluded. As the court said in **Barker V Wingo (supra).** "*If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if the defence witnesses are unable to recall accurately event of the distant past*".

[60] Whilst agreeing that the likelihood of these prejudices heighten with the length of delay, I however hold the view, that demonstration of actual, rather than mere allegation of these prejudices, should be the clinching factor. If the court were to grant this remedy purely based on speculations, then the entire justice system will collapse, unleasling mayhem and anarchy on the society. I apprehend that this is not the intention of legislature. It appears to me, that the demonstration of actual prejudice of this issue, in **Re Mlambo,** helped sway the court to a grant of the reliefs sought therein^ u In that case the applicant suffered actual prejudice because three of the witnesses, formerly senior employees of the **Municipality of Harare,** who would have been called in his defence emigrated and their whereabouts were not known.

With the delay in that case, after the withdrawal of the charges, the applicant came to believe that he would not be prosecuted, so he did not deem it expedient to keep in contact with these persons. The court balanced all the factors and came to the conclusion, that the effect of the extraordinary lengthy delay is such as to deny the applicant the right to a fair hearing.

[61] On the whole therefore, I am inclined to agree with the respondents, that on the facts stated, there is nothing to show that the trial related interests of the applicants have been impaired. I am also of the firm conviction, that the allegation of likelihood of imp.airment^of ,the said interest, when balanced with the other factors to be considered, is not such as to sway the court to a grant of this application. The foregoing said and done, let me however interpolate and observe here, that it is undesirable that the respondents have failed to furnish the applicants with statements of the prosecution witness up till now. The DPP is hereby ordered to furnish the applicants with the statement of prosecution witnesses forthwith. This brings us to the last interest protected to wit:-

[62] 3.2. **The security of the applicants by lessening the anxiety and concern caused by having criminal charges hanging over their heads. Mr Vilakati** for the Respondents, accepted, that this prejudice applies to the applicants. In his words " *I accept in favour of the applicants that concern and anxiety applies to them*"

[64] Not withstanding, the foregoing submission by **Mr Vilakati,** I have anxiously searched the record to gauge the degree of concern and anxiety demonstrated by the applicants on the papers serving before me, and I have found none. I say this because the only averment on this issue, is as Contained in the last 2-lines of paragraph 12 of the Replying Affidavit of the 1st applicant, as appears on page 22 of the book of pleadings, in the following words:-

> " *Have (sic)the matter not being concluded infringes our right to security*"

[64] I hold the view that this is a bare, general and speculative allegation of fact, leaving the security actually infringed in the realm of conjecture. What actual prejudice did the applicants suffer? Did they suffer a nervous break down, anxiety, concern, sleepless nights? Any

stigma in consequence of the pending charges? I hold the view that it is not enough for the applicants to allege that their right to security is infringed. They were required to urge relevant facts upon the court demonstrating this prejudice. By so, doing, affording the court the relevant materials to base its assessment. I hasten to add here, that such facts cannot be replaced by oral embellishments of counsel's submissions from the bar. They must be contained in an affidavit serving before court. As the case lies, I have not been so fortunate as to be afforded such materials. I am not clairvoyant as to know facts not urged upon the court. In **Sanderson (supra)** the appellant demonstrated in full that his right to security was impinged by the charge. That included substantial embarrassment and pain suffered as a result of negative publicity engendered by the nature of the charges, coupled with his occupation and prominent position in society. He set out his own emotional and personal reactions to anxiety and stress, which necessitated the use of medically prescribed tranquillisers and sleeping tablets, together with the great strain placed on his limited financial resources by the drawn out proceedings. The local division found in the appellants favour that there had been unreasonable

delay and significant prejudice; However, after balancing the appellant's right to a speedy trial against society's interest in bringing suspected criminals to book, it dismissed the application. This decision of the local Division was upheld by the constitutional court on appeal.

[65] In the circumstances, I hold that the applicants have failed to demonstrate any prejudice to their security to entitle them to the reliefs prayed.

[66] In conclusion, there is no doubt that the trial of the applicants is yet to start 4 years and 8 months after their arrest. This situation is undesirable. Both sides have agreed that the respondents have not adduced satisfactory reasons for the delay. As it is, it is beyond dispute, when one takes into consideration the totality of the circumstances of this case, which I have hereinbefore examined, that the delay is inordinate. It is a requirement of a fair criminal trial that the accused be afforded a fair and speedy public hearing within a reasonable time. Where the trial is inordinately delayed, as I have hereinbefore enunciated, there is the presumption that the trial is not

being conducted within a reasonable time. However, the question here, which has been thrown up by this application itself, is, whether the ensuing criminal process is nullified, or ought to be nullified in the circumstances.

[67] This question, is . not merely theoretical or intellectually satisfying, as the expositions of Demosthenes, the legendary Greek orator who had the penchance to repeatedly address the sea, when he had .no, human, audience. It is a question that demonstrates the conflict between strict observance of the fundamental Rights of the applicants to fair trial, and the legitimate public expectations of law enforcement.

[68] It has occurred in situations of unlawful pre trial arrests, unlawful searches and inadmissibility of evidence obtained as a result, and unlawful pre trial detentions.

[69] In many of these situations, some authorities across jurisdictions have held that such constitutional violation vitiate the subsequent

criminal process associated therewith e.g in the **Mlambo (supra).** In many other cases across jurisdictions, the courts have held that the unconstitutionality of the act, does not affect the pending criminal process e.g. in **Sanderson (supra).** Most of these authorities emphasis a need for a balancing between the two conflicting interests, as I have hereinbefore demonstrated. In balancing the conflicting interests, the most important indicator is whether the delay has brought the administration of justice to disrepute, in the sense that it has prejudiced the accused person and or violated legitimate public interest.

[70] In casu, I have carefully weighted the totality of the factors that must hold sway for a grant of the reliefs sought, and I find that the applicants have failed to demonstrate the degree of prejudice, which when balanced with the competing interest of the society to bring suspected, (criminals to book, will entitle them to the redress sought. The applicants have clearly failed to demonstrate that there can no longer be a fair hearing or that it would otherwise be unfair to try

them. See Attorney General's Reference No 2 of 2001 (2004) 5LRC 88 HL.

[71] In coming to the foregoing conclusion, I take cogninance of the fact, that in the Kingdom of Swaziland, like in most if not all, developing African Countries,,^ criminal.,. cases are generally not completed within an ascertainable period of time. This is-because-the-justice system has been plagued by a grave number of issues from time immemorial. Therefore, most criminal cases, especially those of a serious nature which require a magnitude of evidence, a large number of witnesses, as well as expertise, such as forensic analysis of evidence, as demonstrated herein, become very long drawn out. This is compounded by the fact that in most cases, the system is ill equipped to handle the complexity of the cases, for example in casu, where the evidence had to be sent to the Republic of South Africa for forensic analysis. This demonstrates that the system lacks the wherewithal to offer such expertise. The ilL consequence of these issues is that they hamstrung the entire justice delivery system and orchestrate long drawn out delays. This is the unfortunate reality. \^e

cannot shut our eyes to them. I hold the view therefore, that in the absence of real and substantial prejudice, in the circumstances, that the applicants should not be allowed to rely on allegations of violation of their Right of fair hearing within a reasonable time, to escape their trial. The court must in all circumstances, balance the competing interest of the accused to a speedy trial, with the societal interests to bring suspected criminals to book. To hold otherwise, will set a dangerous precedent, open the flood gates and stultify the entire administration of justice, thereby unleashing anarchy and chaos, on the society. That certainly is not the intention of legislature.

[72] I apprehend that it is in recognition of the foregoing factors that the court, in Re **Mlambo (supra)** declared, as follows:

> " *It is apparent that a reasonable time is necessary for the state to be in a position to get the case to trial. A varying extent of time will be needed to prepare the docket, depending on the complexity or otherwise of the proposed charge or charges, to record the statements of witnesses and to arrange for their attendance. In addition, there are*

the usual systemic delays, such as a congested court calendar, the availability of court facilities, judicial officers and prosecutors, and the considerate accommodation of the schedule of witnesses. The list is not exhaustive. The system is not perfect and resources are limited and one has to accept as normal and inevitable a period of delay in respect of these matters. But this is not to accept that the state can justify abnormal periods of systemic delay on such grounds __"

[73] The foregoing not withstanding, I hold the view, that once this complaint has been lodged to the court pursuant to Section 35(1) of the constitution, that the factors orchestrating the delay, in casu, should not be allowed to continue to operate to hamstrung the right. , The delay has lasted for 4 years and 8 months. I am of the firm conviction, that a court seized with a matter such as this one, whether the delay is founded to be reasonable or unreasonable, is duty bound to take steps to ensure the
enforcement of this fundamental right. This is because to do otherwise,

has the dangerous potentials of defeating legitimate public expectations
of Law enforcement and of bringing the administration of justice to disrepute amongst right thinking members of the society. I am compelled in the circumstances, to put the DPP to terms. I have statutory empowerment to do just this. Section 35 (2) (b) of the constitution, enables me to '*make such orders, issue such writs and make such directions* " as I may consider appropriate for the purpose of enforcing or,^securing the enforcement of this fundamental right.

> **[74] Mr Vilakati** has urged certain orders which he contends as appropriate for the circumstances of this case. These orders were conceded by **Mr Gumedze.** I think however, that it will serve the public interest more to direct a speedy conclusion of investigation and trial of the applicants.

[75] On these premises, I make the following orders.

1. The Director of Public Prosecutions do and is hereby ordered to apply for a summary trial of the applicants in terms of section 88 (1) Bis of the criminal Procedure and Evidence Act, not latter than the beginning of the next session of the High Court of Swaziland.

2. If the trial is not commenced within 6 months from today, the applicants are at liberty to apply to court for further orders on such supplementary papers as they deem fit.

3. The application in relation to the 3rd applicant do and is hereby dismissed.

4. I make no order as to costs

DELIVERED IN OPEN COURT IN MBABANE ON THIS 28th DAY OF FEBRUARY 2011

OTA J.
JUDGE OF THE HIGH COURT