IN THE HIGH COURT OF SWAZILAND

In the matter of:	Criminal Case Up. 91/83
PRINCE MFANASIBILI	1ST APPLICANT
MFANAWENKHOSI MASEKO	2ND APPLICANT
VS	
REGEM	RESPONDENT
CORAM:	NATHAN C.J.
FOR RESPONDENT:	MR. THWALA
FOR APPLICANTS:	MR. MOSTERT AND

MR. MATHSE

JUDGMENT

(Delivered on 11th March, 1983)

NATHAN C.J.

This is an application for bail brought under Section 105 of Act 66/1938. It was preceded by an application to the Magistrate for bail brought under Section 97 of the Act. That application was refused.

Although the present application may be regarded as a new application and not as an appeal under Section 104 of the Act against the Magistrate's refusal to grant bail, it was common cause that the Court should have regard to the allegations contained in the Applicants' Petition

for bail to the Magistrate, and to the record of the proceedings in that Application. This was a sensible approach, because it is obvious that in deciding the present Application the Court would necessarily have regard to what was said in, and to the judgment in, the first Application.

It appears that the Applicants will be charged with contravening Section 4(1)(b) of the Sedition and Subversive. Activities Act No.46/1938 in that they made a seditious statement relating to the Police or members of the Royal Swaziland Police force. The Applicants' Petition sets out who they are. The first Applicant is, although the Petition does not specifically say this except in the heading to the papers, a Prince. He is also a member of the Liqpqo which is described as the Supreme Council of State of the Kingdom of Swaziland. He is also Chairman of the Civil Service Board of the Swaziland Government and he was as such described by the Deputy Commissioner of Police in his evidence before the Magistrate as holding the destiny of every civil servant in the country including the Deputy Commissioner. The first Applicant is also Chairman of the Swaziland Commercial Amadoda and holds various other appointments.

It was said in the Petition in the first Application and repeated in the present Application although not in writing, that if granted bail the Applicants would undertake to stand trial in due course, not to interfere with Crown witnesses,

not to abscond and to abide by all conditions that might be imposed upon them.

The Magistrate in his judgment referred to the fact to which he appears to have attached some importance, that although the Crown had led the evidence of the Deputy Commissioner of Police the Applicants had closed their case without calling evidence. No evidence was led by them in the present Application; and I must confess to some surprise that they did not lead evidence in view of the importance the Magistrate had attached to this aspect of the matter. I should add that in my view the Magistrate was entitled to have regard to this aspect of the matter, the onus being on the Applicats to satisfy the Court that bail should be granted.

The Magistrate correctly pointed out that an accused person should be granted bail if it is clear that the interests of justice will not be prejudiced thereby, more particularly if it thinks upon the facts before it that he will appear to stand trial in due course. But if there are indications that the Accused will not stand trial or that he will interfere with witnesses or otherwise hamper or hinder the proper course of justice, bail will be refused. In S v Fourie, 1973 (1) SA 100 (D) at p.103, which was approved in S. v Maharaj & Others, 1976 (3) SA 205 (D) at p.207, Miller J. said "As I have already mentioned, the likelihood of conduct by the Accused which may endanger the security of the State, or public safety,

has been held to constitute an exception to the general principle that an accused person should not be denied bail unless the administration of justice would be prejudiced by granting it."

In the present case it is conceded that there is no danger of the Applicants absconding or not standing the trial. Mr. Mostert who appeared for the Applicants submitted that there is no concrete evidence giving any indication that the Applicants would interfere with witnesses or otherwise pervert the course of justice. But it is to be noted that it was alleged by the Deputy Commissioner of Police in his evidence that three of the witnesses in the case will be members of the Liqoqo, and expressed the fear that the Applicants will influence the witnesses in the event of their meeting them. It appears to me that the Deputy Commissioner of Police is correct and that there is at the least a very reasonable fear that by virtue of the high position that they hold the Applicants will be extremely favourably placed to bring pressure to bear upon the witness against them. As the Applicants and the proposed witnesses are all members of the Liqoqo it is inevitable that they should meet and there must be an appreciable danger of improper pressure being brought to bear upon the witnesses.

Mr. Mostert submitted that fears such as this are purely the subjective fears of a policeman. He also submitted that the very people with whom the Applicants would interfere if so minded are the police who would take steps to cancel the bail. But the persons interfered with might well not take

course: they might just as well succumb to the persuasions of the Applicants. It appears to me that the matter cannot be regarded as a mere subjective fear and that one must consider objectively whether it is a reasonable fear.

Mr. Mostert submitted that the Crown must be able to point to some fact justifying its fear, and that it cannot do this. But I think that the necessary fact is evidenced by the very exalted positions that the Applicants hold. It is unfortunate that these high positions should operate to the disadvantage of the Applicants; but this seems to me to be inevitable, especially in a case which has, as Mr. Mostert said, a political flavour. I should add that on this point I am not in agreement with the Magistrate who appears to suggest in some portions of his judgment that the higher the position the less danger there is of interference. In my opinion, the higher the position the greater the danger.

Finally I think one must have some regard to the seriousness of the crime charged. Sedition may well affect the safety and security of the State and although the penalty provided is not very high, it does include imprisonment or a fine or both.

I have come to the conclusion that the Applicants have not discharged the onus resting upon them, and that the Application cannot succeed. I am fortified in this conclusion by the consideration that an early date, 24th March, 1983 has been assigned for the trial.

C. J. M. NATHAN

CHIEF JUSTICE