IN THE HIGH COURT OF SWAZILAND

CASE NO. 24/99

In the matter between

NCANE NHLABATSI	APPLICANT
And	
THE KING	RESPONDENT
Coram	S.B. MAPHALALA – J
For the Applicant	MR. L. GAMA
For the Respondent	MIS S S. NDERI

JUDGEMENT

(02/07/99)

Maphalala J:

This is an opposed bail application. The applicant has filed a notice of application supported by a founding affidavit where she deposed that on or about the 2nd May 1999, she was arrested by police officers stationed at Manzini Police Station on a charge of fraud. She has been in custody since. She went on to state her personal circumstances and made certain undertakings in the event the court granted her bail.

The crown has filed an answering affidavit of Susan Waithira Nderi who is a Senior Crown Counsel in the Director of Public Prosecutions chambers and is the one who argued the matter. In her affidavit she raised a point in limine as follows:

a) The applicant's application is mala fide. The reason being:

i) The magistrate seized of the matter has jurisdiction to entertain the applicant's application as envisaged by the provisions of The Criminal Procedure and Evidence Act No. 67/1938 (hereinafter referred to as the Criminal Procedure and Evidence) see Section B (1) 102, B (2) 102 A as amended.

ii) The applicant has not come to this court by way of an appeal as envisaged by Section 104 of the Criminal Procedure and evidence.

iii) The reason that the High Court is a court of inherent jurisdiction becomes wanting where the legislature has provided a more convenient forum for disposing with the matter of bail, (see Section 105 of the Criminal Procedure and Evidence). Wherefore the applicant's application is calculated to defeat the requirements of Section 102 of the Criminal Procedure and Evidence, contrary to the decision of the court in Charles Kunene and others vs The King, Case 116/98 where Dunn J (as he then was) warned against such a tendency.

On the alternative the crown submits that in the event this court is inclined to entertain the applicant's application, the respondent put forth the following point in limine;

i) Section 103 of the Criminal Procedure and Evidence as amended reads:

" Subject to Section 102A, the amount of bail to be taken in any case shall be in the discretion of the court or judicial officer to whom the application to be admitted to bail is made".

The repealed Section 103, is identical in wording to the amendment save for the inclusion of the words "subject to Section 102A", The inclusion of the said words indicates the intention of the legislature that any court entertaining a bail application should first visit the provision of Section 102A. That is, the judicial officer has no discretion as to the amount of bail in offences, which fall within the ambit of those covered by Section 102 A.

ii) Hoexer J. A in South African Transport Services vs Olga and another 1986 (2) S.A. 684 at 697 (D) comments on the interpretations of statutes and succinctly states:

"That construction should be adopted which is more consonant with and is better calculated to give effect to the intentions of the enactment"

The legislature in enacting the respective amendments intended that all persons charged with theft and kindred offences pay bail at half the value of the subject matter of each offence where the value of the property exceeds E2, 000-00.

The matter came before court on the 25th June, 1999 for arguments and Miss Nderi in her argument followed the submissions outlined in respondents answering affidavit and for the sake of proclivity I shall not repeat them here.

On the other hand Mr. Gama argued that Miss Nderi was totally wrong in her interpretation of the law in that the section she has cited only apply in the magistrates court and not the High Court. The High Court is not bound to adhere to this procedure in view of its inherent jurisdiction. Mr. Gama divulged when asked by the court why this application was not moved before the magistrate court whereupon he

replied that they are trying to avoid the rigours of the amendment as the applicant is indigent and cannot afford the bail. I must say I was taken aback by Mr. Gama's submissions moreso, nowhere in applicant's papers is it reflected that she is without means and the amount she is alleged to have defrauded is not divulged. These facts were only advanced from the bar. I tend to agree with Dunn J in Charles Kunene (supra) that such practice should be discouraged. The granting of bail under these circumstances would open floodgates for people charged with these offences who will try and circumvent the prescribes of the amendment and flood the High Court with such applications. The effectiveness of the amendments will be adversely affected and the very intention of the legislature defeated.

I agree entirely with Miss Nderi's submissions on the interpretation of the amendments more particularly in her submission that the legislature in enacting the respective amendments intended that all persons charged with theft and kindred offences pay bail at half the value of the property where the value of the property exceeds E2, 000-00.

In the result, I refuse the application with costs. Further I would advise that applicant makes her application before the appropriate magistrate court and in the event she feels the bail granted by the magistrate was granted irregularly she may appeal to this court or seek an earlier trial date.

S. B. MAPHALALA

JUDGE