IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Criminal Trial No. 257/2005

In the matter between

Robert Nzima	1st Applicant
Mduduzi Mamba	2nd Applicant
Goodwill du Pont	3rd Applicant
Themba Mabuza	4th Applicant
Sicelo Mkhonta	5th Applicant
Mfanawenkhosi Mntshali	6th Applicant
Kenneth Mkhonta	7th Applicant
Vusi Shongwe	8th Applicant
Mduduzi Dlamini	9th Applicant
Sipho Jele	10th Applicant
Peter Mpandlana Shongwe	11th Applicant
Ignatius B. Dlamini	12th Applicant
Wandile Dludlu	13th Applicant
James G. Nkambule	14th Applicant
Sipho Hlophe	15th Applicant
Brian Shaw	16th Applicant

Versus

Rex

Coram: Jacobus P. Annandale ACJ

For the 1st Applicant: Advocate L. Maziya Instructed

by B.S. Dlamini and Associates

For Applicants number 2 to 11 and 13 to 16: Advocates D. Unterhalter S.C., with him Adv. A. Gotz, instructed by Leo Gama and Associates; Waring, Simelane Attorneys; C.J. Littler and Company; N.J. Manzini and Associates.

For the Respondent: Director of Public Prosecutions, Mrs. M. Dlamini with her Mr. N. Maseko and Mr. S. Fakudze

JUDGMENT (BAIL APPLICATION)

10 March 2006

(Transcript of *ex tempore* judgment delivered in open court with typographical and grammatical corrections) (After the court recorded the appearances for the litigants, it then said:-)

[1] Notably, the crown counsel is absent. The court waited for quite a while and Mr. Makhanya is now standing in for his seniors. The court does not know why the crown does not attend the outcome of the matter.

[2] This is an *ex tempore* judgment. Obviously, the court has not had the time and opportunity to set out its reasons succinctly and neatly in a written judgment. However, the outcome or conclusion is very clear to me. I have no doubt about that. The court rather gives a judgment in a fashion like this instead of delaying it for some time in order to hand down a nicely worded written judgment, as I would have preferred. The applications before the court are opposed. They are for the applicants to be released on bail. Although there are sixteen applicants in the citation, the twelfth applicant is not before court anymore as he has since pleaded guilty to a charge of High Treason. He was sentenced to a non-custodial sentence, with an option to pay a fine, partly suspended.

[3] The applicants have each filed an affidavit in support of their applications. Most of them have also filed replying affidavits in response to two sets of opposing affidavits filed by the respondents. The second set of opposing affidavits, headed as "supplementary", was filed almost immediately prior to commencement of the hearing. As directed by the court previously, the bail hearing is a combined hearing of various

separate applications, some from as far back as December 2005. The application of the last applicant, the 16th, that of Mr. Brian Shaw, was joined during the course of the hearing itself. No opposing affidavit was filed in respect of the 16th applicant but it was agreed to deem the two sets of opposing affidavits to be considered as if it also to include reference to the 16th applicant.

[4] I now recognise the presence of Mr. Maseko and Mr. Fakudze who represented the crown earlier. Welcome.

[5] The matter first came before me as long ago as January 17th when it was by joint agreement postponed to a date which was to be determined by counsel and later so endorsed by the court as being for the 7th of March. At the first occasion in January, the Law Society opposed the appearance of Advocates Els and Viviers who at that time assisted the Director of Public Prosecutions in dealing with this matter. It required some time, which did not take the proceedings any further, to deal with the opposition to the appearance of the counsel instructed by the Director and for some reason still unknown to the court the Law Society did not pursue the steps it was going to take against the right of audience. Maybe the Law Society "saw the light". At the first proceedings the Law Society's representative agreed to hold that aspect in abeyance and pursue it as a separate issue. That has not been done.

[6] Nevertheless, just prior to the hearing on the 7th of March *ad hoc* petitions were presented to the Chief Justice, petitioning for counsel to appear for the respondents. Counsel are not resident in Swaziland. The petitions of Advocates Unterhalter and Gotz were promoted by Mr. Mdluli of CJ Littler and Company and set down for hearing on Friday the 3rd March at which time, again for some reason, the Law Society sought to oppose the petitions. After quite some time in court, it became clear that the matter

that the court was then dealing with, that of Advocate Unterhalter, was misunderstood by the Law Society to be in relation to the other petitioner, at which time the Law Society then filed papers not opposing that petition anymore. It did however vigorously wished to contest the appearance of Advocate Gotz and when this court postponed the proceedings to be dealt with on Monday the 6th of March, again for some unknown reasons, the Law Society did not put up an appearance to pursue the course it had initially indicated it would take and subsequent to that the necessary certificates were filed by the Law Society. Both petitions were granted, enabling advocates Unterhalter and Gotz to appear for the applicants.

[7] I also mention in regard to all these petitions that the Attorney General's Office never took the inappropriate stance as was done by the Law Society. The Attorney General, I can only assume in the interest of good and fair administration of justice, supported the petitions. Mr. Dlamini, I see you here present, and I thank you for your attitude. It is commendable.

[8] On the 7th of March in court, on a date which was set for hearing of this matter about a month and a half previously, the court then had a peculiar application namely that the crown sought a- postponement. The court was informed that the counsel who appeared earlier on, that is Advocates Els and Viviers, withdrew some three hours prior to the court proceedings. The Director informed the court that the crown is in a bit of a dilemma and sought a postponement. That was when the matter eventually commenced at 11.30 a.m. after it had already been stood down at the request of the respondents from 9.30 a.m. in order to consult with the Deputy Prime Minister. Be that as it may, the respondents could not advance sufficient reasons for a postponement and this court considered *inter alia* the applicable

factors such as what the costs implications would be for the applicants knowing that the counsel do not come cheap, so to speak, and that travel costs were involved. That is one aspect but not the major.

[9] The major aspect was that by its very nature bail proceedings are dealt with appropriately timeously whenever possible. That is the dictates of numerous sources of authority. The court then advanced its reasons for refusing the postponement and said that the application must be dealt with forthwith but when the time came, again there was a further aspect namely that at that stage the respondents sought leave to petition the Judge President of the Court of Appeal to file an appeal against the interlocutory order of this court which refused the postponement. At that stage this court did advance its reasons for refusing that.

[10] *Inter alia* I considered the time factor that would by necessity delay the bail proceedings much further. At that time, the 7th of March, the next scheduled sitting for the Court of Appeal, being the 4th to the 19th of May 2006, was about a further two months in the future with the first applications for the bail already being filed in December last year. The undue long delay that such a petition would cause as well as the poor prospect of success caused the application to petition for leave to appeal to be refused. This court also at that stage heard, as part of the reason for the appeal against the interlocutory refusal of the postponement, that it was said that the ruling to refuse a postponement in effect deprived the King of legal representation.

[11] The court held that the Director of Public Prosecutions is the most senior lawyer appointed by the King to represent the crown in all criminal matters. It is thus not so that the King was unrepresented. The court deems the Director of Public

Prosecutions to be an expert litigator in charge of all prosecutions. With her was the Acting Deputy Director of Public Prosecutions as well as Senior Prosecuting Counsel. They were at her side at the time. In the affidavits filed by the Director at the onset it is stated that the Director "*... is further entrusted with the duty of prosecuting in the name and on behalf of His Majesty the King in respect of any offence committed within the jurisdiction of Swaziland*". This lends credit to the finding by the court that the King was not unrepresented in so far as the matter of legal representation goes.

[12] Before I turn to the merits of the application itself, I also need to stress that this application before court puts a test on judicial independence and the Rule of Law in Swaziland. I am glad to state that absolutely no pressure, let alone undue pressure, was placed on this court from any quarter whatsoever. The Constitution of Swaziland guarantees judicial independence. I refer to two sections, 138 and 141 which read:

> "*138. Justice shall be administered in the name of the crown by the Judiciary which shall be independent and subject only to this Constitution.*
>
> *141. (1) In the exercise of the judicial power of Swaziland, the Judiciary, in both its judicial and administrative functions, including financial administration, shall be independent and subject only to this Constitution, and shall not be subject to the control or direction of any person or authority.*
>
> *(2) Neither the crown nor parliament nor any person acting under the authority of the Crown or Parliament nor any person whatsoever shall interfere with Judges*

or judicial officers, or other persons exercising judicial power, in the exercise of their judicial functions."

[13] It is therefore that I said that I am glad to be able to place on the record the absence of any such influence exercised on this court. It is good to be able to say that.

[14] Also, from the onset I want to look at what high treason actually is. The court is here dealing with an application for bail where the main charge, which is said to form the basis of this matter, is high treason. There are further counts on the indictment as well. In the volume 2 of "The South African Criminal Law and Procedure", formerly Gardiner and Lansdown, high treason as defined as consisting in any overt act, unlawfully committed by a person owing allegiance to the state, the state possessing *majestas,* who intends to impair that *majestas* by overthrowing or coercing the Government of that state. There are various legal terms and issues that come into play. The bottom line is that high treason is the most serious crime that can be committed against a sovereign state like Swaziland. This court as well as any right thinking person must and does consider the crime of high treason to be

a crime of the most major import and effect. It is not a "mickey mouse" crime. This court, I place on record, is loyal to the King. Also, as each and every judicial officer is enjoyned to do under the Constitution of Swaziland, we have each made an oath of allegiance to His Majesty, the King of Swaziland. Further, this court as well as any other right thinking person, unequivocally condemns acts of terror in the strongest possible terms. Cowardly behaviour and acts that very adversely impact on innocent victims destabilises any country and cannot ever be condoned.

[15] I now turn to the application itself. Sections 95 and 96 of the Criminal Procedure and Evidence Act, as an amendment brought into effect in 2004, regulates the procedure and the law concerning bail. It does so in detail. Together with these sections there is a constitutional aspect that deals with the position of bail as is stated under the chapter concerning the protection and promotion of fundamental human rights and freedoms. Section 16(7) reads that when a person is detained that person must be brought before court as soon as possible and

> "*...that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that that person appears at a later date for trial or for proceedings preliminary to trial.*"

[16] The import of the constitutional provision as well as the statutory law concerning bail itself firstly empowers this court to consider such an application as is before me and it also sets out certain grounds and aspects that must be considered in an application like this.

[17] The overriding principle is that the court must balance the interests of the applicants and that of the state. The guidelines assisting the court to do so are contained in statutory law which statutory law I may add is not unconstitutional. I say so unhesitatingly and unequivocally. The bail legislation is not inconsistent with the constitutional dictates applicable in this Kingdom. I may further interpolate that the bail legislation in this Kingdom is very much akin to the bail legislation in the Republic of South Africa where the Constitutional Court of South Africa has held similarly to what I have just said about the domestic legislation.

[18] The main charge in the indictment that is under consideration has been certified by the Director of Public Prosecutions as is required under Section 96(13) of the Act and it is common cause that high treason is the applicable offence to be dealt with. It is further common cause that it is an offence as is listed in the Fourth Schedule of the Criminal Code. It is therefore, since it is a Schedule Four offence, that the court has to consider this application under the dictates of the statutory law and not the common law only and I very briefly refer to some sections in the legislation.

[19] Firstly, Section 96(1)(a) is to the effect that a person charged under the provisions of the Fourth Schedule shall be entitled to be released on bail in respect of that offence unless the court finds that it is in the interests of justice that the accused be detained in custody. Further, Section 96(4) sets out some guidelines that are applicable and if even one of five aspects are established it is then deemed to be in the interest of justice that the applicant shall not be released. That is mainly the endangerment of public safety and security, evasion from trial if released, the impact on witnesses and

evidence if released, jeopardising the cause of criminal justice and administration thereof and lastly, if in exceptional circumstances there will be a disturbance of the peace, public order and an undermining of public peace and security or the stability of the land. It is essentially when these factors are established, any one or more, that the court should refuse bail.

[20] Each of the remaining 15 applicants before court filed a statement under oath in the form of an affidavit that they will cause none of these aspects that I have just mentioned. Each of them also said that they have done no wrong as they are alleged to have done. Each of them said that they have a good defence. Each of them said that they will abide by any condition imposed by the court. Further, each also set out some personal circumstances pertaining to their families, their assets, their work situations, their income and other factors that are peculiar to each individual. For the purpose of this ruling I am not going to burden the record by placing into the record exactly what each individually has placed before the court. The common factors are these.

[21] There is also one very disconcerting factor and that is that in the majority of the affidavits before court, there are very disturbing allegations laid by the applicants to which I will revert further down but which concern cruel, demeaning, inhuman and inappropriate allegations of torture.

[22] Essentially, what each of the applicants therefore showed in their own affidavits is that *prima facie* it is not against the interest of justice to permit their release. If it was not opposed by the crown, which it vigorously is, then the court might well on that basis have

granted their release, subject to enquiry by the court and requiring of the crown to state in such a case the reasons why it does not oppose the applications. That would have been required under the dictates of Section 96(2)(d) but that is not the position.

[23] In response to these applications the crown has filed two sets of affidavits. Initially an opposing affidavit was filed with the Registrar on the 29th December last year in which the Acting Director states amongst other things in paragraph 6 that she has perused the various case dockets pertaining to the incidents mentioned in the affidavit of the investigating officer in which the applicants before the court and others are implicated.

"*I am of the view that there are strong prima facie case* (sic) *against all the applicants in respect of the very serious crimes committed. I am further of the view that the evidence clearly indicate that the applicants acted with a common purpose*". Then at paragraph 10:

"*In view of the above mentioned it is my respectful submission that if the applicants be released on bail pending their trial it will not serve the interest of justice as there are* (sic) *a likelihood that if the applicants are released on bail it will endanger the maintenance of law and order and national security*". Obviously this infers reliance on Section 96(e), amongst others. The affidavit referred to by the Director is that of Senior Superintendent Ndlangamandla of the Royal Swazi Police wherein the source of information as referred to by the Director is contained and with him being the investigating officer or officer in charge of the investigations, also providing the case dockets referred to by the Director.

[24] I quote paragraph 4 for a succinct overview of the case against the applicants.

"*The applicants were arrested in various parts of the country after the spate of bombings 14 in total mainly on Government structures such as the Swazi National Courts, houses of Government officials, police officers and police vehicles attached to various divisions of the Royal Swazi Police. Various meetings were held prior to the bombings by the applicants and other people belonging to organisations such as PUDEMO and SWAYOCO where the applicants together with other people* inter alia *conspired to commit various acts of terrorism/violence with the intent to overthrow or destabilise the Government. I am in the possession of various affidavits and exhibits, copies of same are attached, indicating the hostile intent of the applicants. Furtherwhich to state that the investigating officer seized various exhibits at crime scenes of which were forwarded to the forensic science laboratory in Pretoria South Africa for analysis. Results are still awaited. The investigation into this crime is at an early stage. In view of the sensitivity of the investigation, I do not wish to divulge further information at this stage. I am of the humble view that a strong* prima facie *case exists against all the applicants and I wish to state that this case is one of the most complicated matters I dealt with in my entire career in the police force and is of the opinion that if the applicants are released on bail they will not stand the trial as they are charged with serious offences carrying heavy penalty. Investigations todate indicate that*

applicants have a support system in the section of a community which will be willing to assist the applicants in an attempt to flee. The general public is terrified with the spate of bombings which occurred and demand answers from the police. Lastly, I am of the humble opinion that should the accused be released on bail they will not stand their trial, and will commit further crimes in furthering of a common purpose to distabilise the country and in prayer 2 the above honourable court to dismiss the applicants' application to be released on bail."

[25] There is also a supplementary affidavit which was filed by the crown on the 6th of March wherein similar statements are echoed and in which it is clear that whatever was held out to be the case against the applicants still remains the case against them. No further details of evidence is mentioned therein save to state that whatever was said previously is again repeated.

[26] Briefly, in so far as opinion evidence goes in general, for a court to rely on the opinion of someone else, it would firstly require that person to be an expert in a particular field. As I have already said, the court deems and regards the Director of Public Prosecutions as an expert in the field of criminal law. That is the one leg. The second leg is that for a court to rely on someone else's opinion, the grounds on which that opinion is based must be clearly and sufficiently shown by the giver of the opinion, for the court to consider whether or not to accept the opinion.

[27] Such an example would for instance be found in the evidence of a medical practitioner when giving evidence about the level of

sobriety or otherwise of a person examined. It would not suffice for the medical doctor to say that he or she is the best expert in the field of examining drunk people and that he has studied medicine and examination of such people in the minutest detail and that he has all the knowledge in the world and that in his opinion this person was intoxicated. What would be required is for that doctor to state on what he bases his opinion. What was observed. Was the person able to stand on.one leg. What was the speech like. What were the eyes like. What was the reaction to light on the retina when light is shining on it, and so forth, with those observations to be recorded in order for the court to decide whether the opinion can safely be relied on.

[28] I mention this because it is the major difficulty that this court has in this application. As said, I deem and accept the Director and Ndlangamandla both to be experts in their respective fields. Ndlangamandla can be an investigator of long standing but if he forms an opinion then the court requires to know on wiiat information that opinion is based. Likewise, if the Director forms an opinion as to the strength of a *prima facie* case for instance, then the court requires to know on what that opinion is based. If Ndlangamandla says that there is a strong support system that can assist escapes, then at least the court would want to know some detail of that. If the inspector says that public safety is going to be jeopardised, certainly the court is enjoyned to find out if indeed there are such exceptional circumstances that justify detention. If the Director says that a common purpose was present and that the common purpose was formed at various meetings then the court is enjoyned to be informed of what those details are.

[29] It is not necessary to disclose each and every minute detail of the Crown's case. If there is an eye witness, the identity of the eye

witness does not have to be disclosed to the court by necessity but at least the court should be told of what did this person see, what was observed by this undisclosed person. Hearsay evidence is regularly admitted in bail applications. The court also needs to be told what other aspects of the case exist which lays the basis for the forming of an opinion of the strength of the prosecution's case, in order for the court to evaluate the opinion before it blindly accepts it.

[30] I have been referred many times to a very particular aspect and that is the value that the court should place on the opinion of the Director of Public Prosecutions. I am in strong concurrence with accepting the Director's opinion as an opinion of much persuasive value when it comes to bail applications. But, as I have already said, it is not only the opinion itself that needs to be considered but also the basis on which the opinion is based. I refer to *State v Essack,* 1965(2) SA 161 (D) at 163 which was relied upon in *State v Nichas and Another* 1977(1) SA at 263 where Diemont J quoted with approval:

> "*I do not for one moment overlook that the very fact of opposition by the Attorney-General is a weighty consideration. This has been emphasised in several cases. The Attorney-General occupies a highly important and responsible position, and if he opposes bail the court will keep that circumstance very much in the foreground of its consideration of the matter. But this is not to say that whenever the Attorney General opposes such an application the court will refuse to allow bail, for opposition might often be justifiably offered out of considerations of caution.*"

[31] What is thus important is that the opinion of the Director, which locally is the same as the former Attorney General in our neighbouring jurisdiction, is worthy of weighty consideration. But equally it cannot be blindly followed and accepted as debarring bail *per se.*

[32]The Director of Public Prosecutions referred me to a number of authorities, many of them also referred to by the applicants' counsel and I shall be as brief as possible with this. In *State v Miselo* 2002(1) SACR 649(C) it was to be considered whether the release of an accused will disturb the public order or undermine the public peace or security if released and that a number of factors have to be taken into account, two of which were whether the nature of the offence or the circumstances under which the offence was committed was likely to.induce a sense of shock in the community where the offence was committed. Secondly, whether the sense of peace and security among members of the public would be undermined or jeopardised by the release. That aspect refers to the South African bail legislation under Section 68(A) of their Criminal Code which is similar to our provision where exceptional circumstances have to be established. The presence of exceptional circumstances, if it is found to exist, certainly can very well bar release on bail.

[33] I have no hesitation to hold, as is held forth by Ndlangamandla and the Director, that the spate of bombings adversely affect the people of Swaziland and that they do fear repetition and that it can and does undermine the public safety and security. In so far as the seriousness of such offences go, there is no question that that is a factor that will adversely impact against the application.

[34] Another overriding authority, in so far as bail consideration goes into the constitutionality thereof, was a ruling by Kriegler J of the South African Constitutional Court where a number of matters were consolidated and reported jointly at 1999(2) SACR 51 (CC). It has been reported at various other places as well. It involves the matters of amongst others *Dlamini* and *Schietekat.* The learned Judge, who had the concurrence of the other members of that esteemed court; considered as an overriding factor the balance between liberty of accused people and the interests of the society, which the court has to determine. The upshot of this matter was that judicial examination of different factors had to be made the criterium and that the interest of justice was the basic objective, which was traditionally ascribed to the institution of bail, namely to maximise personal liberty, which fitted snugly into the normative system of the Bill of Fdghts contained in the South African Constitution. The chapter relating to bail in the South African legislation creates a complex and interlocking mechanism that was clearly designed to govern the whole procedure whereby an arrested person may be conditionally released from custody. It prescribes the components of that mechanism in minute sequential detail and as was further evident to the learned Judge, and I quote,

> "*bail and the grant thereof is unmistakably a judicial function*"

The legislature views bail in a serious light.

[35] He considered the interests of justice in the various forms that it appears in that legislation. Equally it could have been the domestic legislation. The interests of justice is used in differing content with different interpretations to it. The court that hears the bail

application is required to still do what it has always been required to do and that is to bring a reasoned and balanced judgment to bear in an evaluation where the liberty interest of the arrestee is given full value accorded by the Constitution. The Constitution neither expressly nor impliedly require that when considering whether the interests of justice permit the release of the detainee pending trial, only trial related factors are to be taken into account. The broad policy considerations contemplated by the interests of justice test in that context could legitimately induce the test of whether the detainee would meanwhile endanger a particular individual or the public at large as being constitutionally acceptable. If the detainee would likely again commit a fairly serious offence, it can also be taken into account by the court.

[36] This court is also enjoyned to apply its mind judicially and judiciously when evaluating what is presently before it. The court will lean against the interests of bail applicants where it is shown that if they are released on bail there is quite some likelihood, or a good possibility, or a good chance, that they will do mischief in the sense of causing fear in the public, endangering the safety of the State and other such aspects as is mentioned in the legislation. But again I reiterate the words of the legislature that those considerations especially come into play when "exceptional circumstances" are shown to be in existence that militate against granting bail.

[37] What I have said above is in accordance with *Mohamed* 1999(2) SACR 507 (C) and also S *versus Miselo* 2002(1) SACR 649 (C). What it boils down to is that the court must see and look at what it has before it and to find whether the preventative measures in the bail legislation permits or does not permit release. That is the bottom line.

[38] In order to do so the court cannot have regard to matters within its own personal knowledge such as the strength of a case against the applicants. The court is not privy to police dockets, is not privy to the outcome of any forensic analysis, does not know what case there is against any of the applicants except for what has been properly brought to the court's attention.

[39] I turn to what has been brought to the court's attention with regard to the aspects which have to be considered. All that is known to the court at this stage is that there is a valued opinion, a very highly valued opinion expressed by the Director of Public Prosecutions, which opinion is echoed by a Senior Superintendent of the Royal Swazi Police, namely, that in their opinion there is a very strong case against the applicants and that in their opinion if they are released it will be a disaster. They will cause all sorts of untold harm to the public and to safety, to law and order, that they have a support system which can help them to escape and that they will evade trial. What the court does not know is on what facts these opinions are based except for a disclosure to the court that the opinion is founded on the experience of the police officer who is facing the most difficult case in his career. The investigations are far from complete and forensic analysis results are still awaited. Whatever is contained in the investigating police dockets have been taken cognisance of by both.

[40] This court does not know whether anybody has seen any of the applicants at one of the scenes where the bombings occurred. This court does not know if any finger prints connecting an applicant to one of the alleged incidents established a link between the perpetrator, being an applicant, and the crime. The court does not

know if there is any evidence as to whether at the meetings prior to the spate of bombings any of these applicants were discussing how to overthrow and destabilise the Government. I do not know that. The court is also not told that there is someone who does know it but that to disclose that person's identity would jeopardise the investigations. Or, that that person is able to say that such and such was said and this or that was decided and that it was done between these people.

[41] It is further stated that whatever happened, there is a common purpose, evidence of a common design between the applicants to do what was done. It may well be so, it equally might well not be so. This court does not know.

[42] Common purpose is a doctrine that imputes criminal liability onto another person under certain circumstances. The intention and conspiracy to jointly do wrong would either be formed prior to the event or later on. In this case, if applicable, it would have been at the meetings of SWAYOCO and PUDEMO where others and the applicants would be present and where they jointly decided to do the wrong now complained of. Another facet is that in facts like the present, one or more people go to a place to throw a petrol bomb. Others then join in and actively associate themselves with such wrongdoing. Perhaps it could be so, perhaps it could not be so but this court is not made privy to the knowledge of whether it was so.

[43] An aspect that points strongly to speculative conclusions is found in certain documents that were filed with the court. Documents that read under the name of certain organisations, especially PUDEMO, publish certain inflammatory statements to do

wrong, to overthrow the Government. Inflammatory statements yes, but there is not one single letter in any affidavit that explains in any measure how those documents came to be filed before court or more importantly, how any of the applicants are connected to any of those documents. It is

absolutely tacit in that respect . The court can infer whatever it wishes to very adversely from the contents of those documents. But the court cannot in the least infer any *nexus* between any applicant before court and such documents. The court likewise cannot infer from any information before it whatsoever a *prima facie* view that the applicants before court conspired to do the wrongs they are accused of, except that it is so in the opinion of deponents.

[44] The factual basis on which the opinions are based is undisclosed. I repeat that it is not expected of the crown or the respondent in bail applications to disclose all the details, minutely so, of all the evidence that it has but at minimum it is expected at least to inform the court of what the case against the applicant is. What evidence is there, even if it is evidence that is not conclusive, that will indicate that there is some reasonable possibility of a conviction. It is one of the main factors required of a court to consider in a bail application.

[45] A further factor that plays a not insignificant role in this matter before the court is the likelihood of severe punishment imposed upon a person convicted. This was brought to the fore by the respondents in the supplementary affidavits where it was sought to bring in inadmissible evidence through the plea explanation of the former twelfth applicant. In that document it is stated that that person

admits all sorts of things and that he pleads guilty to a charge of high treason. It is common knowledge that following his conviction the accused person did not receive the death penalty and that the person also did not receive a long term of imprisonment. Instead, a short term of imprisonment with an option to pay a fine, part of which was suspended, was imposed. If it was otherwise, the court could have considered that in the event that there was a reasonable likelihood of a conviction, which presently does not so indicate, then there is a good reason for a person to fearfully anticipate the worst possible end to his life if convicted.

[46] As said, the likelihood of a conviction based on the disclosure of what evidence there is at this stage, which certainly does not have to mean that it is the totality of the evidence, and further if the one conviction in this particular matter is to be considered, then a question mark arises as to whether there is such an enormous fear of a conviction and the consequences thereof that at all costs a person released on bail will want to make away.

[47] There is a further factor and that is that more than one of the applicants volunteered themselves to the police where they were taken into custody and thereafter detained. The uncontroverted evidence is that it was not necessary for the police to hunt down some of the applicants in order to apprehend them but that without a problem they returned from outside the country knowing of the good proposition of being arrested and detained on their return to Swaziland and despite that they did so. When all of this is considered by this court, I may hasten to add that there are various other aspects that equally can be dealt with in the reasons for this judgement, which in my view does not necessitate being done.

[48] When all is said and done the court has a difficulty in accepting that it has been established that the interests of justice prevent the release of the applicants.

[49] Before I continue and finalise there is one aspect which I said I will revert to. It is very sad for me to have to speak about this. There is an ongoing refrain through the depositions of the applicants, obviously vigorously denied and attempted to be controverted by respondents. One would not expect otherwise.

[50] This pertains to torture, cruel degrading treatment. Also, the denial of access to legal representation. The refrain is common to the majority of the depositions by the applicants. This court certainly and definitely does not find that those allegations are true or with substance and that they have been established. As courts of law we are obliged to always also

look at the other side. There is always another side of the coin. There is an old saying that when there is smoke there is some fire somewhere. Smoke does not just come from the blue. When I say that it is disconcerting to read about such allegations I also have regard to the numerous international treaties and conventions which Swaziland subscribes to and which this court unhesitatingly approve of, which all militate against cruel treatment and torture. Our own Constitution has it nothing different.

[51] Our Constitution reads in article 18, headed Protection from Inhuman or Degrading Treatment, that the dignity of every person is invaluable, secondly, that a person shall not be subjected to torture

or to inhuman or degrading treatment or punishment. It goes further to detail it in article 21 that a person charged with a criminal offence shall be presumed to be innocent until proven guilty or until he has pleaded guilty. Further, that he will be given adequate time and facilities to prepare for his defence and that he is entitled to be represented by counsel and that if certain circumstances such as prevail here, that person is also entitled to legal representation at the expense of Government. Further that such a person may not be tortured.

[52] It is a principle of our law that evidence that is tainted, called in some jurisdictions "the fruit of a poisoned tree", is inadmissible. There is therefore no reason or justification for subjecting any person to torture or undue pressure because whatever is obtained as a result of that is inadmissible. It is a further commonality in our law that all evidence must be admissible. It becomes inadmissible where for instance in a confession or an admission made before a judicial officer or before a police officer which implicates the person of another, that such evidence cannot be used against another person if it comes from such source.

[53] It is possible to have the evidence of an accomplice admitted. It frequently happens. It might well be the case in the position of one of the former applicants but whatever is stated in his plea explanation is not permissible against any of the applicants before court. When one looks at the contents of the explanation it also does not impute anything whatsoever against any of the remaining applicants.

[54] This court and all of the courts in our land have a duty and an obligation to uphold and to protect our constitution. The values of

our constitution include the protection of human rights, over and above our inherent common-law duty to ensure fair trial and to prevent the administration of the criminal justice system falling into disrepute and to see to it that justice is done and that it is done in a fair manner. I state this not without consideration that our courts are not only able but obliged to enforce its orders.

[55] I order that the Prime Minister of the Kingdom of Swaziland in liaison with the Minister responsible for Justice and Constitutional Affairs, urgently, in the interests of justice and in the national interest, establish a commission of enquiry into the allegations that are before court concerning torture and denying basic human rights enshrined in our Constitution, to investigate and to report publicly the outcome within a reasonable time.

[56] This court has anxiously and very carefully considered all the aspects that I am required to consider. It is not easy and I do not make light of this, to preside in a matter like this. It is a privilege for any judge in this jurisdiction to be able to see that justice is done and to ensure that people have a fair trial, which includes the right to apply for bail.

[57] It is the duty of this court, which I have already done through their legal representatives, to inform each and every accused person, and they are aware of it, that they have a duty to disclose to the court any previous convictions that they may have and also of any pending cases. I know for instance of one particular applicant, where this court has personal knowledge of a previous conviction that is indeed disclosed.

Each of them I have informed through their legal representatives

that there is a severe penalty for nondisclosure. Whatever they have disclosed pertaining to previous convictions will not form part of the record of these proceedings that can be used in the trial so that the trial court cannot take cognisance of previous convictions, for instance of sedition. The trial court will be able to use whatever is now before this court during the course of the trial and the crown may well want to rely on what was said in statements by the accused persons.

[58] I want to deviate for one minute and that is to tell something to each of you gentlemen who sit there in the dock. You are the applicants. Each of you chose to make a statement under oath. Each of you raised your hand and you said "So help me God" - what is contained here is the truth, the whole truth and nothing but it. If what you said in your statement is the truth, good luck. If you lied, if you have something to do with these bombings then each of you will one day be held accountable when you stand before our creator and our God in the judgment day. I also wish to quote something for you which comes from James Chapter 3 from verse 13 - 18.

> "*13. Who is wise and understanding among you? Let him show by good conduct that his works are done in the meekness of wisdom.*
>
> 14. *But if you have bitter envy and self-seeking in your hearts, do not boast and lie against the truth.*
>
> 15. *This wisdom does not descend from above, but is earthly, sensual, demonic.*

16. *For where envy and self-seeking exist, confusion and every evil thing are there.*

17. *But the wisdom that is from above is first pure, then peaceable, gentle, willing to yield, full of mercy and good fruits, without partiality and without hypocrisy.*

18. *Now the fruit of righteousness is sown in peace by those who make peace.*"

[59] Upon consideration of the material before me, of the law, of the Constitution and of applicable legal principles this court does find that the interest of justice permit the release on bail of each of the applicants.

[60] The conditions that will be made in regard to this determination is yet to be decided by this court. Such conditions are forthwith to be placed before me by counsel for both respondents and the applicants, namely the particulars of the conditions. If the crown and the applicants are *ad idem* about what the conditions should be, so much the better. If you are not *ad idem* or if you want further guidance by the court you will come and see me in chambers right now in order to see if it is possible to formulate the bail conditions.

[61] When the bail conditions are formulated I will make an endorsement which I do now and that is to record under Section 95(4) of the Act that substantial and compelling circumstances are found to exist to justify a reduction of the amount from the statutory E15 000. Not in any order of importance, the personal financial inability of the applicants to pay an amount of E15 000, the absence

of a disclosed strong *prima facie* case against each accused or applicant, which does not have a good prospect of conviction if proved. Also, the long time that this matter will take to be heard on trial, with the investigations presently still incomplete and with the enormous backlog of criminal cases, overcrowding of prisons and the few judges to do justice to all of them and furthermore, to safeguard the interests of both the applicants and respondents, the former against possible abuse, torture or other improper treatment, in regard of the latter to safeguard the interests of the state against being accused rightly or wrongly of such abuse of detainees.

[62] On the conditions that the court has not yet pronounced, counsel for the crown and applicants see if you can draft something, come up and discuss it with me in chambers and we could perhaps expedite the formulation of the conditions. I do have a number of conditions in mind.

[63] The court will now for a while adjourn in order for the court and counsel to look at appropriate conditions and to see if that can be formulated. As soon as this is formulated then I will return to court for that aspect to be handed down.

Postea:

[64] In conclusion, the court has considered appropriate conditions for release on bail. In this regard I have been guided by counsel of both applicants and respondent and after quite some deliberations the court has deemed it fit to order that the bail amount is to be the same for each applicant. Further, that should the need arise, that amount can be revisited to draw a distinction between the amount to

be paid in cash and by way of suretyships.

[65] Further, the court brings it to the attention of each applicant that release on bail is not the same as an acquittal. Not anyway at all. Further that the statute does provide for any applicant or for the crown at any stage to approach the court for a variation of bail conditions, either to ameliorate it, to make it easier, or to impose further conditions, or otherwise adjust it. One such aspect could be the place where the bailee must report or the time etc. That can be done and I bring it to your attention further that if bail is paid and the release is secured, then it is required of a bailee to adhere to the conditions imposed by the court strictly and if there is failure of that, the bail can readily be forfeited to the state or Government and a warrant for arrest may be issued. Further that it will be required of each bailee to report for any further proceedings in this matter, especially if it comes to that. Furthermore, to ensure that you don't behave in such a manner that there is a further charge brought against you, because if you are released on bail on an offence like this and thereafter further cause arises which brings in a separate charge then in that case the court might then well have to consider the more difficult and much more onerous burden of proof on a person that was released on bail and thereafter charged with having committed another offence, which could bring it within the ambit of Schedule 5 which carries the additional evidentiary burden plus a very huge amount of bail that can be required.

[66] The conditions will be firstly that the person granted bail must deposit with the Treasury the sum of E5 000 and then to surrender all his passports or travel documents to the investigating officer at the various Police Stations as is mentioned in the bail conditions, this one for instance is at Simunye, and not to apply for a new passport

or travel document or to leave the country without permission of the investigation officer or the court if need be. To report weekly following release at the respective Police Stations as indicated in the different documents between the hours of 8 in the morning and 4 in the afternoon, the first such reporting to be the first Friday after the release and thereafter every Friday of the week. I have already said that this particular day of the week can readily be amended. To refrain from speaking with or communicating with or interfering especially with prosecution witnesses. If you do not know their identity that can be ascertained from the investigating officer. Presently the only two witnesses known to us are the Director of Public Prosecutions and Inspector Ndlangamandla. Obviously those two persons are excluded. You may speak with the investigating Officer. You must provide your residential addresses on release to the investigating officer and if there are changes, notify him of that. Whenever directed to come to court, do so. If there is any uncertainty take it up with your counsel or with' the court and then take it easy while you are out. I do not want to see you back here any time soon.

JACOBUS P. ANNANDALE
ACTING CHIEF JUSTICE