



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Case No: 224/13**

**In the matter between**

**BHEKI MADZINANE**

**APPLICANT**

**And**

**THE KING**

**RESPONDENT**

Neutral citation: *Bheki Madzinane v The King (224/13) 2013*  
[SZHC] 130 (5 July 2013)

**Coram:** **OTA J**

**Heard:** **28 June 2013**

**Delivered:** **5 July 2013**

**Summary:** **Charge of attempted murder; exceptional  
circumstance warranting bail; application granted.**

**Judgment**

- [1] The Applicant who stands charged for the offence of attempted murder commenced this application pursuant to Sections 95 and 96 of the Criminal Procedure and Evidence Act 67/1938 (as amended) (CP & E), contending for bail pending his trial. The Applicant is alleged to have assaulted a minor child.
- [2] What then are the factors urged by the Applicant *in casu*, as justification for the relief sought in the interest of justice. Applicant articulated several factors in his founding affidavit, which include that he will attend court to stand his trial, abide by all the bail conditions and he has co-operated fully with the police since his arrest.
- [3] It seems to me that the crucial averments for the purposes of this inquiry appear in paragraphs [10] and [11] of the Applicant's founding affidavit, where he alleges that he is employed as a soldier based at Mbuluzi Barracks and should have reported to duty on Tuesday 11<sup>th</sup> June 2013, which he has not done by reason of his arrest and incarceration. In the circumstances, he stands to lose his job as absenteeism and failure to report for duty is treated as a serious offence at his work place, in particular, in this time of the elections. Therefore, a delay in finalizing the trial will adversely affect him as he will lose his job and will accordingly have no substantial redress in due course.

[4] I am inclined to treat this factor as an exceptional circumstance warranting bail, even though the Respondents oppose it as such, contending in paragraph [8] of their answering affidavit that the Applicant should have had the issue of the possible loss of his job in mind before committing the alleged offence.

[5] It is very imperative that the court does not shut its eyes to the crucial factor of Applicant's job and the likelihood of his losing same by reason of his continued incarceration. We must always bear in mind that an Accused person is presumed innocent until he pleads or is proven guilty. Therefore, for him to suffer loss of employment prior to his conviction, if that were to be the result of his trial, will not serve the course of justice. As this court observed in the case of **Sipho Gumedze and five others v Director of Public Prosecutions, Civil Case No. 135/2004, para [13]**, with reference to the text **Criminal Procedure, Handbook, 5<sup>th</sup> Edition para 137, by Bekker etal**, where the learned editors made the following commentary on Section 60 (4) of the South African Penal Code which is in *pari materia* with our Section 96 CP&E, as amended:-

**“The Accused who--- is presumed to be innocent is subject to the punitive aspect of detention. The effect of remaining in carcerated will probably result in the loss of his job, of his respect in the Community --- even if (later) acquitted ---- And if detention had resulted in the loss of the (accused's) job, he may not be able to even retain an attorney. The (accused) who**

**is denied the right to bail will feel that effect at the most important level of Criminal Procedure---- at the trial level--”**

- [6] I am persuaded by the foregoing exposition. I reach this conclusion mindful of the fact that the sole ground upon which the Respondents oppose this application is that the release of Applicant on bail will defeat the interest of justice. This, they say is because the Applicant has been sending his relatives, which includes one 5293 Sibhasana, a police officer based at the Matsapha police station, to crown witnesses, including the investigating police officer 4304 Ntombi Shongwe, to force them to withdraw the charge against the Applicant, and also threaten them with death including the death of the complainant. To buttress these allegations the Respondents filed the confirmatory affidavit of 4304 Ntombi Shongwe.
- [7] The Applicant met the foregoing allegations in his replying affidavit, wherein he denied ever making or sending any of his relatives to make such threats. His allegations are confirmed by the confirmatory affidavits of his mother Mary Madzinane (born Masilela) and 5292 Sibhasana Ndlovu, who deny making the threats imputed to them.
- [8] When this matter was argued, there was a vociferous debate as to whether or not the absence of an allegation(s) of any direct threat or intimidation by the Applicant, should defeat the Respondents’ case. I am happy to observe that this issue was adumbrated in the case of

**Sipho Gumedze and five others v Director of Public Prosecutions (supra)**, wherein the court declared as follows in para [40]

**“S V Hlongwa 1979 (4) SA 122 at page – 114A is authority for the rule that, depending on the circumstances, the court may in the exercise of its discretion to refuse or allow bail also rely on the investigating officer’s opinion that the accused will interfere with state witnesses, even though the officer’s opinion is unsupported by direct evidence. This opinion should be weighed with all other evidence. In S V Lukas and Others 1991 (2) SA 429 (E) Kroon J sounded the following warning at 437 b-c.**

**“The Court should--- be astute not to simply accept the ipse dixit of the investigating officer or other policeman who testify on behalf of the state and should consider the possibility that such witnesses have an improper motive in opposing bail.”**

[9] I am inclined to heed the above warning. More so as this issue is vehemently disputed, I cannot reach a concluded opinion on it on the papers, notwithstanding the allegations of the investigating officer in this respect. The justice of the matter in my view, would be to admit the Applicant to bail on the following conditions:-

- 1) Bail is fixed at E15, 000-00 (Fifteen Thousand Emalangeni), the Applicant will pay cash of E5,000-00 (Five Thousand Emalangeni) and provide surety worth E10,000-00 (Ten Thousand Emalangeni).
- 2) The Applicant shall not interfere with the process of trial or investigation.

- 3) The Applicant, his agents and relatives shall not interfere with or intimidate crown witnesses.
- 4) The Applicant shall attend his trial.
- 5) The Applicant shall surrender his passports and other travel documents and not apply for new ones pending the finalization of his trial.
- 6) The Applicant shall report at the Manzini Police Station monthly on the last day of every month between the hours of 8am and 4pm.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS  
.....DAY OF .....2013**

**OTA J  
JUDGE OF THE HIGH COURT**

For Applicant: S. L. Madzinane

For Respondent: M.D Nxumalo  
(Senior Crown Counsel)