



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 13/13

In the matter between

ZWELI MDZINISO

APPLICANT

And

**THE COMMISSIONER OF POLICE
THE KING**

**1ST RESPONDENT
2ND RESPONDENT**

Neutral citation: *Zweli Mdziniso v The King (206/13)* [2013]
SZHC 141 (12 July 2013)

Coram: **OTA J**

Heard: **28 June 2013**

Delivered: **15 July 2013**

Summary: **Charge of armed robbery; Bail application; exceptional circumstance warranting bail; application granted.**

Judgment

- [1] The Applicant commenced this application on the premises of urgency contending for his release on bail pending finalization of his trial. The application is supported by the founding affidavit sworn to by the Applicant himself.
- [2] The Respondents are opposed to the bail application. The grounds of their opposition are contained in the answering affidavit sworn to by one 5490 D/Constable Mxolisi Dlamini, described therein as an investigator attached to the Serious Crimes Investigating Department, known as Lukhozi. The Respondents also filed a supplementary affidavit via which they conveyed annexures MD 1 and MD 3 respectively to court.
- [3] When this matter was argued, learned counsel for the Applicant Mr N. Mhlanga, was opposed to the supplementary affidavit being countenanced. This, he says is because the Respondents circumvented the due process in urging same, in that they failed to

first seek the leave of court in that adventure. Mr S. Dlamini who appeared for the Respondents expressed a contrary view.

[4] I am inclined to agree with the Respondents. This is because, the overwhelming judicial accord is that bail application though intended to be a formal court procedure, is however considerably less formal than a trial. Therefore, the evidentiary material proffered need not comply with the strict rules of oral or written evidence. **See S V Dlamini; S V Dladla and Others; S V Joubert; S V Schietekat 1999 (2) SA 51 at page 63 para 11, which was cited with approval in the case of Siphon Gumedze and Five Others V Director of Public Prosecutions, Civil Case No. 135/04.**

[5] I will thus countenance the supplementary affidavit and its annexures.

[6] Annexures MD 1 shows that the Applicant was charged jointly with others for the offences of armed robbery and unlawful possession of arms and ammunition without valid licence or permit. These offences are alleged to have been committed at Manzini. It is common cause that the Applicant was subsequently admitted to bail in relation to

these offences. The Applicant alleges that he did not violate any of the bail conditions. This allegation remains uncontroverted by the Respondents.

[7] It is common cause that the charges contained in MD 2 were subsequently withdrawn on technical grounds. It is uncontroverted that these charges are in the process of being re-instated. It appears that after the withdrawal of the charges as indicated in MD 2, the Respondents proceeded to charge the Applicant, jointly with his co-Accused for similar offences of armed robbery, alleged to have been committed in Msunduza and Thembelihle Township, both in the Hhohho region, as evidenced by MD 1. It is for these subsequent charges that the Applicant contends for bail.

[8] The grounds upon which the Respondents oppose this application include the following:-

1. Applicant and his gang are a serious danger to the public.
2. Applicant and his gang are violent as they carry guns.
3. Applicant has shown a propensity to commit armed robberies as evidenced by the offences alleged in annexures MD 1 and

MD 2 respectively.

4. The Applicant knows the complainants who are the witnesses in these cases and if released on bail is likely to harm them.
5. Applicant was unemployed prior to his arrest. He supported his wife and two children through the proceeds of his crime, which enterprise he is likely to return to if released on bail.
6. The Applicant has failed to show exceptional circumstances that entitle him to bail.

[9] Now, the offence of armed robbery for which the Applicant stands charged, is one of the offences under the Fifth schedule of the Criminal Procedure and Evidence Act 67/1938, as amended (CP&E). Section 96 (12) (a) of the CP&E, prescribes that a person charged with any of the offences under the Fifth Schedule, which include violent and serious offences such as murder, rape and robbery committed under aggravated circumstances, shall be remanded in custody until he is dealt with according to law, except he can show exceptional circumstances that justify his release on bail.

[10] The inquiry therefore, is, has the Applicant advanced any exceptional circumstances, which notwithstanding the ominous factors urged by the Respondents, entitle him to bail in the interest of justice?

[11] Let me straight away state here that I agree with the Respondents that Applicant cannot be availed of the contention in the heads of argument filed on his behalf by Mr. Mhlanga, that he previously had employment with the Swazi National Treasury from which he has been suspended due to his continued incarceration. In support of this submission, Counsel urged annexure ZM 1- a letter dated 28th November 2012. These allegations of fact should have been contained in an affidavit duly sworn and filed to constitute evidence. They cannot be brought to court via oral submissions of Counsel in heads of argument or from the bar. This is tantamount to Counsel giving evidence from the bar and is unsustainable. This allegation therefore cannot suffice as such exceptional circumstance warranting bail.

[12] Similarly, I agree with the Respondents that the Applicant has failed to demonstrate on a balance of probabilities that he suffers from

Asthma. The fact that the Respondents opposed this allegation of fact, necessitated that the Applicant advances further evidence e.g medical evidence, in proof of same. He failed to do so.

[13] In any case, even if I were to countenance the Applicant's allegation in this regard, I see no exceptional circumstance(s) arising from the fact that the Applicant suffers from Asthma, which is allegedly exacerbated by the alleged poor ventilation of the Correctional Services to justify his bail. I take Judicial notice of the fact that the Swaziland Correctional Services is now greatly modernized and adequately equipped to cater for all kinds of illnesses, including Asthma.

[14] I am however more inclined to treat the fact that the Applicant did not violate his previous bail conditions in the charges contained in MD 2 as an exceptional circumstance warranting his release on bail. The charges in MD 2 are similar to the ones detailed in MD 1 which we are currently faced with. There is no evidence to show that whilst out on bail in relation to MD 2, the Applicant violated his bail conditions by committing any of the breaches which the Respondents now urge

in casu, as detailed in paragraph [6] ante. I am convinced that this factor alone constitutes a veritable ground for the grant of this application.

[15] In the result, this application succeeds. I make the following orders

1. Bail is fixed at E50,000-00 (Fifty Thousand Emalangeni) in accordance with Section 95 (5) of the CP&E. The Applicant will pay cash of E10,000-00 (Ten Thousand Emalangeni) and provide surety worth E40,000-00 (Forty Thousand Emalangeni).
2. The Applicant shall not interfere with crown witnesses, the process of investigation and trial.
3. The Applicant shall attend his trial.
4. The Applicant shall surrender his passport and other travel documents and shall not apply for new ones pending finalization of his trial.
5. 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 OF2013**

**OTA J
JUDGE OF THE HIGH COURT**

Applicant in Person: N. Mhlanga

For the Respondent: S. Dlamini