IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No. 180/13

MFANAWENKOSI MBHUNU MTSHALI **1ST APPLICANT**

DERRICK DICKSON NKAMBULE **2ND APPLICANT**

And

DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

Neutral citation:	***Mfanawenkosi Mbhunu Mtshali and Another vs Director of Public Prosecutions (180/13*) July [2013] SZHC 154**
Coram:	**OTA J.**
Heard:	**12 July 2013**
Delivered:	**16 July2013**
Summary:	**Bail application: Applicants charged with the offence of sedition; Factors proved justifying bail; Application granted.**

OTA J.

[1] On the 19th of April 2013, the Applicants were arrested and charged jointly with contravening sections 4 (a) (c) and (e) and 5 (1) (read together with sub-section 2(a)(b) and (d) of the SEDITIOUS AND SUBVERSIVE ACTIVITIES ACT OF 1938 as amended. They now contend for a release on bail pending finalization of their trial, which application is opposed.

[2] In terms of our penal statute, the offence of sedition falls under the Fourth Schedule of the Criminal Procedure and Evidence Act 67/1938, as amended (CP&E). This fact brings this bail application within the purview of section 96 (12) (b) of the CP&E, which provides as follows:-

> **"12 Notwithstanding any provision of this Act, where an accused is charged with an offence referred to:**
>
> **(a) .....**
>
> **(b) in the Fourth Schedule but not in the Fifth Schedule the Court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable**

opportunity to do so, adduces evidence which satisfies the Court that the interest of justice permits his or her release".

[3] The onus thus lies on the Applicants to adduce evidence which on a balance of probabilities justify their release on bail in the interest of justice.

[4] The Applicants urged similar factors in their founding affidavits, which include:-

1. They will abide by all the bail conditions.

2. They have school going children and wives who are dependant on them.

3. They have a very good defence to the charges preferred.

4. They fully co-operated with the police since their arrest.

5. They will not evade their trial by escaping the jurisdiction as they have no relatives outside the country to escape to.

6. They will not interfere with state witnesses, undermine or jeopardize the proper functioning of the criminal justice system.

[5] I am however more attracted to the following allegation that appears in paragraph [11] of the 1st Applicant's affidavit, to wit:-

> **"I am head of the family as I also take care of my siblings and therefore a bread winner running a plumbing business at my home area at Msunduza, and if not admitted to bail I stand to suffer serious financial prejudice which will result in loss of means of income and consequently the whole family stands to suffer"**

[6] Then there are paragraphs [11] [14] and [15] of the 2nd Applicant's affidavit where he averred as follows:-

> **"[11] I am head of the family and breadwinner running an upholstery business at my home area at Msunduza, and if not admitted to bail, I stand to suffer serious financial prejudice which will result in loss of means of income and consequently the whole family stands to suffer.**
>
> **[14] I further state that exceptional circumstances exist which in the interest of justice permit my release from custody as I am a businessman as an upholsterer and both my wife and children are dependant on me for survival.**

[15] I state further that I have just secured a business deal involving my business to which my further incarceration can compromise.....”

[7] I notice that the Respondents failed to controvert the aforegoing allegations of fact in any point of substance. They were infact non - committal. They neither denied nor admitted these allegations, but put the Applicants to strict proof, whilst in the same breath contending the absence of exceptional circumstances warranting bail. The averments of the Respondents are not sufficient to defeat these allegations of fact. In the circumstance, I take it as established that both Applicants are businessmen engaged in ongoing plumbing and upholstery businesses respectively. They are as such gainfully employed, which employment will be adversely affected by reason of their continued incarceration.

[8] It is my considered view, that the fact of the Applicants’ employment favours the grant of this application in the interest of justice.

[9] As I observed in my recent decision in the case of **Bheki Madzinane v The King, Case No. 224/13, para [5] judgment of 5 July 2013,** when treating the fact of the Applicant's employment as an exceptional circumstance warranting his release on bail:-

> **"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, 5th Edition para 137, by Bekker et al, 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.**
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> > **'The Accused who .....is presumed to be innocent is subject to the punitive aspect of detention. The effect of remaining incarcerated 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----'

[10] I am fortified in the conclusion reached ante, by the fact that there is no evidence urged by the Respondents to show a likelihood, (not a mere possibility) that the Applicants:-

(a) might not stand trial

(b) might commit other offences whilst on bail

(c) might interfere with crown witnesses thus tampering with the course of Justice.

These are the factors that will militate against the grant of bail. See the case of **Brian Mduduzi Qwabe v Rex Criminal Case No. 43/04,** wherein reference was made to the text **Bail (A Practitioner's guide) Juta, by J. Van der Berg.**

[11] In reaching this conclusion, I have juxtaposed the Respondents' contention that there is overwhelming evidence against the Applicants which will lead to their conviction thus constituting a veritable ground for them to evade their trial, against the established fact that the Applicants are Swazis; resident at Msunduza Swaziland; they have deep emotional and family roots in the country as well as the established fact that the Applicants also have on going businesses in the country, and in my view, these factors show on a balance of probabilities, that the Applicants are likely to stand trial.

[12] Furthermore, the allegation that the Applicants are likely to interfer with crown witnesses if released on bail, cannot stand. The only fact urged in support of this allegation is that some of these witnesses reside at Msunduza where the Applicants are resident and are known to the Applicants. The Respondents failed to show the identity of and nature of the evidence of the witnesses; whether the witnesses have already made their statements and committed themselves to testify; whether the evidence of these witnesses is still the subject of continuing investigation; the relationship between the Applicants and such witnesses and the likelihood that the witnesses may be influenced or intimidated by them, notwithstanding orders not to do so and whether conditions imposed regarding communication can be policed

effectively. These are requisite factors for the Court to weigh in ascertaining the substantiality of the allegation that the Applicants are likely to intimidate or interfere with crown witnesses. See **Brian Mduduzi Qwabe v Rex, (Supra)** where the Court referred to **S v S Acheson 1991 (2) SA 805 (NMHC).**

[13] In the absence of evidence in proof of these factors the interest of justice favours the grant of this application.

[14] On these premises, this application succeeds. Bail is granted as follows:-

1. The Applicants are admitted to bail in the sum of E15,000=00 (Fifteen Thousand Emalangeni) respectively. They shall each pay cash of E5,000=00 (Five Thousand Emalangeni) and provide security in the sum of E10,000=00 (Ten Thousand Emalangeni).

2. The Applicants shall attend their trial.

3. The Applicants shall not interfere with the process of trial or investigation.

4. The Applicants shall not interfere with or intimidate crown witnesses.

5. The Applicants shall surrender their passports and other valid travel documents and shall not apply for new ones pending the finalization of their trial.

6. The Applicants shall report at the Mbabane Police Station monthly on the last day of every month between the hours of 9 am. and 4 p.m.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE .....DAY OF.....2013

OTA J

JUDGE OF THE HIGH COURT

For the Applicants: **S. Gumedze**

For the Respondents: **A. Makhanya**