



**IN THE HIGH COURT OF SWAZILAND**

Case no. 115/2012

In the matter between:-

<b>RODNEY MASOKA NXUMALO</b>	<b>1<sup>st</sup> Applicant</b>
<b>MPHIKELELI MTHINI DLAMINI</b>	<b>2<sup>nd</sup> Applicant</b>
<b>VUSIE MUSA DLAMINI</b>	<b>3<sup>rd</sup> Applicant</b>
<b>MPENDULO MASIBEKELA GAMEDZE</b>	<b>4<sup>th</sup> Applicant</b>
<b>JABULANI MATSAU MNCINA</b>	<b>5<sup>th</sup> Applicant</b>
<b>LAWRENCE KAMANGA MASINGA</b>	<b>6<sup>th</sup> Applicant</b>

and

<b>REX</b>	<b>Respondent</b>
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**Neutral citation:** *Rodney Masoka Nxumalo & 5 others v Rex*  
(115/12) [2013] SZHC275 (3<sup>rd</sup> November 2013)

<b>Coram:</b>	HLOPHE J
<b>For the 1<sup>st</sup> -2<sup>nd</sup> and 4<sup>th</sup> Applicants:</b>	Mr. Kunene
<b>For the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Applicants:</b>	Mr. T. Fakudze
<b>For the Respondent:</b>	Mr. M. Nxumalo

## JUDGMENT

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- [1] The Applicants instituted an urgent application seeking an order of this Court releasing them on bail. Their application was opposed by the crown which contended that it would not be in the interests of justice to release the said Applicants on bail. Otherwise the nature and details of the charges faced by each one of the Applicants as accused persons are set out herein below.
- [2] Having listened to argument in the matter, I handed down my judgment extempore and undertook to avail my written reasons in due course. This comprises such written reasons. Otherwise I clarify having given reasons verbally in Court and going on to record same on the file cover which still bears same to date.
- [3] It is otherwise worthy of mention that whereas six Applicants had moved the bail application concerned, three of the Applicants withdrew theirs during argument, with their counsel Mr. Fakudze informing the Court that he was to decide on the way forward. The withdrawal of the applications concerned came about after this Court had sought to find out from all counsel involved as to what the effect of section 96 (4) (a) as read with section 96 (5) (e) and (f) of the Criminal Procedure and Evidence Act of 1938 was in the matter. It was no doubt the realization of what I would term the hopelessness of the Applicants' case when

viewed from this angle that the said Applicants withdrew their applications.

[4] The remaining Applicants' application continued being heard resulting in this Court pronouncing an extempore judgment there and then and advising as stated above on the way forward. I may just point out that this Court heard and continued to hear trials with the written reasons still outstanding and none of the parties indicated a desire to have the written reasons expedited, which this Court would have done. I can only add that I adopted the approach I did in light of the fact that these were bail proceedings which needed to be accorded as much urgency as was possible, particularly as regards the determination of Applicants' fate.

[5] The facts of the matter are that all the Applicants were part of a group of eight accused persons who were charged with thirteen counts of theft by false pretences in all, which were founded mainly on allegations that the Applicants had tricked several members of the public who became complainants in each matter by advising them that they had been identified for some royal business and caused them to pay some huge sums in line therewith. In fact there were ten such counts out of the thirteen counts. There were other basis such as a member of the public being promised a PS1 tender upon paying a certain huge sum as well as deceiving another one by saying that they were police officers who were there to arrest him for his illegal electric connection unless he paid them a sum of E100 000.00 which was paid. The other complainant was

allegedly promised illegal electric connection upon him paying them a sum of E 50 000.00 which they would facilitate as employees of Swaziland Electricity Company. The members of the public who are complainants in all the charges, paid the amounts demanded and lost a total sum of over E673 300.00 in all and in the process. The payment of such huge sums by the unsuspecting and vulnerable members of the public indicates that the trick by the fraudsters concerned was very potent, which necessitated that a decision that affords members of the public protection be pronounced should the Court come to a conclusion their application does not succeed.

[6] In their bail applications, the Applicants contended that they were going to abide all the conditions the Court was going to attach to their release and went on to argue that they were presumed to be innocent in law.

[7] Counsel for the Respondent argued, as pleaded in their papers, that it was not going to be in the interests of justice to release the Applicants on bail regard being had to the amounts allegedly defrauded the complainants as well as the manner in which the offences had been committed including their repetitive nature as well as the prevalence of the offences concerned. In order for this point to be made graphic, I refer to the following table drawn to indicate the circumstances of each particular count, the accused responsible, the amount stolen, as well as the dates when the amounts were stolen.

<b>Count</b>	<b>Accused</b>	<b>Basis</b>	<b>for</b>	<b>Amount</b>	<b>Date</b>
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		<b>alleged theft by false pretences</b>	<b>Involved</b>	
1	1, 2 and 3	Royal Assignment	E93 000 .00	05/2012(around May 2012
2	1, 2, 3 and 4	Royal Assignment	E23 500.00	15/08/2012
3	2, 3, 4 and 8	PSI Tender	E20 500.00	08/2012 and 09/2012 (around August and September 2012)
4	1, 2 and 3	Royal Assignment	E23 000.00	06/07/2012
5	2, 3 and 4	Royal Assignment	E33 000.00	25/06/2012
6	6 and 7 and 1	Royal Assignment	E28 000.00	19/06/2012
7	1 and 5	Bribery to avoid arrest for the illegal connection of electricity(as they claimed to be Police Officers)	E100 000.00	23/05/2012
8	4 and 6	Royal Assignment	E127 000.00	27/07/2012
9	1 and 6	Royal Assignment	E28 300.00	17/02/2012
10	3	Offering to assist in complainant illegally connect of electricity(claiming to be from SEC employees)	E50 000.00	22/05/2012
11	4	Royal Assignment	E30 000.00	15/08/2012

12	4	Royal Assignment	E17 000.00	31/12/2011
13	6	Royal Assignment	E100 000.00	20/08/2012
<b>Total amounts defrauded</b>			<b>E673 300.00</b>	

[8] A comment in this regard is that the offences are shown to have been committed mainly within a period of five months. The tricks being pulled are very potent when one considers the amounts involved and their being concentrated within the same period. It is also clear that almost all the Applicants are allegedly repeat offenders in the repeated commission of the offences concerned, which were primarily the promise of Royal assignments to members of the public. The repeated alleged commission of the offences in question by allegedly the same accused persons necessitates that members of the public be protected from the potent tricks being pulled by the same people.

[9] It is true that they should be presumed innocent but what we should consider in these circumstances is the likelihood of each one of the accused persons committing the offences upon release when considering their disposition. Worse still the prevalence of the offences concerned together with the potency of their trick makes it all the more necessary that bail be refused so that the members of the public are protected.

[10] Section 96 (4) (a) of the Criminal Procedure and Evidence Act of 1938 provides as follows:-

*“96 (4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established-*

*(a) where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule;*

[11] Section 96 (5) (e) and (f) of the Criminal Procedure and Evidence Act of 1938 on the other hand provides as follows:-

*“96 (5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely-*

*(e) any disposition of the accused to commit offences referred to in Part II of the First*

*Schedule as is evident from the accused's past conduct;*

*(f) the prevalence of a particular type of offence;*

[12] It merits a comment that according to these sections where there is a likelihood of an accused upon being released on bail committing the same offences or even an offence mentioned in Part II of the First Schedule which theft by false pretences is one, such an accused may not be released on bail. The likelihood of each one of the Applicants to commit the same offences or those forming Part II of the First Schedule is apparent from the facts. It can be seen that they allegedly committed the same offences repeatedly. Others such as accused 3, 4 and 5 are shown to be not only facing similar charges before the Mbabane Magistrates Court but are shown as having been convicted of the same offences in the past and are currently out on bail pending appeal. The first Applicant on the other hand is alleged to have taken part in the commission of at least of the offences concerned and to have partaken in the theft of about E231 800.00.

[13] My understanding of the effect of these sections is that bail may not be granted to one accused in an offence that has been committed repeatedly and in situations where the offences concerned are prevalent together with the amounts stolen being significant. It cannot be disputed that in this matter the offences, which are all of a similar nature were allegedly committed repeatedly by each accused person or in



furtherance of a common purpose with others and they were also prevalent at the time.

[14] Considering the cumulative effect of the sections of the Criminal Procedure and Evidence Act aforesaid, I was constrained to agree with crown counsel that it would not be in the interests of justice to admit the Applicants to bail. Based on these considerations, I was convinced this is not a matter in which I could exercise, the Courts discretion in the Applicants' favour. Accordingly the Applicants applications could not succeed and were accordingly dismissed on these considerations.

**Delivered in open Court on this.....day of November 2013.**

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**N. J. HLOPHE**  
**JUDGE – HIGH COURT**