



**IN THE HIGH COURT OF SWAZILAND**

Case No. 28/2013

In the matter between:-

**MFANUKHONA DLAMINI**

**Applicant**

and

**THE KING**

**Respondent**

**Neutral citation:** *Mfanukhona Dlamini v The King* (28/13) [2013]  
SZHC09 (28<sup>th</sup> January 2013)

**Coram:** HLOPHE J

**For the Applicant:** Mr. Mabila

**For the Respondent:** Mr. Mathunjwa

**Heard:** 25/01/2013

**Delivered:** 28<sup>th</sup> January 2013

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## JUDGMENT

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- [1] Before me is an application for bail moved by or on behalf of the Applicant who prays that he be admitted to bail upon such terms as this court may find appropriate. I may just add that the said application is being moved under a certificate of urgency.
- [2] It is a fact that the Respondent other than filing a notice of intention to oppose had not filed any opposing papers. It was submitted by Mr. Mabila that this was not necessary because in reality the matter was turning on law and not on facts. He submitted the issue was in reality the effect the 2004 amendment to section 95 and 96 of the Criminal Procedure And Evidence Act of 1938 had on section 18 (1) of the Theft of Motor Vehicles Act 16 of 1991 as amended. Both this section refer to the release on bail of an accused person.
- [3] In fact Mr. Mabila submitted that the question was whether section 95 (6) of the Criminal Procedure And Evidence Act of 1938 as amended in 2004, eliminated the requirement of the “half the value payable in cash only” as bail in situations where an accused is charged with contravening sections 3 (1) and 5 of the Theft of Motor Vehicles Act of 1991. Mr. Mabila’s argument was effectively that the current position, as a result of the promulgation of section 95 (6) of the Criminal Procedure And Evidence Act, was that whilst bail still has to be at half the value for one charged with theft of a motor vehicle, a portion of such half can, in the discretion of the court, be made of sureties as

opposed to cash as was the case under the Theft of Motor Vehicles Act of 1991, where the court had no discretion.

[4] Reacting to Mr. Mabila's submission firstly on the need or otherwise to file opposing papers, Mr. Mathunjwa for the crown, confirmed that bail was not being opposed per se except for an insistence that same be fixed in line with the provisions of section 18 (1) of the Theft of Motor Vehicles Act of 1991; which is to say it has to be fixed at half the value of the motor vehicle concerned payable in cash only, which is to say no portion of that "half the value" can be in the form of a surety or sureties. He therefore confirm there was no need to file opposing papers as the issues were crisp and were common cause.

[5] Section 18 (1) of the Theft of Motor Vehicles Act of 1991 provides as follows:-

*"Where a person is charged with an offence under section 3 or 5 the amount of bail to be fixed by a court shall not be less than half the value of the Motor Vehicle stolen, and a deposit of the amount of bail so fixed by the court shall be made in cash only notwithstanding any law to the contrary".*

[6] For what it is worth and as shall be seen herein below, I have to cite section 18 (3) of the Theft of Motor Vehicles Act of 1991 which provides as follows

*"Where a person is charged with any other offence under this Act, the amount of bail to be fixed by a court shall not be less than half the amount of maximum or minimum fine fixed for that offence".*

[7] Section 95 (5) of the Criminal Procedure And Evidence Act 1938 as amended in 2004 provides as follows:-

*“95 (6) where an accused person is charged with any offence, other than the offences covered by the Provisions of this section but not excluding an offence under the Theft of Motor Vehicles Act, 1991, the amount of bail to be fixed by the court shall not be less than half the value of the property or thing upon which the charge relates or is based upon and where the value cannot be ascertained without any form of speculation the court may, for purposes of this subsection, without or with the assistance of any person the court deems could be of assistance to it, also fix an amount to be the value of the property or such thing”.*

[8] The allegations supporting the bail application are to the following effect:-

The Applicant alleges that he is a businessman involved in the repairing of motor vehicles damaged in accidents which he says he often buys from auction sales. This business he says he operates at his two homes situate at Nhlambeni and Ngwane Park areas. He says in early December 2012, Police Officers invaded his two homes and confiscated various motor vehicle parts and components. These items, he was told, he says by the Police, were part of an investigation. These items have not been returned to him to date, he alleges. What is worthy of note is that even though he alleges to be a businessman who buys damaged motor vehicles for their parts, he does not say anything about the three motor vehicles he is charged with stealing. He also does not disclose where he had obtained such cars from as a defence.

- [9] He further says he approached the Police on a number of occasions for the return of the said items to him which however has not happened despite that same was prejudicing his business aforesaid.
- [10] Following an invasion of his business once again by the Police, which he says occurred on the 23<sup>rd</sup> January 2013, he says he called the Police to ascertain what was happening as they had removed all the vehicle parts found at his home. He says he eventually went to the Police following their inviting him and he was arrested upon arrival and charged with 9 counts comprising various offences ranging from theft of three motor vehicles from different towns in the Republic of South Africa as well as being in possession of various parts of a motor vehicle including tempering with some of the said parts through obliterating such identity marks as their engine numbers. Some of the charges related as well to the sale of parts stolen from certain motor vehicles particularly those stolen from the different South African towns which include Durban, Marikana and Pongola.
- [11] After the brief argument referred to above, Mr. Mabila indicated that they could possibly reach some common ground in the matter through engaging each other and asked for a short adjournment. There being no objection to the adjournment sought to engage each other I adjourned the matter and afforded the parties a chance directing that I be alerted once they were through with their engagement.
- [12] When the court reconvened after I had been alerted the parties were through with their engagement, I was informed by Mr. Mabila that no

agreement had been reached and therefore that the matter was to be argued.

[13] Mr. Mabila this time around did not pursue his initial argument to the effect that the promulgation of the 2004 amendment to the Criminal Procedure And Evidence Act, 1938 had the effect of allowing that a portion of the amount forming a half the value of the motor vehicle concerned could now be in the form of a surety.

[14] According to Mr. Mabila, he had, during the adjournment, considered closely the charges against the Applicant (which he went onto hand to court) as well as the relevant sections of the Theft of Motor Vehicles Act 1991 and the amended Criminal Procedure And Evidence Act, and had concluded that in the circumstances of the matter the question of the effect of the aforesaid amendment of the Criminal Procedure And Evidence Act on half the value being payable in cash only did not arise because that would be the case in instances where an accused person was charged with the violation of section 3 or 5 of the Theft of Motor Vehicles Act. In the present matter such a charge was not feasible in view of the fact that he had been charged with common law theft of the motor vehicles concerned and had not been charged with violating section 3 as regards the theft of such motor vehicles nor even section 5 of the Theft of Motor Vehicles Act, 1991 as regards the receiving of any of the said motor vehicles.

[15] As the theft of the motor vehicles concerned was the only charge laid against the accused in terms of which bail had to be payable in cash on an amount equivalent to half the value, such could however not be the

case in this matter as this was a statutory requirement which would not be applicable in the matter at hand in view of the fact that such a charge could not be in terms of the statute as the said theft was allegedly committed in the Republic of South Africa and not in Swaziland. This is in accordance with the principle that statutes apply within the territorial limits of where they were promulgated.

[16] On this basis, Mr. Mabila argued, the other charges preferred against the accused could only be dealt with in terms of section 18 (3) in so far as bail was concerned. This section he submitted, provided that bail for any such offences could only be fixed at half the maximum sentences as imposed by the statute concerned as provided in terms of section 18 (3) of the Theft of Motor Vehicles Act 1991.

[17] On these basis Mr. Mabila argued, the accused's bail ought to be fixed at half the maximum sentences provided for and not on half the value of the motor vehicles concerned. In response Mr. Mathunjwa submitted that there was no merit in Mr. Mabila's argument because the charges preferred against the Applicant in terms of counts 3 and 5 talked of the accused being charged with violating section 3 (1) of the Theft of Motor Vehicles Act of 1991 as read with section 4 of the same Act. He went further to submit that at this stage, it was not open to the court to unpack the charges so as to determine if the charge was appropriate or not as that was a question for another day. He submitted it was sufficient that the charge provided *ex facie* itself that the accused was alleged to have violated section 3 (1) by committing the offences mentioned in section 4 (1) of the Act which relates to the commission of other offences such as possession of certain parts or components of a

stolen motor vehicle as well as tempering with certain identities of the motor vehicle such as obliterating its engine number.

[18] Mr. Mathunjwa submitted that simply because in counts 3 and 5 there was mention of the contravention of section 3 (1) then their bail was supposed to be fixed at half the value of the motor vehicle.

[19] I have noted that in the matter at hand, the facts reveal that all the motor vehicles were stolen in the Republic of South Africa. For this reason there could not realistically be a charge based on the statute as the alleged theft was in terms of the common law in view of the fact that theft is in law a continuing offence. Indeed the theft charges preferred against the accused in terms of counts 1, 4 and 7 of the Act are expressed in terms of the common law *ex facie* the charge sheet and is not in terms of section 3 (1) of the Theft of Motor Vehicles Act.

[20] This being the case it does not seem appropriate to me that in a matter where the facts undoubtedly point to a possible charge of theft against the accused being only in terms of the common law, it would avail the crown to simply include in the charges the statutory offence which attracts restricted bail conditions as a means of ensuring that an accused is given bail as restricted in terms of the Act as in the case of one charged with contravening the Statutory offences provided for in law which limit feasible bail conditions. I see no reason why this court should not take such a factor into account if anything as regards the strength of the case against the accused so as to determine whether bail would be appropriate.



[21] It seems to me that in a case like this, it is open to this court to exercise its discretion in fixing the bail conditions including how the bail is to be paid. This is what I shall endeavour to do therefore.

[22] It is for this reason that I am of the view that bearing in mind that the accused is charged with the theft of three motor vehicles, albeit in terms of the common law, he is revealed *prima facie* by the facts before me to be a dealer in the stealing and stripping of motor vehicles for the sale of their parts or components and this makes his matter too serious and distinguishes it from an ordinary theft. It makes it worse in my view that such a crime was allegedly committed on about three occasions and within a space of a few months in between and particularly within one year. In such a case I am of the view that although I am not obliged by any statute on how to fix the bail, I cannot lose sight of how the Legislature, by analogy, wants such offences to be dealt with particularly when considering that its intent is to eradicate the crime concerned, perhaps because of its effect on the well being of law abiding citizens or even the economy of the country.

[23] Before I pronounce what the terms of the bail I have in mind are, I need to point out that the accused should consider himself very lucky that notwithstanding his being charged with at least 9 counts of serious offences, three of each incident being of a similar nature the crown has decided not to raise that as a ground for opposing his bail as contemplated by section 96 (4) (a) read with section 96 (5) (e) of the Criminal Procedure And Evidence Act, which makes me doubt that the court would have come to a different decision than to refuse such bail.

[24] It seems to me therefore that in order to give effect to the spirit of the legislature without necessarily applying the same legislation and taking into account the serious and the alleged repetitive commission of the offences by the accused the following would be appropriate bail conditions to the application for bail which is not being opposed except to argue on what its terms should entail.

[25] Accordingly, having taken into account all the circumstances of the matter including the fact that bail is not opposed per se, I will grant Applicant bail at half the total value of the motor vehicles allegedly stolen (that is as represented by the alleged prices of the motor vehicle's revealed on the charge sheet) which I will direct be payable in cash only, and thereafter:-

23.1 The Applicant is to report to the Manzini Police Station fortnightly on Fridays beginning on the first Friday of his release from custody.

23.2 The Applicant shall surrender his travel document and shall not apply for another one in the interim.

23.3 The Applicant shall not leave the Jurisdiction of this court without the leave of this court.

23.4 The Applicant shall not interfere with crown witnesses.

23.5 The Applicant shall not perform any act that undermines the interests of Justice whilst out of custody.

23.6 The Applicant shall not commit any other offence during the time of his release from custody.

**Delivered in open Court on this the .....day of January 2013.**

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**N. J. HLOPHE  
JUDGE**