IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 184/14

In the matter between

MAXWELL MANQOBA DLAMINI **1ST APPLICANT**

MARIO THEMBEKA MASUKU **2ND APPLICANT**

Versus

REX **RESPONDENT**

Neutral citation: *Maxwell Manqoba Dlamini and Another v Rex (184/14*) [2014] SZHC 397 (13 November 2014)

Coram: **M. S. SIMELANE J**

Heard: **7 November 2014**

Delivered: **13 November 2014**

Summary: **Bail Application, Applicants charged under the Sedition and Subversive Activities Act 46/1938 and under the Suppression of Terrorism Act 3/2008 – Bail Refused.**

Judgment

SIMELANE J

[1] The Applicants lodged an application before this Court seeking an order admitting them to bail upon such terms and conditions as this Court may deem appropriate.

[2] It is paramount for me to state that the Applicants were arrested and charged with sedition and offences in contravention of the Suppression of Terrorism Act, 2008 following their participation at a May Day celebration on 1 May 2014.

[3] Soon after their arrest they applied to be admitted to bail before this Court. Their bail application was refused by this Court on the basis that the security of the country would be threatened if they were released. I also found that the first applicant had a high propensity to

commit crimes and that the Applicants were likely to evade trial if released on bail.

[4] This notwithstanding, the Applicants have again brought a fresh application to be admitted to bail. Their contention is that since the refusal of their application for bail various new circumstances have arisen which are for bail. They now seek a reconsideration of their bail application, and state that it would be in the interests of justice to release them on bail pending finalization of their criminal trial.

[5] The Applicants contend that one of the new circumstances is that they have filed three separate applications challenging the constitutionality of the Sedition and Subversive Activities Act of 1938 and the Suppression of Terrorism Act of 2008. It follows that they are challenging the constitutionality of the very legislation under which they have been charged.

[6] It is further their contention that in the event the constitutional Court finds that these pieces of legislation are unconstitutional and invalid, the Court would strike down the legislation. Hence the charges the Applicants face would therefore fall away.

[7] They also submit that it is practically impossible for the criminal case to proceed until the constitutionality of the charges has been determined. They contend that the conclusion of the criminal trial has been delayed, and unless they are released on bail, they will have to

remain in custody until both the constitutional litigation and the criminal trial are completed.

[8] The Applicants further submit that another new circumstance warranting bail, is the deteriorating health of the second Applicant. It is alleged that he suffers from diabetes and arthritis and the poor conditions at the remand centre have impacted negatively on his health.

[9] The third new circumstance that should compel bail to be granted according to the Applicants, is the interruption of the first Applicant's education. The first Applicant states that he is a student at the University of Swaziland and is registered for a Bachelor of Commerce Degree. When he was arrested in May 2014, he was in the middle of writing his university examinations and he raised this in his bail previous bail application. He states further that although the Judge refused to release him on bail, he however did stipulate that the first Applicant will be permitted to write his examination on the day following the hearing. This aspect of the order was subsequently rescinded, due to the refusal of the Correctional Services officials to facilitate it. Consequently, the first Applicant was unable to write his examination.

[10] The Respondents argued *au contraire* that the merits of the bail application were heard by the Court and the Court dismissed the bail application having found that the Applicants were both a flight risk

and a risk to public order and security. The Court also found that first Applicant has a propensity to commit similar offences.

[11] The Respondent further argued that for the bail applications to be reopened the Applicants should allege new facts that will demonstrate to the Court that their personal circumstances have changed. They have to demonstrate that they are no longer a flight risk nor are they a threat to public order and security. The first Applicant should further demonstrate that he no longer has the propensity to commit similar offences.

[12] It is the Respondent's further contention that the Applicants have dismally failed to raise new circumstances or facts that would render the earlier decision nugatory.

[13] It is pertinent, that I note here that the main consideration for the Court in an application of this nature is whether there are new facts submitted by the Applicant which have the effect of changing the earlier decision of the bail application which resulted in its dismissal. This principle was succinctly stated by the Court in the case of **Jacobus Michael Prinsloo V The State, South African Supreme Court of Appeal, Case No. 613/2013,** as follows:-

> **"A Judicial officer is not only entitled but obliged to hear a bail application based on new facts."**

[14] This principle was further adumbrated in the case of **S V Vermaas 1966 (1) SACR 528 9 (J) at 531 E,** where the Court remarked:-

> **"Obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said the application should not be repeated and the court will not entertain it. But it is a non sequitur to argue on that basis that where there is some new matter the whole application is not open for reconsideration but only the new facts. I frankly cannot see how this can be done. Once the application is entertained the court should consider all facts before it, new and old and on the totality come to a conclusion. It follows that I will not myopically concentrate on the new facts alleged."**

[15] Again in **S V Mohamed, 1999 (2) SACR 507 (C)** the Court had this to say:

> **"if the appellant succeeded in establishing "new facts" on the second outing, then in order properly to adjudicate the appeal, I would have to have regard to all the evidence which was given during both stages."**

[16] Section 96 (1) (a) of The Criminal Procedure and Evidence Act 67/1938 as amended states as follows:-

> **"In any Court-**
>
> **(a) an accused person who is in custody in respect of an offence shall, subject to the provisions of section 95 and**

> **the Fourth and Fifth Schedules, be entitled to be released on bail at any stage preceding the accused's conviction in respect of such offence, unless the court finds that it is in the interests of justice that the accused be detained in custody."**

[17] The Constitution states that bail is a discretionary remedy. The main consideration being the interest of justice, and particularly whether there is a likelihood that the accused if released on bail may evade trial, interfere with crown witnesses, conceal or destroy evidence.

[18] I am inclined to agree with the Respondent that the ill health of the second Applicant is not a new factor. This was stated by the Applicant when moving the initial bail application. I am cognizant of the fact that His Majesty's Correctional Service has medical facilities and inmates are always referred to the main hospitals in the event there is need for further or advanced medical care. It is a fact that every person is entitled to medical care. An inmate can be released on bail only on exceptional circumstances which are of such a nature that they cannot be contained within the correctional services. The second Applicant has not adduced any evidence to the effect that the sickness he has is one that is exceptional and that the correctional service has stated that it is one that cannot be contained within the confines of His Majesty's Correctional Services.

[19] The Prisons Act of 1964, Section 33 thereof takes care of the second Applicant's needs. He can get medical attention of his choice, a

special meal and additional blankets from private sources. The Section reads as follows:-

> **"33.(1) A civil prisoner and an unconvicted criminal prisoner may, subject to examination and to such other conditions as may be prescribed, be permitted to maintain himself, and at proper hours to purchase food, clothing, or other necessaries or receive them from private sources.**
>
> **(2) Food, clothing, or other necessaries belonging to a civil prisoner or an unconvicted criminal prisoner shall not be given, hired, tent, or sold to any other prisoner.**
>
> **(3) A prisoner who is found by the officer in charge to have contravened sub-section (2) may at the discretion of such officer lose the privileges of purchasing or receiving food, clothing or other necessaries from private sources for such period as such officer may think proper.**
>
> **(4) A civil prisoner and an unconvicted criminal prisoner shall receive the regular prison food and clothing if he does not provide himself with food or clothing, or if the food or clothing he has provided for himself is, in the opinion of the officer in charge, unsatisfactory."**

[20] Further Section 16 (6) (c) of the Constitution Act of 2005 allows for the Accused to access private medical treatment whilst in custody. He is at liberty to have medical care of his choice. This Section of the Constitution reads as follows:-

"(6) Where a person is arrested or detained-

(c) that person shall be allowed reasonable access to medical treatment including, at the request and at the cost of that person, access to private medical treatment."

[21] In the cas**e** of **Leo Ndvuna Dlamini v The King Criminal Case No. 12/13, Ota J** had this to say at paragraph 42:-

"[42] It is incontrovertible that every person, whether on trial or a convict, is entitled to medical care. There is also no doubt that a person can be admitted to bail on grounds of ill health. However, for a medical condition to be such as to ground bail, it must be exceptional, in the sense that it is contagious or it is of such a nature that it cannot be handled within the prison prescints or it is adversely affected by very dire and established circumstances within the prison, which cannot be contained by the Correctional Services.

[22] In my view for the above stated reasons the second Applicant's ailment is such that it can be contained within the prison prescints.

[23] I found in the initial bail application that the first Applicant has the propensity to commit offences. It is a fact that the first Applicant was acquitted and discharged on the offence of being found in possession of explosives. The fact remains that the 2013 charges of Sedition preferred against him still stands. I am mindful of the fact that the first Applicant allegedly committed the offence in the instant matter

whilst out on bail on similar charges of sedition. The Applicants' Counsel argued that the Court can impose bail conditions on the Accused for them not to make public addresses. It is an uncontroverted fact that bail conditions were attached even on his release on bail before but the Applicant failed to comply with the conditions and proceeded to make more statements. The Court cannot turn a blind eye to this. I find that the first Applicant has a strong propensity to commit similar offences in nature to the current charges. I further find that the first Applicant is abusing the bail system and indeed to the detriment of the criminal justice system.

[24] More to the above is that in the initial bail application, I refused the Applicants bail as I found that they were also a threat to public order and national security. The Applicants have not disputed that they uttered such threats. It would be absurd for me to take such utterances lightly. I find that the Applicants have the likelihood to endanger the safety of the public and national security.

[25] The Respondent has alleged that the Applicants made statements to the effect that **"The leadership and system of governance of the country should be overthrown."** The Applicants have not challenged this evidence. It stands.

[26] I further found that the Applicants are a flight risk. No new circumstances have been adduced by the Applicants in the instant matter save to repeat what they adduced before Court in the initial application for bail. They stated that they have families in Swaziland

and deeply rooted in the country. I find that this is a song that is always sung by every prisoner desirous of being released on bail and to me it does not carry any weight at all. The interest of justice far outweigh their release on bail. I reject it.

[27] It is a fact that the Applicants are facing very serious charges which are likely to attract very harsh sentences on conviction and this includes lengthy custodial sentences. The consideration here is whether there is a likelihood that if the Applicants are released on bail they are likely to evade trial. I find that considering the severity of the sentences likely to be imposed by the Court in the event of conviction the Applicants are likely to evade trial and I find that they are a flight risk.

[28] The Applicants have stated as a new circumstance the fact that they are challenging the constitutionality of the Suppression of Terrorism Act and the Sedition Act. The Applicants were charged in May 2014, appeared in Court, moved their bail applications which were not successful, were later allocated a Judge and a trial date. They braced themselves for trial. The matter was set down for trial on 1 October 2014. Just when the trial was about to commence they then decided to file an application challenging the constitutionality of the Suppression of Terrorism Act and the Sedition Act. The charges preferred against the Applicants under these pieces of legislation were not new to them as they became aware of them as early as May 2014. However, they waited until when the trial was to commence to launch an attack against these Acts. In my view the Applicants, I find, are the

architects of the delay and cannot blame anyone for that. I fail to understand why they could not challenge the legislation upon being charged if indeed they were serious about their case proceeding logically. Why make a commitment on the trial date and later raise issues with the legislation under which they have been charged.

[29] Further from the annexure MM1 page 40 of the book of pleadings, it is clear that the delay in the trial has always been at the instance of the Applicants. The correspondence referred to reads as follows:-

> **“ 09 JUN 2014**
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> **THE DIRECTOR OF PUBLIC PROSECUTIONS**
> **MBABANE**
>
> **Dear sirs,**
>
> **RE: MARIO MASUKU AND MAXWELL MANQOBA DLAMINI COURT CASE NUMBER 184/2014**
>
> **1. We have been instructed to represent the accused persons herein.**
>
> **2. We have instructed South African counsel, who however can only be available towards the end of September. We shall therefore apply for a postponement of the matter until counsel is available.**

3. We also wish to advise that we shall be challenging the constitutionality of the Suppression of Terrorism Act NO. 3 of 2008 and the Sedition and Subversive activities act NO. 46 of 1938.

Yours Faithfully

Leo Gama & Associates "

[30] In paragraph 2 of their letter to the Director of Public Prosecutions the Applicants state that they will apply for a postponement of the matter because they have instructed Counsel who cannot be available on the trial date. It is important to note that the date was set down in their presence and in the presence of their legal representative. It was accepted as a suitable date to all parties concerned. There was no mention of the Applicants' intention to engage Counsel in the matter. I find that the Applicants cannot have it both ways. They cannot eat their cakes and have it at the same time. In any event, they have had ample time to engage alternative Counsel.

[31] The first Applicant also advanced as a new factor that the continued detention is an interruption to his education. I find that this is not a new factor. The Prison Act should be followed. I find that it is a misconception that once in custody it is a must that you study or sit for your examination. This to me is regulated by the Prison Act. It is a privilege as opposed to a right if you are a prisoner.

[32] On the whole the Applicants have failed to advance any new circumstances that warrant their release on bail. It appears to me therefore that the interest of justice in the instant matter far outweighs the right of the Applicants to liberty pending their trial. It remains for me to emphasize, that the Accused stand charged with the offences of Sedition and Contravening the Suppression of Terrorism Act. The Crown has graphically exhibited the circumstances under which the offences were committed. The Applicants are faced with serious offences, the gravity of which that cannot be over emphasized. Upon conviction the Applicants are likely to get harsh sentences which may include a custodial one. I find that there is a likelihood that the Applicants may evade trial and thus undermine the criminal justice system. For the above stated reasons, I find the Applicants applications for bail unmeritorious.

[33] **ORDER**

I hereby order as follows:-

That the Applicants' applications for bail be and are hereby dismissed.

M. S. SIMELANE J.

JUDGE OF THE HIGH COURT

For the Applicants: **Advocate Anna-Marie De Vos**
For the Respondent: **Mr. T. Dlamini**