



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 343/2015

In the matter between:

MBUSO MBINGO

Applicant

VS

REX

Respondent

Neutral citation: *Mbuso Mbingo v Rex (343/2015) [2016] SZHC 16 (10 February 2016)*

Coram: FAKUDZE, J

Heard: 16 December, 2015

Delivered: 10 February, 2015

Summary: Criminal Law – Where bail has been refused by a court, the same court cannot re-open it in a subsequent application as this would violate the principle that the court that heard the subsequent application is *functus officio*. The only option available to applicant is to appeal. Bail is refused.

JUDGEMENT

- [1] The Applicant was arrested and charged with the offence of Robbery. Applicant is instituting application proceedings before this court seeking an order releasing him on bail upon terms as this court may deem appropriate.
- [2] The papers filed of record revealed that the application is a sequel to an initial bail application which served before Mdladla, AJ, who refused and dismissed it on the ground that the Applicant had violated Section 96 (14) (a) (ii) of the Criminal Procedure and Evidence Act, 1938.
- [3] On the 11th December, 2015, the Applicant launched this bail application premised on the following grounds that:-
- (a) He has a bona fide defence to the offences he is charged with and further that the non disclosure that he was out on bail for an offence of murder when the initial application was made was an error arising from the fact that the applicant is unlearned in law.
 - (b) He has already spent three months (3) in custody and the trial date has not been set.
 - (c) After his incarceration, he developed chest pains because of the unhealthy condition in prison.
 - (d) He has a valid defence to the effect that he was not at the scene or vicinity where the alleged crime took place.

[4] The Crown opposed the granting of bail on the following grounds that:-

- (a) Prison authorities allow the provision of extra private blankets to awaiting trialists and such should be raised with the prison authorities.
- (b) There is enough medical services at the Correctional Service and the Mbabane Government Hospital serves as a referral hospital.
- (c) Applicant canvassed same issues in the initial application.
- (d) This court is *functus officio* as bail was refused by the same Court sometime back.

[5] After listening to arguments by both Counsel, the Court has come to the conclusion that the Court is *functus officio*. It cannot therefore re-open the matter as it was finalised by Mdladla A.J. The issues raised by the Applicant were canvassed in the initial application.

[6] In the matter between **Maxwell Mancoba Dlamini and Another V Rex - Criminal Appeal Case No. 46/2014 His Lordship M.C.B. Maphalala A.C.J.** observed that:-

“It is trite that an accused cannot be allowed to repeat the same application for bail based on the same facts on the basis that it constitutes an abuse of court.”

[7] The case at hand is falls within the observation made by the Learned Lordship in the Mancoba case (*supra*). There are no new facts that have been established by the applicant. The application is still based on the same facts that were rejected by His Lordship Mdladla A.J.

[8] The other segment is that even if there were new facts or peculiar circumstances, this Court would still have no power to re-open the application. In **Sibusiso Bonginkosi Shongwe V Rex Criminal Appeal Case No 191 of 2015**, it was categorically stated by the Supreme Court when that case came on appeal that:-

“Where a court hearing a bail application has made specific findings refusing bail, an accused person is precluded from lodging a subsequent bail application before the same court on the pretext that new facts exist. The court is functus officio and has no jurisdiction to entertain the matter. The new facts or change of circumstances applies where bail has been granted and the application is only intended to vary the bail condition. Otherwise the subsequent bail application would offend the general principle of our law that once a court has pronounced a final order or judgment, it becomes functus officio and cannot thereafter correct or supplement its judgment.”

[9] In the light of the above cited authorities, this application is accordingly dismissed and no order as to costs is made.

FAKUDZE J
JUDGE OF THE HIGH COURT

For Applicant: M. Mbhamali

For Respondent: T. Dlamini