IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 469/2015

In the matter between:

MATHIAS MOYO **Applicant**

VS

REX **Respondent**

Neutral citation: *Mathias Moyo v Rex (469 /2015) [2016] SZHC 35 (26 February, 2016)*

Coram: FAKUDZE, J

Heard: 24 February 2016

Delivered: 26 February 2016

RULING ON POINTS OF LAW (BAIL)

Summary: *Criminal Procedure - Bail application on "new facts"- Bail initially refused by High Court on grounds that Applicant is a flight risk – refusal taken up on appeal – Appeal court confirms findings of court – a – quo Bail application at High Court on allegation of new facts – new facts can be used to vary bail conditions where bail granted – cannot be used where bail refused – point of law upheld*.

JUDGEMENT

[1] Applicant is appearing before the superior courts of this land for the third time, applying that he be released on bail. He has appeared before the High Court, the Supreme Court and now to this court again.

[2] The first application was heard by His Lordship Mlangeni J, who dismissed it on the basis that Applicant is a flight risk given that he is a Zimbabwean National. The other reason was that he has no roots in this country in the form of any substantial investment which would compel him to stand trial.

[3] Applicant filed an Appeal and the Appeal Court dismissed the application on the same basis as the *court-a-quo*.

[4] Applicant has now filed another bail application before this court basing it on the fact that "new circumstances or facts" have arisen which he believes constitutes a solid base for him to be granted bail.

Applicant specifically states in paragraph 9 of the application that-

> *"9. I am advised that I may again launch a fresh bail application should there be a change in circumstances and new facts brought to the fore."*

[5] The alleged new facts are stated in paragraphs 10 and 11 where it is alleged that –

> *"10. I am again moving this application on an urgent basis as my employer has since laid charges for absenteeism against me and I am expected to appear for a hearing on the 27th February, 2016. Annexed hereto and marked MM2 is a copy of the letter.*
>
> *11. Should I not report for my hearing I stand to suffer prejudice in that I will obviously lose my employment which employment is my only source of income*."

[6] Respondent has filed the Notice to Oppose and has also raised a point of law that this court is *functus officio* and that it cannot entertain this bail application even if there are "new facts." Respondent contends that new facts can only be used for purposes of varying a bail condition where bail has been granted. He referred this court to the Appeal case of **Sibusiso Bonginkosi Shongwe V Rex Criminal Appeal No. 191/2015.** Respondent also referred this court to the recent High Court judgments **of Mbuso Mbingo V Rex Case No. 343/2015 and Ndumiso Nkululelo Shabalala V Rex Case 102/2015.**

[7] Applicant contends that this court is not *functus officio* in respect of further bail applications based on "new facts" and on evidence that was not presented in the initial bail application. Applicant referred this Court to three cases to support his submission. These are the cases of **Selby Musa Tfwala v Rex High Court criminal case No. 383/2012, Mathias Moyo v Rex Criminal Appeal Case 469/15 and Jacobus Michael Prinsloo v The State Supreme Court of Appeal of South Africa Case No. 613/2013.**

[8] Applicant argues that the High Court case of Selby Tfwala makes it clear that new facts can be a basis for a matter to be re – opened. Likewise, the case of Jacobus Michael Prinsloo establishes the fact that new facts can be used in applying for bail where such has been refused before. Applicant further argues that since cases that are decided upon by South African Courts are persuasive in this jurisdiction, the principles laid down in Jacobus Michael Prinsloo should persuade this court notwithstanding what the Supreme Court said in Sibusiso's Shongwe case. Applicant finally argues that the recent Supreme case of Mathias Moyo (supra) should take precedence over that of Sibusiso Shongwe by virtue of it being the latest case on the issue at hand. This means that Sibusiso Shongwe's case has now been overturned or over ruled by what the Supreme Court said in Mathias Moyo. In the Mathias case, the Supreme Court said in paragraph 5 -

> *"5 It is true that whereas it would in law be open to the Applicant to move a fresh application upon new facts or circumstances having come to the fore, those herein disclosed are not such circumstances. Of course such new facts must be realistic and not merely conjured so as to defeat the res judicata or the functus officio principles. See*

the case of ***Sibusiso Bonginkosi Shongwe v Rex High Court Case No. 191/15****."*

[9] After hearing Counsel for both parties, I reserved judgment. I informed them that I will notify them on the date for delivering the Ruling in due course. The purpose of this Ruling is to fulfil what I promised to the litigants.

[10] As observed earlier in this Ruling, it is common cause that Applicant was denied bail by both the High Court and the Supreme Court. It is also common cause that Applicant has filed another bail application alleging new facts. This court will not at this stage determine whether there is merit or no merit in the alleged new facts. The focus of this court, for now, is to determine whether new facts can be invoked or can be a basis for granting bail based on them.

[11] The answer to this million dollar question is found in the Supreme Court case of **Sibusiso Bonginkosi Shongwe V Rex (**Supra) where His Lordship Maphalala ACJ, as He then was, said in paragraph 17 of His judgment -

> *"[17] The new facts or change of circumstances should be invoked in circumstances where bail has been granted and the application is only intended to vary the bail conditions. Otherwise the subsequent bail 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 therefore alter correct or supplement its judgment*."

[12] I need not give any interpretation to the above quotation because it is clear and unequivocal. It clearly states that new facts can only be invoked to vary a bail condition and not to cause a new application to be filed based on the alleged new facts.

[13] Since this court is lower and inferior to the Supreme Court, it is duty bound to follow the decisions of the Supreme Court. I will now address the issue of the three cases Applicant earlier referred this court to his contention that new facts can be invoked in a fresh application for bail. On the issue of the South African case of Prinsloo (supra), it is this court's considered view that South African case law is only persuasive in Swaziland and is therefore not binding. This means that if the Supreme Court of Swaziland has pronounced itself on a certain matter before it, no matter how highly persuasive judgments from other jurisdictions are or may be, the Supreme Court of Swaziland's position prevails. The Selby Thwala case (Supra) which Applicant referred this court to, is a High Court judgment and it is therefore a judgment of a lower court. It can therefore be said that what was said in Thwala's case no longer holds true in the light of Sibusiso Shongwe's case.

[14] The arguments that have been marshalled by Applicant's Counsel that this court should follow the latest Appeal case of Mathias Moyo (supra) are convincing and valid. However, this court's response to this submission, is that the Learned Judge in that judgment had in mind the High Court case of Sibusiso Shongwe to validate the principle that new facts can be a basis of launching a new application. This was before that case was appealed against. Paragraph 5 of the Moyo's judgment (particularly the words "see the case of Sibusiso Bonginkhosi Shongwe v Rex Case No. 191/ 15") bears testimony to this fact when the Learned Appeal Judge specifically said -

> *"5 It is true that whereas it would in law be open to the Applicant to move a fresh application upon new facts or circumstances having come to the fore, those herein disclosed are not such circumstances. Of course such new facts must be realistic and not merely conjured so as to defeat the res judicata or the functus officio principles. See the case of* ***Sibusiso Bonginkosi Shongwe v Rex High Court Case No. 191/15****."*

[15] If, for argument's sake, the Learned Justice's intention was to impliedly overrule or overturn the earlier Supreme Court Judgment, reference would have been made to the Appeal case of Sibusiso Bonginkosi Shongwe and not to the High Court one. If there was an express intention to overturn or overrule the Appeal case of Sibusiso, there would have been that clear and express intention to do so. I therefore beg to disagree with applicant's Counsel that the Mathias case (which was determined by the Supreme court), should take precedence over the Sibusiso Shongwe's case.

[16] I am inclined to hold the view that the Supreme Court's position, as decided upon by that Court in the Sibusiso Shongwe's case, should prevail. The introduction of new facts should only be invoked where the application is meant to vary bail conditions where bail has been granted. They cannot be used to re - open a closed case.

[17] In the light of all that has been said above, the point of law is accordingly upheld.

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FAKUDZE J

JUDGE OF THE HIGH COURT

For Applicant:	S. Jele
For Respondent:	E. Matsebula