IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 102/2015

In the matter between:

NDUMISO NKULULEKO SHABALALA **Applicant**

VS

THE KING **Respondent**

Neutral citation: *Ndumiso Nkululeko Shabalala v The King (102 /2015) [2016] SZHC 12 (10 February 2016)*

Coram: FAKUDZE, J

Heard: 16 December, 2015

Delivered: 10 February, 2016

Summary: Criminal Law – Where the court makes specific findings refusing bail, it is not open to the same court in a subsequent application to review its own decision under the guise of new circumstances. The court becomes *functus*

officio and the matter should be taken up on appeal. Where new facts are alleged, they must be used on an application for the variation of a bail condition. Application accordingly dismissed.

JUDGEMENT

[1] The applicant informed this court that he was arrested on the 26th April, 2015 and charged with various counts which include Robbery, contravention of Section 12 (1) of the Theft of Motor Vehicle Act, 1991 and violating the Opium and habit Forming Drugs Act. Applicant has instituted application proceedings before this court seeking an order releasing him on bail upon such 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 Hlophe J, who refused and dismissed it on the ground that the offences committed by the accused person are very serious in nature and the Respondent has shown that it would not be in interests of justice to release the accused person from custody. This judgement was delivered on the 29th June, 2015.

[3] On the 11 December, 2015 the Applicant launched this bail application premised on the following grounds:-

(a) That Applicant has already spent (7) seven months in custody and that although his trial has commenced, only two witnesses have testified.

(b) That Applicant pleaded guilty to only count three, mainly because he was found driving the vehicle which it was alleged he used to rob and he did not know that it was stolen as the vehicle was given to him by one Ncamiso Mamba who was not arrested.

(c) That Applicant is confident that upon completion of the trial he will be acquitted on count one or two after bringing sufficient evidence to prove his innocence.

(d) That Applicant has also been advised by his attorney that the investigating officer is no longer opposing his admission to bail.

(e) That applicant's incarceration in an inconducive environment is a threat to his health and the diet he is fed with has resulted in loss of weight.

[4] The Respondent opposed the application on the grounds that:-

(a) The issue of the ill health and the Applicant being a flight risk were canvassed in the initial application.

(b) There is no medical evidence to prove that his medical condition is peculiar and cannot be accommodated within the available medical facility in the Correctional Services Institution.

(c) The matter is *functus officio* because it was decided upon by this court.

(d) There is proof that the matter is continuing in court.

(e) The investigating officer is still opposing the application for bail.

[5] In the light of the above mentioned legal arguments, the court holds the view that the bail should be refused on the grounds that it is *functus officio.* The Applicant should have taken the matter on appeal based on the principle that it cannot review its own decision. 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*** as he then was, observed in paragraph 5 that -

> *"Where the court makes specific findings refusing bail, it is not open to the same court in a subsequent bail application to review its own decision under the guise of new circumstances. The court becomes functus officio and the matter should be taken up on appeal. It is only the appeal court which can deal with the specific findings of the court a quo. On the other hand, it is open to the court of first instance to vary its own decision with regard to bail condition where bail was granted."*

[6] This court is in full agreement with the observations by the Supreme Court on the principle of *functus officio.*

[7] The other consideration this court has taken into account in refusing the grant of bail is the fact that Applicant has stated clearly that his matter is already proceeding in court. He has also alleged that the application for bail is no longer opposed by the investigating officer. This fact is disputed by the Crown.

[8] When the matter was argued by Applicant's Counsel, he indicated from the bar that there was a new fact that entitled the applicant to re-apply for bail. This new fact is alleged in paragraph 5 of the Founding Affidavit. This pertains to the health of the Applicant. The Respondent has responded to this by saying that this issue was canvassed in the initial application for bail which was refused. I have failed to find any support for the Respondent's contention in the judgement by His Lordship Hlophe J. referred to earlier on. Nevertheless, the Respondent has raised the issue that there is no medical evidence to prove that Applicant's health is at stake. I concur with Respondent's Counsel on this point.

[9] The wise words by **His Lordship M.C.B. Maphalala A.C.J,** as He then was**,** in the **Maxwell Mancoba Dlamini's** case (Supra) are worth noting. His Lordship said in paragraph 4 of His judgement-

> *"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*."

[10] It is this court's humble view that the issue of ill health cannot be a basis for granting bail as it is constituted on the same facts as it was in the initial application. It is a repetition of what was canvassed in the earlier application. In the case of **Sibusiso Bonginkosi Shongwe V Rex Appeal case 191 of 2015, His Lordship Maphalala M. C. B. A.C.J,** observed in paragraph 17 of His judgment 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 should be invoked in circumstances 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 therefore alter, correct or supplement its judgment."*

[11] The test is that the new facts or change of circumstances should only be invoked where bail has been granted and the purpose of the new facts or change of circumstances is meant to vary bail conditions. It cannot apply where an application seeks to re-open the case because of the new facts or change of circumstances.

[12] In the light of all that has been said above, this court dismisses the application and no order as to costs is made.

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FAKUDZE J.

JUDGE OF THE HIGH COURT

For: Applicant: M. Mbhamali

For Respondent: A. Makhanya