# IN THE HIGH COURT OF ESWATINI

**HELD AT MBABANE** **CASE NO. 02/2019**

In the matter between:

**SIBUSISO PATRICK SHONGWE** Applicant

And

**REX**
Respondent

**Neutral Citation:** *Sibusiso Patrick Shongwe v Rex (02/2019) [2020] SZHC 88 (07 May 2020)*

**CORAM:** **N.M. MASEKO J**

**FOR THE APPLICANT:** Mr A.C. Hlatshwako
**FOR THE RESPONDENT:** Mr M. Dlamini

**HEARD:** 22 April 2020
**DELIVERED:** 07 May 2020

## Preamble

*Criminal Law – Criminal Procedure – Applicant's bail application was dismissed by the Court on the basis that the Applicant has not discharged the onus bestowed upon him by Section 96 (12) (a) of the Criminal Procedure and Evidence Act which requires an Applicant to adduce evidence of the existence of exceptional circumstances justifying his release on bail – In this subsequent application, the Applicant has discharged such onus and proven through medical evidence that an old medical condition has since deteriorated to an extent that he requires urgent surgical operation – Principle of rei judicatae and functus officio dealt with in the cases quoted – exceptional circumstances having been found to be present, the Applicant is accordingly granted bail attended with strict reporting conditions.*

## JUDGMENT

[1] On the 27th March 2020, the Applicant launched motion proceedings on urgency for an order in the following terms:

1. Dispensing with and waiving the Rules of this Honourable Court relating to time limits, manner of service and hearing this matter as one of urgency.

2. Admitting the Applicant to bail on such terms and conditions as may in law be permissible and as such the Honourable Court may deem appropriate.

3. Further and/or alternative relief.

[2] The Applicant's Founding Affidavit is filed in support of this application.

[3] The Applicant states in his Founding Affidavit that on the 29th December 2018, he learnt of the death of his girlfriend from the Swazi News newspaper and that he was being wanted by the police in connection with the death of his girlfriend. As a reaction to these news, the Applicant made arrangements to hand himself to the police. He stated that he enlisted the assistance of Musa Kunene who together with his elder sister they accompanied him to the Nhlangano Police Station where he surrendered himself to the police.

[4] He states that he was thereafter charged with one count of murder and two counts of theft. He testifies that during the investigations he co-operated with the police and that he will plead not guilty during his trial.

[5] It is common cause that the Applicant remained incarcerated until he moved a bail application before my brother Maphanga J.

[6] Maphanga J, delivered his judgment on the 13th June 2019 and dismissed the bail application on the grounds that the Applicant had

failed to prove the existence of exceptional circumstances which in the interest of justice justify his release on bail.

[7] It is common cause that the Applicant thereafter filed an appeal before the Supreme Court. However, he later withdrew that appeal and re-launched this application alleging the existence of new exceptional circumstances as regards his old health status which has deteriorated as of the present.

[8] I must state at the outset that this judgment is not a review of the judgment delivered by my brother Maphanga J on the 13th June 2019. It is trite law that an accused can move another bail application before the same Court, though not before the same judge, if he/she can demonstrate that new circumstances exist justifying the Court to consider this new set of exceptional circumstances which are alleged by the accused to be present at this stage

[9] I must state that when a person files a subsequent bail application, it is not an unusual step, but it is a permissible procedure regard being had to the circumstances of each case, and importantly that, bail is a process in the criminal justice system designed to prevent prolonged

pre-trial incarceration of accused persons who by the nature or circumstances of each particular circumstances deserve to be admitted to bail pending their trial, unless of course, it can be shown that it would not be in the interest to do so.

[10] Further to that, bail is a remedy aimed at complimenting the legendary principle in criminal law that accused persons are innocent until proven guilty in a Court of law. The notion being that, the law recognises that no matter what the charges faced by the accused may be, he/she is entitled to be admitted to bail unless it can be shown in a variety of ways that his/her release on bail pending his/her trial would not be in the interest of justice.

[11] In *casu*, the Applicant is charged with a Schedule 5 offence of murder and is thus compelled to prove the existence of exceptional circumstances in terms of Section 96 (12) (a) of the Criminal Procedure and Evidence Act NO. 67/1938 as Amended which provides as follows:

> ***"96 (12) notwithstanding any provisions of this Act, where an accused is charged with an offence referred to –***
>
> ***(a) In the Fifth Schedule the Court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law,***

***unless the accused having been given a reasonable opportunity to do so adduces evidence which satisfies the Court that exceptional circumstances exist which in the interest of justice permit his or her release."***

[12] In his initial bail application the Applicant disclosed that he was suffering from a medical ailment in that he suffers from ulcers a condition he described as requiring a special diet.

[13] The Applicant did not disclose the ailment which he had now disclosed in his subsequent application. At a glance, this may create a misleading impression that he is shifting goal posts or fabricating this illness. It is only when you read paragraphs 13, 14, 14, 16, 17and 20 of his Founding Affidavit that a reasonable explanation is given why he never mentioned the ailment during the bail application before Maphanga J.

[14] This is what he says at para 13-15 and I quote:-

***"[13] My continued incarceration is prejudicial to me because I am employed as a police officer under the employ of the Government of Eswatini. I suffer from asthma and ulcers and I have really struggled to live with these conditions at the Correctional facility.***

***[14] Apart from my asthmatic condition and that brought about by ulcers from which I am suffering, I also have a rare sickness that attacks my genitals more especially my testicles. I have suffered from this ailment from way back as the year 2005. Thus, during the year 2007, although I cannot recall the exact date, I underwent a surgical operation at the Raleigh Fitkin Memorial Hospital in Manzini. Since then my condition got better with it only resurfacing in the year 2015. Luckily then, I was in gainful employment with the Royal Eswatini Police Service and I could afford to buy medication and consult traditional healers.***

***[15] I submit that on the 19th March 2020, I was supposed to undergo yet another surgical operation at the Mbabane Government Hospital but the appointment fell through on the eleventh hour. I was informed by one Ncamisile Mazibuko who is an inspector at the Mbabane Correctional facility wherein I am kept, that the surgical equipment was out of order hence I could not be taken in for the operation on the 19th March 2020 as aforesaid.***

***[16] I really suffer immense pain as the condition referred to ante is worsening by the day. As aforesaid, I could only mitigate the pain and the consequences of the condition through traditional medicine. At the Correctional facility, I can no longer access the traditional healers as I freely could when I was enjoying my freedom.***

***[17] Currently I am in the dark as to when the equipment at the Government Hospital is likely to be back in order as all other affected persons do not know either.***

***[20] The conditions at the Correctional facility do not have the capacity to mitigate the pain that I currently am going through as a result of this ailment. The conditions***

***ranging from the diet to sleeping arrangements is not at all conducive to a sickly person. I have remained incarcerated since December 2018 to date and this is no means an exaggeration"***

[15] This application is vigorously opposed by the Crown and has raised a point *in limine* that, this Court is *functus officio* because the same Court dismissed Applicant's initial bail application on the 13th June 2019, therefore this Court cannot review its own decision.

[16] During submissions, Mr Dlamini for the Crown submitted that the Applicant was abusing the process of this Court, in that, whilst knowing that this ailment dates back to 2008, he never disclosed that during his initial bail application before Maphanga J. Further that this therefore does not constitute new evidence of the existence of new circumstances justifying the release of the accused person on bail.

[17] On the counter, Mr AC Hlatshwako submitted that the submissions by the Crown does not have merit, because the Applicant explained that the ailment on his testicles dates back to 2005 and that in 2007, he was operated at the Raleigh Fitkin Memorial Hospital. Applicant states further that he had been treating this ailment ever since. He explains

further that after the operation, the ailment got better and later resurfaced in 2015. He says, when it resurfaced in 2015, he was now in gainful employment with the Royal Eswatini Police Service and was able to obtain medication and also consult traditional healers.

[18] It is unfair to allege that an accused who is in custody is abusing the process of the Court, when the law permits that a subsequent bail application can be filed if new circumstances have arisen while may justify his release on bail.

[19] In *casu*, the Applicant has explained the history of his ailment, and it was confirmed by Dr Jeff Mulume Ngoie in his medical report that he examined the Applicant at Nhlangano Correctional Facility on the 12th September 2019. Dr Ngoie testified further that, owing to the seriousness of the ailment, he referred him to the Raleigh Fitkin Memorial Hospital in Manzini whereupon there was no improvement, and upon conducting another examination on the Applicant, he then referred him to the Mbabane Government Hospital because it was a serious condition requiring a specialist medical practitioner.

[20] Dr Ngoie explained in detail the level and degree of care generally available in the medical profession. He illustrated that it has four categories namely:

1. attendance by Paramedics;
2. attendance by Nurses;
3. attendance by General Practitioners, popularly known as GPs; and;
4. attendance by Specialist practitioners.

[21] He testified that he is a General Practitioner, hence the seriousness of the Applicant's sickness was above his capabilities and thus referred him to the Mbabane Government Hospital to be attended by a Specialist Medical Practitioner.

[22] The Applicant himself testified that owing to the seriousness of his ailment he was due for another surgical operation at Mbabane Government Hospital on the 20th March 2020, however that could not happen due to the fact that the surgical equipment was out of order. He testified further that he is currently being treated at Mbabane Government Hospital.

[23] It is beyond doubt that these circumstances as described by Dr Ngoie are all events that occurred after the 13th June 2019, this being the delivery of the first judgment. There is no way by which the Applicant would have fabricated his illness. Dr Ngoie testified that one of his testicles is swollen and that the Applicant complains of pain. It is true that the Correctional Services have medical facilities and competent medical practitioners, but as Dr Ngoie testified, the ailment of the Applicant currently requires a specialist medical practitioner owing to its seriousness.

[24] It is common cause that an ailment can be cured only to resurface at a later point in time. This is the case in *casu*. It is difficult therefore how this Court is expected to disregard a serious medical condition which has been confirmed by a medical practitioner of the Correctional Services institution. Dr Ngoie is not in private practice nor is he referring the Applicant to a private health facility. He has referred the Applicant to a Government Hospital (Mbabane) which has the requisite specialist practitioners and equipment to deal with Applicant's ailment because such facilities are not available at the Correctional Services.

[25] It is also common cause that Maphanga J never dealt with this issue because it was never raised with him. The Applicant explained that

when the ailment resurfaced in 2015 he was in gainful employment and could afford western medication and traditional medication, however, the situation is different now as he is in custody and does not have freedom of movement to solicit for medical help at his free will.

[26] In the case of **MAXWELL MANCOBA DLAMINI v REX CRIMINAL APPEAL CASE NO. 46/2014 MCB Maphalala ACJ** (as he then was) sitting with JP Annandale AJA (as he then was) and R Cloete AJA (as he then was) both concurring, stated as follows at paragraphs 4-5 pages 3-4 of the judgment:-

> ***"[4] 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 the Court process. A subsequent bail application should be premised on new circumstances which did not exist when the first application was made.***
>
> ***[5] 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 on appeal. It is only the Court of Appeal which could deal with specific findings of the Court a quo. On the other hand it is open to the Court of first instance to vary its decision with regard to bail conditions where bail was granted."***

[27] In *casu*, the ailment of the Applicant dates back to 2007 when he had his first surgical operation at the Raleigh Fitkin Memorial Hospital. The ailment is proven by the evidence of Dr Ngoie who attended to the Applicant at Correctional Services Nhlangano. It must be emphasised that the nature of the sickness of the Applicant and how it resurfaced after the 13th June 2019 qualifies it to be treated as an exceptional circumstance. The fact that it was not disclosed during the proceedings before my brother Maphanga J does not diminish its status of being an exceptional circumstance, because it is a medical condition that is there, and have been proven by the Applicant. The case of Maxwell Dlamini (supra) does not discriminate against what I would call **"continuous sickness conditions"** which may manifest into a worse condition in the future as not being a condition that qualifies to be an exceptional circumstance within the ambit of Section 96 (12) (a) of the Act.

[28] It would not amount to an abuse of the Court process, where the Applicant who has been refused bail by this Court because he has not established exceptional circumstances, for him to file a subsequent bail application using the seriousness or severity of a medical condition, which was not severe at the time when he moved the initial bail application, as the Applicant has done. The test should rather be whether such illness is genuine or not and whether it has been proven

by medical evidence as it is the position in *casu*. There is no way by which an accused can hide an ailment which is troubling him. It is a fact that when he moved the initial bail application he did not disclose this ailment because at the time it had not developed into a worse condition as it has done now, and confirmed by medical evidence. It becomes difficult how then an Applicant in this position can be deemed to be abusing the process of the Court, and allegations be made also that this medical condition does not amount to **"new circumstances with did not exist when the first application was made."**

[29] It is trite law that each case must be decided on its own circumstances. In *casu*, the circumstances are a serious medical condition that has been confirmed by medical evidence. The fact that the Applicant has been sick for some time and did not disclose the sickness when he moved his first bail application because the condition was better, should not be an obstacle to be used as he had filed this subsequent bail application and has proven his medical condition. The objection by the Crown seems to be more procedural than substantial and/or factual. Even then the Applicant has complied with the procedure because he has not pleaded the same facts as which he pleaded before my brother Maphanga J. Factually, and/or substantially, he has proven his illness beyond a reasonable doubt through medical evidence as he is currently receiving specialist treatment at Mbabane

Government Hospital. Otherwise it is trite that the standard of proof of existence of exceptional circumstances is **on a balance of probabilities**. In *casu* he has exceeded that standard to one of beyond reasonable doubt.

[30] The case in *casu* is similar to the case of **SELBY MUSA TFWALA v REX CRIMINAL CASE NO. 383/2012** where **MCB Maphalala J** (as he then was) dealing with similar circumstances stated as follows at paragraphs 6, 7 and 8 pages 4-5, and I quote:-

> ***'[6] It is apparent from the evidence that the Crown does not dispute or challenge the medical report or the fact that the applicant suffers from a terminal illness. Furthermore, the Crown does not dispute the evidence of the Applicant's living conditions at the Remand Centre as not being suitable for a person suffering from such an illness; and, that such living conditions are likely to worsen the health condition of the Applicant.***
>
> ***[7] It is well settled that the "exceptio rei judicatae" is subject to specific exceptions and that it is not absolute. See the case of CUSTOM CREDIT CORPORATION (PTY) LTD v SHEMBE 1972 (3) SA 462 as well as JOHANNES NKWANYANE v THE ACCOUNTANT GENERAL CIVIL APPEAL NO. 14/2005 at para 14. One of these exceptions is where new evidence has been found which was in advertently omitted and not considered in the previous hearing. There is no doubt that the medical report constitutes new evidence which was not presented to the Court when the matter was first heard. The exceptio rei***

***judicatae cannot operate in a matter where subsequent to the first judgment now circumstances have arisen which have a bearing to a just and determination of the matter.*** (my emphasis)

***[8] In the Supreme Court case <u>of WONDER DLAMINI AND LUCKY SANDILE DLAMINI CRIMINAL APPEAL NO.1/2013</u>, I had this to say at para 7, 8 and 9;***

> ***"In defining exceptional circumstances Magid AJA, in <u>SENZO MENZI MOTSA v REX APPEAL CASE NO. 15/2009</u> states as follows at paragraph 11:-***
>
> ***In my judgment, the word, exceptional in relation to bail must mean something more than merely "unusual" but rather less than unique which means in effect "one of a kind."***
>
> ***Section 96 (12) (a) makes it clear that an applicant for bail in respect of a Schedule Five offence bears a formal onus to satisfy the Court that exceptional circumstances exist which in the interest of justice permit his release; the applicant discharges the onus by adducing the requisite evidence failing which his detention in custody continues pending finalisation of the trial. <u>Admittedly, the onus has to be discharged on a balance of probabilities.</u>***
>
> ***The offences listed in the Fifth Schedule consist of serious and violent offences, and, which upon conviction are accompanied by severe penalties. It is apparent that when Parliament enacted this law, the purpose was to render the granting of bail in respect of these offences most stringent and difficult to obtain by placing the onus on the accused to adduce evidence showing the existence of exceptional circumstances. The legislation seeks***

***to protect law-abiding citizens against the upsurge in violent criminal activity. The legislation does not deprive the Courts of their discretion in determining bail applications in respect of the Fifth Schedule offences but it requires evidence to be adduced showing the existence of exceptional circumstances. It further places the onus of proof upon the applicant ----"'*** (my emphasis)

[31] At paragraph 10, His Lordship continues to state and I quote:-

***"[10] Admittedly Section 96 (12 (a) of the Act renders the granting of bail in respect of offences listed in the Fifth Schedule most stringent and difficult to obtain by placing the onus on the accused to adduce evidence showing the existence of exceptional circumstances. <u>However, the Court retains a discretion to consider the circumstances of each case whether or not the applicant has discharged the onus required by the Act. The retention of the Court's discretion in this regard affords flexibility that diminishes the overall impact of the harsh and stringent nature of the requisite onus".</u>*** (my emphasis)

[32] At paragraph 11, His Lordship states as follows and I quote:-

***'[11] The Criminal Procedure and Evidence Act NO. 67/1938 as amended, does not define what constitutes exceptional circumstances. The definition of Magid AJA in <u>SENZO MENZI MOTSA v REX (supra) at para 11</u> means something***

***more than merely unusual but rather less than unique which means in effect one of a kind. In the <u>WONDER DLAMINI Case (supra) in para 15</u>, the Supreme Court adopted a definition made by Horn JA in <u>S v JONAS 1998 (12) SA SACR 667</u> where the Learned Judge said:***

> ***"<u>The term exceptional circumstances is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances…"'</u>*** (my emphasis)

[33] The Applicant states at paragraph 20 of his Founding Affidavit that:-

> ***"[20] The conditions at the Correctional facility do not have the capacity to mitigate the pain that I currently am going through as a result of his ailment. The conditions ranging from diet to the sleeping arrangements, is not at all conducive to a sickly person. I have remained incarcerated since December 2018 to date ----"***

[34] As stated above, the Selby Musa Thwala case *(supra)* is a classic precedent for the case in *casu* because of its similar circumstances. His Lordship MCB Maphalala J (as he then was) comprehensively addressed the issue of exceptional circumstances at length and supported his reasoning with legal precedent in this jurisdiction and in

the Republic of South Africa. His Lordship also dealt with exceptional circumstances which may have been inadvertently omitted in the first bail application. This is the case in *casu*. The fact that the Applicant's medical condition should have been mentioned in the first bail application and was not, falls squarely within those facts that are classified as **"inadvertently omitted"**. It could be due to a number of reasons, but the one advanced by the Applicant is that at the time when he moved the initial bail application, the condition had not taken this worse turn. He cannot be faulted therefore for the deterioration of his medical condition after the 13th June 2019. It could well be that the unfavourable conditions at Correctional Services resulted in his condition deteriorating as he has himself testified that the sleeping arrangements are not conducive and that the health facilities are not adequate to deal with his deteriorating illness, hence Dr Ngoie saw it fit, and prudent so, to refer him to specialist medical care and to a better equipped health facility in the form of Mbabane Government Hospital.

[35] His Lordship MCB Maphalala J (as he then was) in the Selby Tfwala case (supra) emphasises the notion that exceptional circumstances are wide in nature and can never be defined as each case is dealt with on its circumstances. His Lordship observed further that it is not only terminal illnesses only that may be accepted by a Court as exceptional

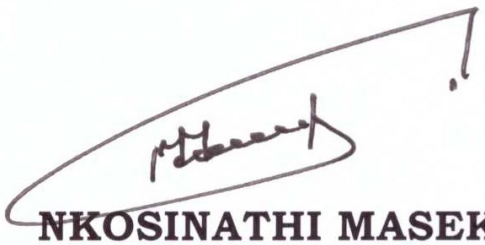
circumstances, but even a serious medical operation necessitating the Accused's absence is one that springs to mind. In *casu,* even though the medical condition is one that is not classified as terminal, but it is a serious medical condition which has been confirmed by Dr Ngoie's testimony as dealt with herein above.

[36] In the circumstances, it is my considered view that the Applicant had discharged the onus as per Section 96 (12) (a) of the Act, and that exceptional circumstances exist that justify his release on bail pending his trial.

[37] Consequently, I hand down the following order:-

1. Applicant is admitted to bail on the terms and conditions as contained in the Bail Recognisance Form.
2. The Bail Recognisance Form is hereby declared an order of this Court.
3. The Applicant's reporting condition is to be stringent and to be at a fortnightly interval in order to monitor his presence.

So ordered.



**NKOSINATHI MASEKO**
**JUDGE OF THE HIGH COURT**