

**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO: 155/2022**

In the matter between: .

**BONGIJMIISA GOODMAN MTHEMBIJ**

**APPLICANT**

And

**REX**

**RESPONDENT**

Neutral citation

*Bongani Goodman Mthemhu v The King*  
(155/2022) [2022] SZHC' I 09 (02/06/2022)

**CORAM:**

**B.S. DLA MINI J**

**DATE HEARD:**

20 May 2022

**DATE DELIVERED**

02 June 2022

**Summary:**

*An application to be admitted to bail. Applicant initially charged with Arson and later charged with Contravening Section 5 (J) of the Suppression of Terrorism Act No.5 of 2008 as read with Section 2 (a) to (e) of the Act. Requirements to be considered by Court in deciding whether or not to admit Applicant to bail.*

**Held;**

*The pleadings filed in Court and the arguments presented in Court by the respective Attorneys demonstrate the existence of material disputes of fact which cannot be resolved on the papers. The established requirements for the granting or refusal of bail must be informed by the peculiar facts of each and every case that comes before Court.*

**Held further;**

*The matter requires oral evidence to be led for a determination of the disputed issues.*

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**JUDGMENT**

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## **INTRODUCTION**

- [1] The Applicant is Bongumusa Kenneth Mthembu, an adult Liswati male of Lavumisa area, District of Shiselweni.
- [2] The Applicant was arrested by members of the Royal Eswatini Police on the 2<sup>nd</sup> 11 May 2022 on allegations of having committed the common law offence of Arson.
- [3] On the 29<sup>th</sup> April 2022, the Applicant appeared at the Magistrates' Court in the Shiselweni District where he was remanded in custody till the 25<sup>th</sup> May 2022.
- [4] On the 3<sup>rd</sup> May 2022, the Applicant filed an application under a certificate of urgency and essentially sought to be admitted to bail as he alleged was innocent of the charge alleged against him.
- [5] Prior to the hearing of the application for bail by the Applicant, the charge of arson was either amended or substituted with the offence of

Contravening Section 5 ( 1) of the Suppression of Terrorism Act No.5 of 2008.

**SUBMISSIONS BY RESPECTIVE PARTIES**

[6] It is alleged in the Founding Affidavit by the Applicant that he is innocent of the charge preferred against him by the Crown. The Applicant motivates his quest for liberation, albeit through the bail mechanism, as follows in the Founding Affidavit;

*"11. I submit that I will plead not guilty to the charge I am held for.*

*12. I have a valid and bona fide defence to the charges it is alleged I committed.*

*13. I submit that I was nowhere near the crime of scene on the day.*

*14. I was peacefully asleep at my aunt's place.*

*15. I submit that I was at home and I only learnt of the incident the following morning when the community was talking about it."*

[7] The Applicant further states in his affidavit that his incarceration could lead to him losing his job and that his minor and school going

children could be left with no one to look after them if he is continuously kept in custody. The Applicant alleges that he is married to a young wife who could be tempted to leave him if he is absent in their lives.

[8] The Respondent on the other hand, disputes the averments made by the Applicant. In the Answering Affidavit, it is stated by the Respondent that;

**"JO. AD PARAGRAPH 12**

*Contents of this paragraph are denied. It is denied that there is a valid and bona fide defence. We have sufficient evidence against 2<sup>nd</sup> Applicant. He was one of the leaders who forced entry at the Inkhundla gate by breaking the padlock using an axe so that all the crowd could gain entry into the Inkhundla. His allegations of alibi are false. Further there is other evidence from eye witnesses who saw the 2<sup>nd</sup> Applicant partaking in the commission of the crime.*

### **11. AD PARA GRAPHS 13-15**

*Contents of these paragraphs are denied I reiterate the contents of the above paragraph /2 /vie} that 2<sup>nd</sup> Applicant was part of the crowd that burnt down the Jnkhund!a and all the property that was inside it. "*

[9] The factual narrative of the respective parties in the present matter differs significantly. This effectively means the Court must dig deeper in trying to ascertain the factors for consideration in bail proceedings.

### **ANALYSIS AND CONCLUSION**

[10] In an application for bail, the primary consideration is whether or not the interests of justice will be served by either admitting the Applicant to bail or by keeping him in custody pending trial. In **Gumedze and Others v Director of Public Prosecutions (135 of 2004) [2005] SZHC 17 (17 February 2005)**, it was held by the Court that;

**"(5) The whole issue turns on what is in the best interest of justice to grant bail to an accused who will not stand trial or who might otherwise abuse his liberty pending verdict, for example, by intimidating State witnesses. However, it must be appreciated that**

it is also not in the best interest of justice to refuse bail to an accused who will stand his trial and who will not interfere with the administration of justice,"

[11] In Section 96 (4) of the Criminal Procedure and Evidence Act

No.67 of 1938, it is provided that;

"The refusal to grant bail and the detention of an accused in custody shall be in the interest of justice where one or more of the following grounds are established-

(a) Where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or

(b) Where there is a likelihood that the accused, if released on bail may likely evade trial;

(c) Where there is a likelihood that the accused if released on bail may attempt to influence or intimidate witnesses or to conceal or destroy evidence;

(d) Where there is a likelihood that the accused if released on bail may undermine or jeopardize the objectives or the proper

functioning of the criminal justice system, including the bail system; or

(e) Where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine public peace or security."

[12] In *Senzo Matsenjwa v The King* (30/2017) [2018] SZSC 45 (06/11/2018), it was held by the Supreme Court that;

"[19] In dealing with the interest of justice, the enquiry is whether it is in the interest of justice to release the accused person on bail or not. This in turn is dealt with by enquiring as to whether the accused person is likely to flee the jurisdiction or not and whether the accused person is likely or unlikely to interfere with the witnesses and/or evidence in the matter. The Court exercises its discretionary powers in granting or denying bail."

[13] In another case of the *Director of Public Prosecutions v Bhekwakho Meshack Dlamini and Others* (478/2015) (2016) SZSC 40 (30<sup>th</sup> June 2016), it was held by our apex Court that;

"14. The accused bears the onus to establish on a balance of probabilities that it is in the interest of justice that he should be



**released on bail. \1/here the accused is charged with an offence listed in the Fifth Schedule of the Criminal Procedure and Evidence Act, the accused should in addition adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release."**

[14] Although it is a settled principle that in proceedings for bail, the Court is not concerned with the question of determining the guilt or otherwise of an accused person, still the question of whether the accused person will not (a) abscond; (b) interfere with the Crown's witnesses and, (c) interfere with the administration of law and order is a factual enquiry that calls upon the Court to fully apply itself to the facts, particularly in instances where the Applicant and the Crown are not in agreement. On the circumstances leading to the commission of the offence.

[15] If, by way of example, the Applicant alleges on affidavit that he will not interfere with the Crown witnesses or that he will not abscond and the Crown, on the other hand, in its Answering Affidavit disputes these allegations, how else can the Court resolve these disputes other than by calling for oral evidence?

[16] It appears to be unavoidable that the bail application made on behalf of the Applicant must be referred to oral evidence in order to resolve the differences held by the parties.

[17] On a separate note, the Applicant's Attorney submitted that the manner of amending and/or substituting the initial charge of Arson with that of Contravening Section 5 (I) of the Suppression of Terrorism Act was unlawful and improper in that;

(a) The Applicant was remanded in custody and is still in custody on the strength of a remand warrant from the Nhlengano Magistrate Court based on the Arson charge.

(b) The offence of Arson preferred against the Applicant has not been withdrawn but instead the Crown served the new charge on him (Attorney) which was irregular and improper.

[ 18] The Applicant's attorney also forcefully argued that the incarceration of the Applicant is unlawful as he was remanded in custody by the Magistrates' Court on the 29<sup>th</sup> April 2022 to the 25<sup>th</sup> May 2022. This,

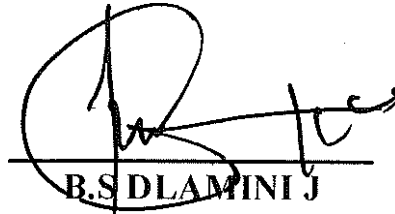
according to the Applicant's attorney is unlawful as the Applicant should have been remanded in custody for not more than seven (7) days.

[19] The Applicant's attorney may or may not be correct in his submissions. Those issues, in the Court's view, can properly be addressed in defence to the charge during the trial. The Court will for now, align itself with the submissions by the respective parties being that at this stage, the Court should consider the bail application serving before it either on the basis of the Arson charge or the charge of Contravening Section 5 (I) of the Suppression of Terrorism Act

[20] In the circumstances, the Court comes to the conclusion that the Applicant's application for bail is fraught with disputes of fact which cannot be resolved on the pleadings and it is accordingly ordered that;

**(a) The Applicant's application for bail is referred to oral evidence.**

**(b) The Applicant's application for bail is to take priority over other matters allocated for trial.**



**B.S DLAMINI J**

**THE HIGH COURT OF ESWATINI**

*For Applicant:* Mr. M. Nkambule (Nkambule Attorney,1)

*For Respondent:* Mr. A. Nxumalo (D.P.'s Chamber,1)