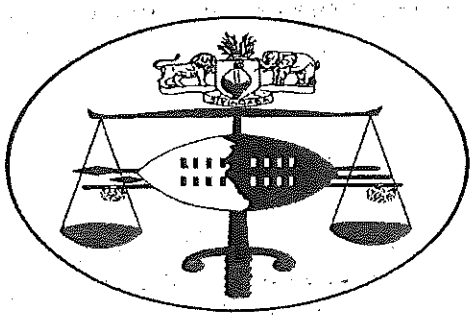

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 2470/2022**

In Matter between:

BONGINKOSI INNOCENT DLAMINI **APPLICANT**

And

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

Neutral citation: *Bonginkosi Innocent Dlamini v The Director of Public Prosecutions (448/2022) SZHC 16 [2022] (06 February 2023)*

CORUM: Z. Magagula J

Dates heard: 31.01.23

Date delivered: 06.02.23

Summary: *Criminal Procedure – Application to be admitted to bail – Provision of Section 96 (4) (b) and (d) of Criminal Procedure and Evidence Act considered - that it would not be in the interest of Justice to admit applicant to bail - Applicant is currently on bail on a charge of murder - Applicant is likely to evade trial, application for bail dismissed.*

JUDGMENT

[1] The applicant, Bongumusa Innocent Dlamini has made application to this court to be admitted to bail. In his founding affidavit, the applicant averred that he was arrested by members of the Royal Eswatini Police based at the Manzini Police station on the 1st day of December 2022 and charged with the offence of attempted murder. It being alleged that on or about the 5th August 2022 and at or near Fairview Barrika bottle store, in the Manzini District, the applicant wrongfully, unlawfully and intentionally attempted to kill one Sihle Gama by stabbing him with a home-made knife several times on the head. The applicant's application is opposed by the Crown.

APPLICANT'S CASE

[2] The applicant submitted that the complainant, Sihle Gama who was friend, made some funny comment which applicant did not appreciate and a fight ensued. He averred that they have since *"smocked the peace pipe"* with the complaint. The applicant said soon after the incident with the complainant, he had to travel to Lavumisa, Shiselweni Region to undergo a cleansing in ritual to rid himself of all traces of criminality following the stabbing of the complainant.

[3] The applicant acknowledge that, seen from an incorrect perspective, his travelling to Lavumisa may be misconstrued as evading arrest yet nothing could be further from the truth. In fact, applicant averred, he wanted to arrange with the Police to convene a meeting with the complainant where the " proverbial peace pipe may be smoked". However, he was eventually able to achieve this on his own.

[4] Applicant further averred that he was arrested just after he got to know that the Police were looking for him in connection with the offence. He was about to hand himself over to the Police. He stated that after his arrest he co operated with the police and assisted with their investigations. The applicant averred that he was entitled to be admitted to bail as the presumption of innocence operated in his favour. He indicated that he would plead not guilty at his trial because he was warding off an attack against his person. He argued that he was "suffering" from compromised eyesight as his left eye was blind following an accident he had earlier. The applicant complained about the living conditions at the correctional facility and argued that they were not conducive , particularly to one who is presumed innocent. He stated that the sleeping arrangements were not to his liking as he slept on a mat.

[5] It was applicant's further averment that there were exceptional circumstances that warranted his release from custody. He argued that he may miss his appointment with the eye specialist at the Mbabane Government Hospital where he was to be fitted with an artificial eye. The operation had been scheduled for the 19th December 2022.

[6] Applicant averred that he was suffering from a "rash" that had afflicted his entire body for which he had been receiving treatment. It was his desire to consult with a dermatologist as the rash was not responding to the treatment as fast as he would have liked. Applicant stated that he had two children, for whose maintenance he was responsible plus two other children left in his care by his late brother.

CROWN'S CASE

[7] The Crown's opposing affidavit was deposed to by 6363 Detective Constable M.Hlatshwako who is the investigating officer in the matter. Detective Hlatshwako stated that to his knowledge the complainant was keen to have the matter prosecuted, he is the one who assisted the Police in locating and apprehending the applicant who had evaded arrest for eight (8) months.

[8] He explained that his investigation led him to applicant's elder brother who advised him that the applicant had relocated to the Republic of South Africa soon after the commission of the offence.

He said even after his arrest the applicant failed to co-operate with the police to the extent that he refused to produce the knife used in the commission of the offence.

[9] Detective Hlatshwako stated further that the applicant's eye condition was not new. He had suffered an the injury back in 2017 in a bar fight and same officer was the investigating the case. Officer Hlatshwako pointed out that applicant was currently out on bail pending trial at the High Court on a charge of murder. That applicant had failed to comply with the bail conditions in the earlier matter because he was no longer reporting to the Police periodically to the extent that he could not be served with notices requiring him to attend pre-trial conference. Finally officer Hlatshwako argued that it would not be in the interest of Justice that applicant be admitted to bail.

[10] It is settled law in this jurisdiction that in a bail application the enquiry is not really concerned with the question of guilt – that is the task of of the trial court. The court hearing, the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interest of justice lie in regard to bail. The focus at the bail stage is to whether the interests of justice permit the release of the accused pending trial. See **T.L Dlamini J. in Sifiso Mathayi Gamedze v Rex [272/2016] SZHC 75 (2017) 20 April 2017**.

[11] I agree with the submission by the applicant's Counsel that bail is a right enshired in the constitution. Section 16 (7) of the constitution of Eswatini Act 2005 reads;

> *"[7] If a person is arrested or detained as mentioned in sub section (3) (b) then without prejudice to any further proceeding that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that the person appears at a later date for trial or for proceedings preliminary to trial"*

[12] This position was affirmed by the Supreme Court in **Maxwell Manqoba Dlamini and Mario Masuku v Rex [46/2014] SZSC 09 [**

July 2015] where it was held, that personal liberty is a right entrenched in the constitution and that the accused is entitled to be released on bail unless doing so would prejudice the interest of justice.

[13] Section 96 (4) of the Criminal Procedure and Evidence Act 67/1938 provides that it shall in the interests of justice to refuse bail where a number of listed grounds are established. Among those grounds, are the following;

> *96 (4) (b)* *" where there is a likelihood that the accused, if released on bail, may attempt to evade trial;*
>
> *(c)* ...
>
> *(d)* *Where there is a likehood that the accused, if released on bail may, undermine or jeopardise the objective or the proper functioning of the Criminal Justice system, including the bail system"*

[14] In considering whether the ground in (b) above has been established, the court needs to look at the time lapse between the commission of the offence and the arrest of the applicant. By his own admission the applicant immediately left for Lavumisa after the stabbing of the complainant to perform some cleansing ritual and he does not explain how long the ritual took and / or why he did not hand himself over to the authorities upon his return or why it was more important to perform a ritual than to deal with such important legal issues. This clearly demonstrates that the applicant did not intend to surrender himself and consequently if admitted to bail the likelihood that he will evade or attempt to evade trial is great. The court could not rule out the real possibility of the applicant having fled to South Africa as averred by Detective Hlatswako.

[15] The applicant was out on bail for the offence of murder allegedly committed in 2019 at the time of the commission of the offence in issue in these proceedings. Granted that he has not been convicted of the previous charges, but in exercising its discretion, the court

ought to ensure that the administration of justice and in particular the bail system are not undermined or jeopardised.

[16] It would clearly not be in the interest of justice for the court to grant bail to an applicant who while out on bail for a serious offence commits another violent and serious offence. This would diminish society's confidence in the court and the Criminal Justice system. The ground in **Section 96 (4) (d)** has clearly been established.

[17] I need mention one other factor that was raised by the applicant in his replying affidavit and by his counsel in arguments. The applicant argued that the answering affidavit ought not to be considered because it was largely hearsay.

[18] Detective constable Hlatshwako stated that he was informed by the applicant's brother that applicant relocated to the Republic of South Africa soon after the Commission of the offence – he then stated that if bail is granted to applicant he will evade trial. While a bail application is intended to be a formal court procedure, in practical terms, it is less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence.

[19] The applicant is now facing two very serious charges, the earlier murder charge for which he was admitted to bail and the current charge of attempted murder. By his own admission the applicant did stab the complainant and makes the Crown's case against him very strong. He has every motivation to evade trial considering the likely sentence should be found guilty.

[20] I find that the basis of officer Hlatswako's belief that applicant relocated to South Africa is sound. It may well be a different take at trial, but for purposes of a bail hearing, I cannot find much fault with it.

[21] For the reasons set out herein above, the application for bail is refused.

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Z.Magagula
Judge of the High Court

Appearances:

A.C Hlatshwako for Applicant

M.Mbingo for the Crown