IN THE HIGH COURT OF ESWATINI

CASE NO. 232/2023

HELD AT MBABANE
In the matter between:

SIBUSISO DIDA DLAMINI **APPLICANT**

And

THE KING **RESPONDENT**

NEUTRAL CITATION: *SIBUSISO DIDA DLAMINI VS THE KING (232/2023) [2023] SZHC – 201 (02/08/2023)*

CORAM: **B W MAGAGULA J**

HEARD: **22/06/2023**

DELIVERED: **02/08/2023**

SUMMARY: *Bail application – principles of bail considered – Section 96 (4) of the Criminal Procedure and Evidence Act 67 of 1938 lists grounds on which the courts can deny bail. Accused disappeared for 13 days after the incident that led to the death of the deceased.*

HELD: *Applicant has failed to discharge the burden that the interests of justice will not be prejudiced by his release on bail.*

HELD FURTHER: *Application dismissed.*

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

[1] The Applicant stands charged with the offence of Murder.

[2] The Applicant filed a bail application on the 03rd April 2023 having been arrested by the police on the 18th February 2023. The office of the Director of Public Prosecutions is opposed to the granting of bail. Hence the filing of an opposing affidavit. It is deposed to by 6470 Detective Constable Zama Mthethwa, in her capacity as the principal investigator in the case.

[3] The Applicant filed his replying affidavit on the 14th April 2023 and matter was set for hearing on the 26th April 2023[1].

[4] In bail applications the onus is on the Applicant to satisfy the Court that he is entitled to be released on bail.

Applicant's Case Before Court

[5] Applicant states that he is firmly rooted in the Kingdom of Eswatini and has no family ties in any jurisdiction. He has two children and fiancé. He has further undertaken to live with his mother in Msunduza, Mbabane. He further argues that someone who is married and has a family is considered differently to somebody who is single and has no attachment to a place other than where he was born or resides. Applicant alleges that he is a family man and has a strong attachment to this jurisdiction. The Court is implored that it may impose conditions on his bail, to ensure he does not evade trial.

[6] In his founding affidavit[2], the Applicant also state that he handed himself over to the Lomahasha Police Station on the 18th February 2023. He was then taken by the Lomahasha Police to Pigg's Peak Police Station. That is where he was arrested on the same date. Ever since his arrest he has been in custody. He now seeks to be admitted to bail pending the hearing of his matter.

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[1] See Musa Waga Kunene vs Rex. Criminal Appeal Case No. 74/2017 at paragraph 10

[2] Reference is made to paragraph 5.

[7] The Applicant has further motivated his application for bail, by stating the following:-

7.1 It will take a long time for his matter to be finalized as the High Court is facing a backlog of cases. His own matter has not as of yet been set for trial.

7.2 He will plead not guilty to the charge of murder that he is facing on the ground of self defence as the deceased was killed in the process of warding the attack from the deceased. He alleges that his life was in imminent danger.

7.3 He was unaware that the deceased had died, because he was also injured as he fractured his arm after the fight. He crawled and left the deceased whilst he was still alive. He went to hospital to seek help in respect of his fractured arm.

7.4 He did not have any intention to kill the deceased, he only acted in self defence.

7.5 He is innocent until proven otherwise by a competent court.

7.6 He has not yet been provided with a list of witnesses to be paraded by the Crown during the trial. As such it cannot be said that he will interfere with them.

7.7 He has highlighted the exceptional circumstances as being a father of two minor children, who wholly depend on him for support. The existence of a fiancée who is not in formal employment. The Applicant has also stated that he is unemployed and depends on manual work as well as seasonal employment as a cane cutter.

7.8 He suffered serious injuries during the fight with the deceased, to the extent that he has not yet been taken to any medical facility. He only uses a sling to hold his arm.

THE CROWN'S CASE

[8] The Crown is opposed to the Applicant being granted bail. The following reasons have been advanced:-

8.1 There is likelihood that the Applicant will escape and evade trial.

8.2 In bail applications, the onus is on the Applicant to satisfy the Court that he is entitled to be released on bail.

8.3 Applicant is likely to endanger the safety of the public, as he attacked a defenseless old man who was also his uncle at this own homestead.

8.4 The Applicant is alleged to have gone to the deceased's homestead with the aim of erecting his own house there, yet it was not his land but his uncle's. He attacked the deceased while he was inside the house as evidenced by the broken door, which shows forced entry into the house and also a broken window pane.

8.5 The deceased was defenseless such that at the scene, there were scattered pans, pots and cutlery which emanated from inside the house. This demonstrates that someone must have been throwing those items to a person on the outside as a means of defence.

8.6 The Applicant exhibited a high degree of violence when committing the offence with which he is charged. This is because he went to the deceased's place of residence to fight him, when he well knew that the deceased resided there alone and had no one to assist him.

8.7 The Applicant habours hatred against the deceased's family. Hence, it is likely that once released on bail, he will continue where he left off demanding to erect his house at deceased's place, knowing fully well that it does not belong to him.

8.8 Applicant left the deceased knowing fully well that he had died, which is why he then called his sister in law and notified her to check on the deceased as they had a fight. He did not render any assistance to the deceased knowing very well that he had been injured. The Court is urged to consider the prevalence of this

particular type of crime, where people are being murdered for the land they possess.

8.9 The Applicant is likely to evade his trial once granted bail. This is because of the porous nature of the boarders to neighboring countries. Some of the countries like Mozambique have no bilateral extradition treaties with Eswatini. Even those with an extradition treaty like South Africa, the exercise of bringing the Applicant back to face trial is onerous.

8.10 After the Applicant had committed the offence, he evaded arrest by the police. He went to the neighbouring Republic of South Africa, through informal crossing points. He then came back later to reside at Ntsanjeni area in a shack, where he has dagga fields.

8.11 The Applicant does not have any emotional, family or occupational ties to this court's jurisdiction. He is also not a family man, as he not married. In as much as he has a mother of his children, she is resident at her parental homestead in Lomahasha. The Applicant resides in the mountains where he tends to his dagga fields. The deceased was his uncle by virtue of the fact that he was a brother to the Applicant's father. As such, the uncle's homestead cannot be said to be his homestead. The Applicant is likely to skip the country and leave the mother of his children to fend for herself and the children, as she always does. He can easily forfeit any bail amount the court may fix in the event of being granted bail.

8.12 The Applicant does not have assets within the jurisdiction of this court as he does not have a house at his homestead or any other area apart from the shack he occupies at Ntsanjeni Mountains where he has dagga fields. Without even a home to tie him to this court's jurisdiction, he can easily forfeit any bail amount that the court may fix in the event of being granted bail.

8.3 It is submitted that the Applicant may attempt to skip the country using informal borders to neighboring countries. After the commission of the offence he fled to the Republic of South Africa, using the informal crossings and spent some weeks there, before returning to his girlfriend at Lomahasha who is alleged to have advised him to hand himself in. At the time of his arrest, he was not employed but growing dagga.

8.14 The court must look at the nature and gravity of the charges on which the Applicant shall be tried of. He has been charged with murder which does not offer an option of a fine upon conviction.

8.15 Considering the available evidence, there is a high possibility that the Applicant will be convicted. The higher the chances of conviction and the stiffer the sentence to be imposed, the greater the chances that the Applicant will evade trial.

10.16 The strength of the Crown's case against Applicant and harshness of the sentence he is likely to receive upon conviction, will undoubtedly induce him to evade trial.

8.17 The Applicant is aware of the Crown's witnesses and there is likelihood that once released on bail, he will interfere with them.

It is likely that once released on bail he may intimidate witnesses from his family. He may also intimidate his girlfriend as she was recorded a statement too.

8.18 The Crown will not be able to ensure there is no communication between the Applicant and the witnesses once the Applicant is admitted to bail as they live in one small community where they were bound to see each other every day.

8.19 It is submitted that investigations were long completed and witnesses have already made statements and agreed to testify.

THE LAW

[9] The purpose of bail is clearly enunciated by the learned author **Nagel (ed) Rights of the Accused (1972) 777 – 8** who observed as follows;

> ***"The basic purpose of bail, from the society's point of view, has always been and still is to ensure the Accused's reappearance for trial. But pretrial release serves other purposes as well, purposes recognized over the last decade as often dispositive of the fairness of the entire criminal proceeding. Pretrial release allows a man accused of a crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence or probation. It spares his family his hardship and indignity of welfare and enforced separation. It permits the Accused to take an active part in planning his defense with his counsel, locating witnesses, proving his capability of staying free in the community without getting into trouble".***

[10] In bail applications, the onus is on the Applicant to satisfy the Court that he is entitled to be released on bail. See **Musa Waga Kunene vs Rex** (supra).

[11] In another decided case of **Director of Public Prosecutions vs Bhekwako Meshack Dlamini & 2 others Criminal Appeal Case No. 31/2015, Chief Justice MCB Maphalala** held as follows at paragraph 14, page 10;

> ***"The Accused bears the onus to establish on a balance of probabilities that it is in the interests of justice that he should be released on bail. Where 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 exist which in the interest of justice permits his release."***

[12] In the case of **Musa Waga Kunene v Rex Criminal Appeal Case No. 74/2017**, at para 10, the court held as follows;

> ***"[10] It is trite principle of our law that bail is a discretionary remedy...furthermore, an Accused bears the onus to show on a balance of probabilities that it is in the interest of justice that the should be released on bail."***

[13] Section 96(4) of the **Criminal Procedure and Evidence Act 67 of 1938** provides follows;

> *"96 (4) The refusal to grant bail and the detention of an Accused in custody shall be in the interests of justice where the one or more of the following grounds are established:*
>
> **a) Where there is 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 attempt to 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 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 likelihood that the release of the Accused may disturb the public order or undermine the public peace or security.**

[14] The above section envisages a factual inquiry into whether the factors listed in subsections 4 (a) – (e) are present. The absence of the stated factors means

the Accused must be released on bail. It is factual inquiry which requires the court to court to assess the likelihood of the risk for purposes of bail.

[15] In the case of **Brian Mduduzi Qwabe v Rex High Court Criminal Case No. 43/04**, the court held as follows;

> ***"It must be remembered that in granting or refusing bail as the case may be, the court does not approach the matter on the basis of mere possibility but from the viewpoint of likelihood. Those are the two different tests."***

[16] The above stated position was confirmed by the Supreme Court in the case of **Mathias Moyo v Rex Criminal Appeal Case No. 01/2016** where the apex court held that;

> ***"The position of the law is settled that matters of bail are decided on a likelihood on the part of the Applicant."***

[17] It is clear that what is sought to be protected by not releasing the Accused on bail is the interest of justice. Thus in the case of **Rodney Masoka Nxumalo and two others, Criminal Case No 1/14;** MCB Maphalala JA (as he then was) stated as follows;

> ***[7]Bail is a discretionary remedy. Frank J in Rex v. Pinero 1992 (1) SACR 577 (NW) at page 580 said the following;***
>
> ***"In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all-embracing issue: will the interests of justice be prejudiced if the Accused is***

granted bail? *And in this context it must be borne in mind that if an Accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced. Four subsidiary questions arise. If released on bail, will the Accused stand trial? Will he interfere with State witnesses or the police investigations? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and the security of the State? At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release of bail."* Underlining my emphasis).

[18] Section 96(5) of the **CP&E ACT** states as follows;

"In considering whether the ground in subsection 4(a) has been established, the court may, where applicable, take into account the following factors, namely;

a) The degree of violence towards others implicit in the charge against the Accused;
b) Any threat of violence which the Accused may have made to any;
c) Any resentment the Accused is alleged to habour against any person;
d) Any disposition to violence on the part of the Accused, as evident from past conduct;

e) Any disposition of the Accused to commit offences referred to in part II of the First Schedule as is evident from the Accused's past conduct;

f) The prevalence of a particular type of offence;

g) Any evidence that the Accused previously committed an offence referred to in part II of the First Schedule while released on bail or;

h) Any other factor which in the opinion of the court should be taken into account."

[19] Section 96(6) of the **Criminal Procedure and Evidence Act 67 of 1938,** (as amended) provides that;

"In considering whether the ground in subsection 4 (b) has been established, the court may, where applicable, take into account the following factors, namely-

a) The emotional, family, community or occupational ties of the Accused to the place at which the Accused shall be tried;

b) The assets held by the Accused and where such assets are situated;

c) The means and travel documents held by the Accused, which may enable the Accused to leave the country;

d) The extent, if any, to which the Accused can afford to forfeit the amount of bail which may be set;

e) The question whether the extradition of the Accused could be effected should the Accused flee across the borders of the Kingdom in an attempt to evade trial;

f) The nature and gravity of the charge on which the Accused shall be tried;

g) The strength of the case against the Accused and the incentive that the Accused may in consequence have to evade his trial,

h) The nature and gravity of the punishment which is likely to be imposed should the Accused be convicted of the charges against him;

i) The binding effect and enforceability of bail conditions which may be imposed and the case with which such conditions could be breached;"

[20] In the case of **Director of Public Prosecutions vs Bhekwako Meshack Dlamini & 2 others Criminal Appeal Case No. 31/2015, Chief Justice MCB Maphalala** held as follows at paragraph 14, page 10;

> *"The interests of justice sought to be protected in bail proceedings are two-fold: firstly, that the Accused should attend trial and not abscond or evade trial. Secondly, that the Accused does not undermine the proper functioning of the Criminal Justice System including but not limited to interfering with the evidence of the prosecution as well as undermining the safety and security of the public. 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."*

[21] In **Ndlovu vs Rex 1982- 86 SLR 51 at 52 E-F, Nathan C.J.** stated the applicable principles as follows;

"The two main criteria in deciding bail applications are indeed the likelihood of the Applicant standing trial and the likelihood of his interfering with Crown witnesses and the proper presentation of the case. The two criteria tend to coalesce because if the Applicant is a person who would attempt to influence Crown witnesses it may readily be inferred that he might be tempted to abscond and not, his trial. There is a subsidiary factor also to be considered, namely, the prospects of success in the trial" (emphasis added).

[22] In **S v Acheson 1991 NR1 (HC), Mahomed AJ**, at page 20, stated the considerations which the Court takes into account in deciding whether there is a reasonable likelihood that, if the Accused is released on bail, he will tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted, involves an examination of other factors such as;

a) *Whether or not he is aware of the identity of such witnesses or the nature of such evidence;*
b) *Whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject matter of continuing investigations;*
c) *What the Accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;*

[23] Supporting such position is the case of **S v Hlongwa 1979 (4) SA (D&CLD), at page 115- 114 per Howard J**: where the court held that;

> *d) Whether or not any condition preventing communication between such witnesses and the Accused can effectively be policed."*
>
> *"Depending on the circumstances, the Court may rely also on the investigating officer's opinion that the Accused will interfere with state witnesses if released on bail even though his opinion is unsupported by direct evidence."*

[24] In **Ndlovu v S (2001) JOL 9073 (ZN)** at page 3, it was held that a further consideration is whether Applicant if released will endanger the public or commit an offence. **The onus is upon the Applicant to prove on a balance of probability that the court should exercise its discretion in favour of granting him bail. In discharging this burden Applicant must show that the interests of justice will not be prejudiced, namely that it is likely that he will stand his trial or otherwise not interfere with the administration of justice or commit an offence**. *(Underlining my emphasis).*

[25] **Section 96(8)** of the **Criminal Procedure and Evidence Act 67 of 1938,** provides that;

"In considering whether the ground in subsection 4 (d) has been established, the court may, where applicable, take into account the following factors, namely-

a) ***The fact that the Accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;***
b) ***Whether the Accused is in custody on another charge or whether the Accused is on parole (where applicable);***
c) ***Any previous failure on the part of the Accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or***
d) ***Any other factors which in the opinion of the court should be taken into account.***

ANALYSIS

[26] The Accused in his founding affidavit says after he realized that he had fractured his arm, he crawled and then went to hospital to seek help for his broken arm[3]. This must have been on the 10th February 2023, the date on which the Applicant in his own version[4] says he went to Tebetebe to check on his father's homestead and perform routine maintenance. Seven days later, he was able to go to Lomahasha to see his fiancée. Yet in paragraph 24 of his founding affidavit he says he has not been taken to any medical facility ever since he was arrested. He only has a sling made of cloth which he was to

[3] See paragraph 11 of the Applicant's founding affidavit
[4] See paragraph 9 of the founding affidavit

suspend his arm. I find the evidence of the Applicant littered with inconsistencies. He does not state the name of the hospital that he went to after the fight. If indeed he went to hospital having a fracture, he does not explain why he was not given the appropriate medical response to the fractured arm on that day. Applicant alleges he has not been taken to any medical facility ever since he was arrested. He had 13 days from the day of the incident before handing himself over within which he decided to go about his business, including going to Lomahasha to check on his fiancée. During this entire time, if the extent of the injuries are as severe as he portrays them to be, why did he not go to hospital? It contradicts his assertion that he went to hospital after the fight with the deceased. The Applicant's account is improbable and incredible.

[27] In bail applications, especially in respect of offences under the Fourth and Fifth Schedules, an Accused is entitled to be released on bail, unless (my own underlining) the court finds that it is in the interest of justice that the Accused be detained in custody. See **Section 96 (1) (a) of the CP&E ACT**.

[28] In the case of **Director of Public Prosecutions vs Bhekwako Meshack Dlamini & 2 others Criminal Appeal Case No. 31/2015, Chief Justice MCB Maphalala** held as follows at paragraph 14, page 10;

> *"The Accused bears the onus to establish on a balance of probabilities that it is in the interests of justice that he should be released on bail. Where 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 exist which in the interest of justice permits his release."

[29] In the case of **Musa Waga Kunene v Rex Criminal Appeal Case No. 74/2017**, at para 10, the court held as follows;

> ***"[10] It is trite principle of our law that bail is a discretionary remedy...furthermore, an Accused bears the onus to show on a balance of probabilities that it is in the interest of justice that he should be released on bail."***

[30] In the founding affidavit, the Applicant states that during the fight the deceased fell on his head and unfortunately hit a rock[5]. The Applicant also says during the fight they actually both fell, and he was able to craw and he called the deceased's wife through her mobile phone. He then asked her to go and check on the deceased, whilst he went to hospital to seek help for his fractured arm. In the replying affidavit, he concedes that the call was made to his sister in law[6]. Something that he had not said initially in his founding affidavit. He only mentioned a call having been made to the deceased's wife. Again, there inconsistences on the Applicant's account cast a lot doubt on the truthfulness of what he has placed before court.

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[5] See paragraph 11 of the Applicant's founding affidavit.
[6] See paragraph 8 of the replying affidavit.

[31] The other issue that warrants attention is the date on which the incident is alleged to have happened. In his founding affidavit, the Applicant says the incident that led to the death of the deceased occurred on the 10th February 2023[7]. The investigating officer says he gathered from his investigations that the incident may have taken place on the 5th February 2023 in the evening. She basis her conclusion on the time and date on which the Applicant had made the call to his sister in law. As the court has observed above, the Applicant does not deny making a call to the sister in law. He only disputes the date on which he had made the call. In my assessment, the denial of the date of the incident is a ruse to avoid accountability for his failure to hand himself to the police timeously. This conduct ultimately gives credence to the assertion that he was evading arrest.

[32] The court accepts that there is real likelihood that the incident happened on the 5th February 2023. If the Applicant only decided to hand himself at Lomahasha Police Station on the 18th February it leaves an entire 13 days of disappearance which is unexplained. This casts serious aspersions on his credibility and his likelihood to attend trial if granted bail. As held in the matter of **Director of Public Prosecutions vs Bhekwako Meshack Dlamini and 2 Others**, [8] the Applicant has failed to discharge the onus on a balance of probabilities, that it will be in the interest of justice that he should be released on bail.

[7] Reference is made to paragraph 9 of the founding affidavit
[8] Criminal Appeal Case No 31/2015

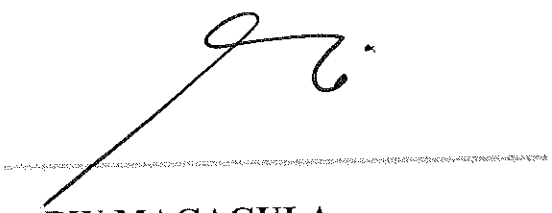
[33] The conduct of the Accused in disappearing for 13 days after the incident points to the direction that there is likelihood that if he can be release on bail, he may evade trial. See **Section 96 (4) (b) of the Criminal Procedure and Evidence Act 67 of 1938.**

[34] The court is also persuaded by the submission by the Crown being that the offence which the Applicant has been charged with (murder) is prevalent. Section 96 (5) (f) enjoins the court to take into account of such a factor.

[35] Due to the aforegoing reasons, it is the conclusion of this court, that the Applicant has not discharged the onus of proving on a balance of probabilities that the court should exercise its discretion in the favour of granting him bail. He has fallen short in discharging this burden, in particular that the interest of justice will not be prejudiced. Specifically to show that it is likely that he will stand trial and not interfere with the administration of justice.

ORDER

The Application is dismissed, bail is refused.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant:	SM Jele: (SM Jele Attorneys)
For the Crown:	N. Dlamini: (The Director of Public Prosecutions Chambers)