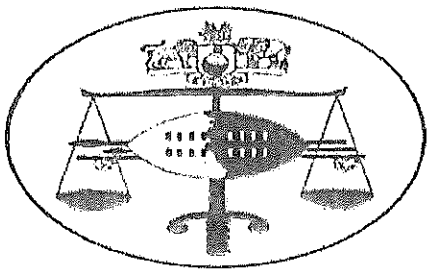


IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 193/2023**

In the matter between:

NKOSINATHI LIKHWA MAGAGULA **Applicant**

And

THE KING **Respondent**

Neutral Citation: *Nkosinathi Likhwa Magagula vs Rex* (193/20223 [2023] *SZHC* 210 (03/08/2023)

Coram: **K. MANZINI J**

Date Heard: 22nd June, 2023.

Date Delivered: 3rd August, 2023.

SUMMARY: - *Applicant for bail on charges of Robbery and Attempted Murder – Applicant alleges that he meets all the established requirements for the grant of bail.*

- *Applicant alleges that he is the sole breadwinner, who is entirely responsible for the upkeep and maintenance of his elderly and sickly mother, as well as his unemployed sister. The Applicant also alleges that he is gainfully employed, and his continued incarceration is putting his employment at risk. According to the Applicant these amount to exceptional circumstances that warrant his release on bail.*

HELD: The application for bail is dismissed.

JUDGMENT ON BAIL

03/08/2023

K. MANZINI J:

[1] The Applicant herein is Mr. Nkosinathi Likhwa Magagula, a twenty-eight (28) year old LiSwati male, who is a resident of Nkwalini, Zone 4, Mbabane, within the District of Hhohho.

[2] The Respondent is the Crown, duly represented by the Director of Public Prosecutions, based at the Ministry of Justice Building, Mhlambanyatsi Road, Mbabane, Hhohho District.

[3] The Applicant was arrested on or about the 17th of May, 2023 at Nkwalini by the members of the Eswatini Royal Police Force. The Applicant was charged with two offences. The charge sheet reads as follows:

> *"Count 1*
>
> ***The accused is charged with the offence of Robbery.***
>
> ***In that upon or about the 20th February, 2023 and at or near Goje Township, Zulwini area in the Region of Hhohho the said accused person did wrongfully, unlawfully and intentionally pointed one Wolf Peter Wolfgang with a pistol, assaulted him with the pistol on the head and further threaten tied him on the hands and legs with an electric cable, using force and violence to induce submission and did take and steal from him the following property valued at E518 780.00 (Five Hundred and Eighteen Thousand Seven Hundred and Eighty***

Emalangeni), the property of or in the lawful possession of Thuli Khumalo and thus rob her off the same; (sic).

Stolen Property

1. *1 x White Toyota Land Cruiser SUV PSD 999 BH valued at E300 000.00;*
2. *Jewellery valued at E20,000.00*
3. *2 x Canon Cameras valued at E50,000.00*
4. *1 x Apple Lap-top valued at E10,000.00*
5. *1 x I 13 iPhone valued at E20,000.00*
6. *1 x Heckler and Koch 9 mm pistol valued at E20,000.00*
7. *1 x Violin guitar valued at E20,000.00*
8. *50 x 9 mm live round of ammunition valued at E20,000.00*
9. *1 x Bernedelh VB 9 mm pistol valued at E39,780.00*
10. *Money in cash amounting to E20,000.00.*

Total value = E518,780.00

Money in foreign currency - US$10,000.00

Money in foreign currency - 20,000.00 Euros

Money in foreign currency - 40,000.00 Meticais

Count 2

The accused is charged with the offence of attempted Murder.

In that upon or about the 2nd May, 2023 and at or near Msunduza area in the Region of Hhohho the said accused person did wrongfully, unlawfully and intentionally attempt to kill one Bandzile Dlamini by shooting him with a pistol on the right hand, the said Bandzile Dlamini nearly died."

[4] In his Founding Affidavit the Applicant averred that he will not plead guilty to the charges levelled against him, and that he is innocent of the first count that he is charged with. He explained also, in his averments, that in relation to Count 2, being attempted murder, that he acted in self defence, and therefore has a *bona fide* defence. The Applicant averred that he had been attacked by the said Bandzile Dlamini, and duly protected himself. Regarding the count relating to Robbery, the Applicant averred that he did not commit the offence, and had been wrongly accused because he does not even know the said victim, being a certain Mr. Wolf Peter Wolfgang. (paragraph 8 Founding Affidavit).

[5] In paragraph 9 the Applicant averred that it would not be in the interests of Justice to refuse him bail, as applied for the following reasons:

"9.1 **There is no likelihood that if I am released on bail I may endanger public safety or commit any of the offences.**

9.2 **There is no likelihood that if released on bail I may attempt to evade trial as I am bona fide Swazi born and bred here with all my ancestral and family roots firmly entrenched in the Kingdom of Eswatini.**

9.3 **There is no likelihood that if released on bail I will influence intimidate witnesses as they are unknown to me as I have not as yet been furnished with a summary of evidence containing their list.**

9.4 **There is further no likelihood that if released on bail I may undermine or jeopardize the objective or the proper functioning of the criminal justice system including the bail system as at all**

material times I have co-operated with the Police throughout their investigations.

9.5 For avoidance of doubt I undertake not to commit any of the conduct listed in paragraphs 9.1 to 9.4 above herein."

[6] It was further the averment of the Applicant that he is employed as a paramedic, and his continued imprisonment is detrimental to his employment. He explained that he is the breadwinner at his home as he has a family who look to him for their daily sustenance. He explained that his mother, who is sickly, and his unemployed sister are entirely dependent on him. He stated that he is willing to cooperate with the investigating officers, and would abide with all bail conditions, as he would continue to reside at his parental home in Nkwalini should the Court grant him bail.

[7] On his client's behalf, the Applicant's Attorney submitted that despite that the Crown opposed the bail application, on the basis that there are no exceptional circumstances adduced by the Applicant in terms of **section 96 (12) (a)** of the

Criminal Procedure and Evidence Act 67/1938 (CP& E) as amended, he opined that the Crown had adopted the wrong approach towards the entire application. He also submitted that the Crown had also opposed the bail application on the grounds that there is a possibility that the Applicant may flee to the Republic of South Africa in order to evade trial.

[8] According to the submissions by Counsel for the Applicant, the position of the law today is that the onus of proving that it shall be in the interests of justice for the Court to deny an accused person bail where certain grounds are established. He cited **Section 96 (4)** of the **Criminal Procedure and Evidence Act** as follows:

> ***"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 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 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 the public peace of security."

[9] In his submissions, Counsel herein argued that the Crown had not complied with **Section 96 (13)** of the **Criminal Procedure and Evidence Act**, by not issuing a written confirmation that the effect that they were charging the accused with an offence referred to in the Fourth Schedule and the Fifth Schedule. He pointed out that the Charge Sheet in the matter herein is completely void of such intention of the Crown to charge the Applicant with a Fourth or Fifth Schedule offence. He stated that this being the case, it

obviated the need for the Applicant to even establish to the Court that exceptional circumstances exist that make it in the interests of justice to grant him bail. The Applicant's Counsel cited the case of **Mashumi Shongwe v The King High Court Case No. 230/2023** to this end. The Applicant's Counsel submitted that according to this authority in the ordinary course, the onus remains with the Crown to craft the charge with such precision that a definitive description of the charge in the Charge Sheet that such charge is an offence listed under the Fourth Schedule. The Court in that case also referred to the case of **Bomber Mamba v the King (103/2021) SZHC 46 [2023] (9 March, 2023)**. Applicant's Attorney maintained that on the face of it, the charge sheet *in casu*, does not specify that the charges levelled against the Applicant are Fourth Schedule Offences, and neither does evidence thus far point to the commission of a Fourth Schedule, or even a Fifth Schedule offence.

[10] The Applicant's Attorney pointed out that the Crown kept on making reference, in their allegations to the effect that the Applicant was with some cohorts, but the charge sheet did not state that the Applicant was being charged with the furtherance of a common purpose. He stated that herein the Applicant was being charged with an offence he did not commit. He stated that in the

charge sheet, there is no clear explanation or reference to the effect that he was with cohorts when he allegedly committed these offences. He explained also that the Respondent in the Answering Affidavit also refers to an attack on a maid, but the charge preferred against the Applicant does not relate to such an attack on a maid. Counsel for the Applicant further cited the **Constitution of Eswatini Act No. 1 of 2005** wherein it is provided that:

> ***"If a person is arrested or detained as mentioned in subsection (3) (b) then without prejudice to any further proceedings 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 person appears at a later date for trial or for proceedings preliminary to trial."***

[11] The Applicant's Counsel further stated that the Respondents in paragraph 7 of the Answering Affidavit alleged that the Applicant may evade trial simply because his cohorts are believed to be in South Africa. It was the submission of the Applicant's Attorney that there was no reason for any apprehension on

the part of the Crown that the Applicant would evade trial. He pointed out that the Applicant had detailed that he had voluntarily approached the Police on the 3rd of May, 2023 in order to report that he had been attacked the previous day, and he had only been arrested on the 17th of May, 2023. It was submitted by Counsel that the Applicant did not at any stage attempt to leave the country to escape the clutches of the Police. It was further pointed out that the items listed on the charge sheet, that are alleged to have been stolen were not found in his possession, and therefore there is nothing at all to tie him to the commission of the offence. Counsel in this regard referred to the Case of **Sibusiso Shongwe v Rex Appeal Case No. 26/2015**, and submitted that the Court, had held herein that the High Court had erred in denying the Applicant in that case bail on the mere say so of the Police Officer without any proof that the Applicant was indeed a flight risk, and that he may interfere with witnesses. In that case, the Honourable C.J. Maphalala granted bail.

[12] *In casu* it was the submission of Counsel for Applicant that the Respondent bears the onus of convincing the Court that the Applicant should not be released on bail. The facts or evidence adduced before Court to support the charge should pass muster and should substantiate sufficiently the charge levelled against the Applicant under the 5th Schedule of the Criminal

Procedure and Evidence Act in order to shift the onus of the Applicant to the Applicant and thereby encumber him with the burden to adduce evidence that exceptional circumstances exist that he must be admitted to bail. The Counsel for Applicant further cited paragraph 69 of the **Mashumi Shongwe Case** as follows:

> ***"[69] Horn JA in S v Jonas 1998 (2) SACR 667 (South Eastern Cape local division) observed that in this regard that.....the State cannot simply hand up the charge sheet to show that the accused has been charged with a Schedule 6 listed offence and then rely on the accused's inability to show exceptional circumstances."***

[13] The submission of Counsel in relation to the above quotation from the **Mashumi Shongwe Case (supra)** was that the Applicant herein has shown that exceptional circumstances do exist that he be admitted to bail as he is the only breadwinner at his home, and he stands to lose his employment if he continues to be incarcerated. He prayed therefore for this Court to admit the Applicant to bail and to grant him an order in terms of the Notice of Motion.

THE RESPONDENT'S CASE

[14] It was the submission of Counsel for the Crown that as stated in paragraph 3 of their Opposing Affidavit duly deposed to by 4837 Detective Constable S.M. Tsabedze, a point of law is being raised by the Respondent to the effect that Applicant has failed to comply with **Section 96 (12) (a)** of the **Criminal Procedure and Evidence Act** by failing to adduce evidence that exceptional circumstances exist which make it in the interest of justice to admit him to bail. It was also averred by the Investigating Officer that the Applicant herein is facing a serious charge of robbery. According to the averments of the Deponent in paragraph 3.2:-

> ***"This offence is listed in the Fifth Schedule of the Act in terms of Section 96 (12) (a) of the Act the Applicant is required to adduce to the satisfaction of the Court that exceptional circumstances exist which in the interest of justice permit his release. The Applicant has not complied with this requirement."***

It was the Deponent's prayer therefore that the application for bail be dismissed.

[15] It was averred by the Investigation Officer that the Applicant is not innocent of the preferred charges against him and was not acting in self defence when he shot Bandzile Dlamini whilst at Msunduza location. It was opined by the Deponent herein that:-

> *".....[1] If the Applicant was acting in self defence he could have then left the scene and went to report the matter to the Police and opened a case against the complainant this allegation is not true, it is designed to mislead the Court, the Applicant is the one who attacked the complainant as he was trigger happy. The Applicant also acted recklessly by shooting in a public place and he could have hurt many unsuspecting patrons or innocent passersby. It will therefore not be in the interest of justice to release the Applicant on bail. The Applicant was also in possession of the firearm illegally as he does not possess any licence to same."*

[16] The Attorney for the Crown further submitted that the Applicant committed the offence with cohorts, who are still at large, and the Crown fears that he may, if released on bail, evade trial by escaping to South Africa where his

cohorts are believed to be as they are South African nationals. Counsel for the Crown further submitted that the charge of Robbery with which the Applicant herein is charged is a Fifth Schedule offence. She stated that this being the case, it is a very serious offence which attracts a lengthy custodial sentence. The Attorney herein submitted that the Applicant may be induced to flee the jurisdiction of the Court, by escaping to South Africa. The Counsel for the Respondent further submitted that the Crown has demonstrated the seriousness of the offence faced by the Applicant at paragraphs 4.1 up to 4.5 of the Opposing Affidavit. She stated that the Crown had a very strong case against the Applicant, and the evidence against him, coupled with violence perpetrated during the commission of the offence may aggravate the sentence that may be imposed by the trial Court in the event that he is convicted.

[17] Counsel for the Crown further submitted that the Applicant is likely to commit an offence listed in Part II of the First Schedule of the Criminal Procedure and Evidence Act if released on bail. She stated that at paragraph 6 of the Opposing Affidavit, the Investigating Officer detailed how the Applicant attacked the victims at their home, where they are meant to feel secure. She stated that the offence was brutal and violent. It was also submitted that the Applicant became *"trigger happy"* after committing the offence. After being

in possession of one of the guns that were stolen, hence the charge of attempted murder. She stated that the Applicant's release on bail may pose a danger to the safety of the public.

[18] According to the Attorney for the Crown the offence of Robbery was committed by means of the use of a fire arm, and in a violent and premeditated manner. The offence, according to Counsel, this offence is listed in the Fifth Schedule of the Act and in terms of **Section 96 (12) (a)** of the **Criminal Procedure and Evidence Act (as amended)**, the Applicant is required to adduce exceptional circumstances that to the satisfaction of the Court make it in the interest of justice permit his release. She stated that the Applicant herein has failed to adduce to Court such exceptional circumstances. She stated that the decisions of the High Court, as well as the Supreme Court support the position that losing employment, and the inability to provide support for dependents are common consequences of incarceration, and there is nothing exceptional about this. She cited the Supreme Court Case of **Wonder Dlamini and Another v Rex Criminal Appeal Case No. 1/2003**, which case, was cited with approval by the Learned Magid AJA in **Senzo Menzi Motsa v Rex Appeal Case No. 15/2009**, wherein the Court stated that exceptional

circumstances must *"mean something more than merely 'unusual", but rather less than unique which means in effect "one of a kind".*

[19] The Counsel for the Crown further cited the case of **Director of Public Prosecutions and Bhekwako Meshack Dlamini and 2 Others Criminal Appeal Case No. 31/2015**, where the Court emphasized on the seriousness of Schedule 5 offences because they are premeditated and perpetuated by the use of violence. The Court in that case according to that case went on to emphasize that the onus rests on an applicant who is facing a Schedule 5 offence to adduce the exceptional circumstances that warrant his release on bail. The Counsel for the Crown submitted that there is no evidence before Court that warrants the release of the Applicant on bail herein.

ANALYSIS AND CONCLUSION

[20] ***"The two main criteria in deciding bail applications are indeed the likelihood of the applicant not standing trial and the likelihood of his interfering with Crown witnesses and the proper presentation of the case. The two criteria level tend to coalesce because if the applicant is a person who would attempt to influence Crown witnesses, it may be readily inferred***

that he may be tempted to abscond and not stand trial, there is a subsidiary factor who to be considered, namely, the prospects of success in trial."

Per Nathan C.J. in **Ndlovu v Rex 1982 – SLR 51 at 52 E – F.**

[21] The Applicant herein was arrested on the 17th of May, 2023. He faces charges of Robbery and Attempted Murder. It is trite that bail in a discretionary remedy, and the Court is required to exercise this discretion in a judicious manner, having due and proper regard to legislative provisions applicable and attendant thereto. The said exceptional circumstances being pertinent to the peculiar circumstances of the case at hand (See: **Sibusiso Bonginkosi Shongwe v Rex Appeal Case No. 26/2015**).

[22] It is trite that the right to bail is set out in **section 16 (7)** of the **Constitution Act of 2005, Section 95 and 96** of the **Criminal Procedure and Evidence** Act (supra). The constitutional provision reads as follows:

"If a person is arrested or detained as mentioned in subsection (3) (b) then without prejudice to any further proceedings that may be

brought against the person, that person shall be released either conditionally or unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that such a person appears at a later date for trial or for proceedings preliminary to trial."

[23] It is also trite that this constitutionally enshrined right is not to be taken as being absolute, it is to be considered together with **Section 96 (1) (a)** of the and **Evidence Criminal Procedure Act** which sets out the conditions and procedures under which may be granted as follows:

"(1) In any Court-

(c)an accused person who is in custody in respect of an offence shall, subject to the provisions of section 95 and the Fourth and Fifth Schedules, be entitled to be released on bail at any stage preceding the accused's conviction in respect of such offence, unless the Court finds that it is in the interest of justice that, the accused be detained in custody."

[24] Section 96 (4) of the Act lays down the grounds upon which a Court may rely in its decision to deny an application for bail on the basis that it may be in the interest of justice.

"These are stated thus:-

(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 I of the First Schedule.

(b)....where there is a likelihood that the accused if released on bail may attempt to evade trial.

(c) ....where there is 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 proper functioning of the criminal justice system.

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

[25] This Court, taking into account whether it is in the interests of justice to deny bail, **Section 96 (10)** of the Act provides in **sub-section (4)** that the Court shall decide the matter by weighing the interest of justice against the right of the accused to his or personal freedom and in particular the prejudice the accused is likely to suffer if he or she is to be detained in custody taking into account where applicable the factor detailed herein under being:-

(a) The period for which the accused has already been in custody since his or her arrest;

(b) The probable period of detention with the disposal or conclusion of the trial of the accused is not released on bail;

(c) The reason for any delay in the disposal or conclusion of trial and any fault on the part of the accused to such delay;

(d) Any financial loss which the accused may suffer owing to her detention;

(e) The state of health of the accused;

(f) Any other factor which in the opinion of the Court should be taken into account.

[26] **Section 96 (a) of the Criminal Procedure and Evidence Act (supra)** also provides that in considering whether the grounds in subsection 4 (c) have been established, the Court may, where applicable, take into account the following factors namely:-

(a) Whether the nature of the offence of the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed.

(b) Whether the shock or outrage of the community might lead to public disorder if the accused is released.

[27] The onus of proof shifts to the accused in **section 96 (12)** where the accused has to prove exceptional circumstances:

"(12) not withstanding any provision 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 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."

[28] The offences referred to in **Section 95 and 96** of the Act as specified in the Fifth Schedule include murder when-

(a) It was planned or premeditated.

(b) The victim was a law enforcement officer or judicial officer performing his or her functions as such whether on duty or not or law enforcement officer who was killed by virtue of his or her holding such position.

(c) The offence was committed by a person or group of persons or syndicate acting in the execution of common purpose or conspiracy.

[29] The law, it is clear, envisages that in bail applications, Courts have the duty to enquire into, and to weigh the pros and cons of the question whether it will be in the interests of justice to deny the Applicant his right to liberty pending trial. This duty to enquire, also includes the right to decide if the applicant is likely to suffer if he or she continues to be detained in custody, and this decision has to be weighed as against the protection of investigations, and the prosecution of his case without hindrance.

[30] It is the position of the law that the Crown still bears the onus of establishing that the detention of the accused is in the interest of justice. It is also true that the exception to the Crown's onus only occurs under the requirements of **Section 96 (12) (a)** where the accused is charged with the offence referred to in the Fifth Schedule must adduce evidence which satisfies the Court that exceptional circumstances exist which in the interest of justice permits his or

her release (See **Bomber Mamba v The King (103/2021) SZHC 46 [2023] 09 March, 2023**.

[31] The Crown has the duty to discharge its onus by placing substantial facts upon which the charges are based before Court to start with. It is only then that the accused has an opportunity to answer and to show exceptional circumstances. According to the Court in the **Bomber Mamba Case** (and this was cited with approval by the Court in the **Mashumi Shongwe Case** (*supra*) *"the onus in the ordinary sense, remains on the Crown as the ordinary offence (unqualified) only falls under the schedule where it is indicated as such. This means that it is incumbent on the Crown to frame the charge in precise terms to show either by means of relevant elements, a definitive description on the charge sheet or through evidence that the specific offence is that of a Schedule 4 category or indicate in the evidence that this is so...."*

[32] The Charge sheet in casu does state that the Applicant faces the charge of Robbery. It is common cause, that Robbery is clearly a fifth schedule offence. This is in spite of the submissions of Applicant's Counsel herein, that the charge sheet does not succinctly, and expressly state that the accused is

charged with an offence falling within the list of offences to be found in the fifth schedule. The Respondent in the Answering Affidavit deposed to by 4837 Detective Constable S.M. Tsabedze does in paragraph 3.2 quite clearly state that the offence of Robbery, with which the Applicant is charged is one that falls within the ambit of Schedule 5 of the Act, and in terms of **Section 96 (12) (a).**

[33] The charge of Robbery, renders the bail application herein as one which falls squarely within the provisions of the fifth schedule of the CP& E (supra). His bail application is therefore one to be determined and dealt with under **Section 96 (12) (a)** of this Act. The said section reads as follows;-

> *" Not withstanding any provisions of this Act where an accused is charged with an offence referred:*
>
> *(a) In the fifth schedule the court shall order that the Accused be detained in custody until he or she id 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 release."*

[34] Indeed, the Respondent herein raised a point of law that the Applicant has failed to make averments in his Founding affidavit which would satisfy this Court that indeed exceptional circumstances do exist that warrant the applicants release on bail. It is trite that the onus of proving on a balance of probabilities, the existence of these special or exceptional circumstances which would permit his release on bail. (**See: Wonder Dlamini and Another v Rex Supreme Court Criminal Case No. 01/2013, Director of Public Prosecutions v Bhekwako Meshack Dlamini and 2 Others Supreme Court Criminal Appeal Case no. 31/2015**

[35] What falls to be decided by this Court is whether the Applicant has established his exceptional circumstances on a balance of probabilities. The Applicant in advancing his submission in motivation of the grant of his bail application, submitted the following:-

35.1 That he is in peril of losing his employment on account of his continued incarceration.

35.2 That he is the only breadwinner in his family.

35.3 That he has an elderly mother, who is sickly, as well as an unemployed sister, all of whom, are dependent solely upon him for support.

[36] The Court herein finds that the Applicant had failed to submit any exceptional circumstances that could convince the Court that it is the interest of justice to release him on bail. That he stands to lose his employment, and has a mother and sibling who are dependent on him, does not pass muster. There is nothing peculiar about this, nor can it be said to be out of the ordinary. In **Mzwandile Dlamini v The King High Court Criminal Case no 83/13,** Ota J at paragraphs 14 and 15 stated the following: -

> ***" I am inclined to agree with respondents that the factors urged by the applicant do not by any stretch of the imagination qualify as such exceptional circumstances. I say this because the fact that the accused is a breadwinner of his family, will abide by the bail conditions and is a very young man, are, apart from being usual sing song of bail applicants, ordinary "run of the mill" factors which the court would be constrained to consider if this was the usual ordinary bail application predicated on an inquiry into the interest of justice."***

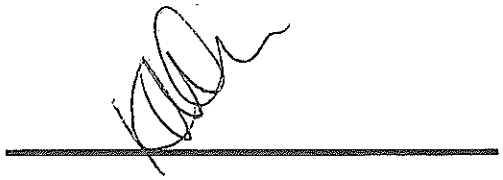
[37] The Court, herein is swayed by the contents of the Investigating Officer's Answering Affidavit. In doing so, I am emboldened by the case of Sv **Hlongwa 1979 (4) SA at pages 114 and 115,** where the following was stated:-

> ***" The Court may rely on the Investigating Officer's opinion even though his opinion even though his opinion is unsupported by direct evidence."***

[38] I am moved to align itself with the finding in the **Hlongwa** case (supra), as well as other decisions of this Court which have relied on this decision.(**See: Zwelibanzi Simelane v Rex High Court Criminal Court Case No. 88/22 and Musa Waga Kunene v Rex Criminal case No. 03/2016).**

[39] *In casu* , I find that the Respondent has placed before Court, sufficient facts and evidence placed before Court to support that a finding that the charge of Robbery does fall under the 5th Schedule of the Criminal Procedure and Evidence Act to shift the onus to the Applicant. Having regard to all the foregoing, I have arrived at a conclusion that the Point of Law, as raised by the Respondent herein is upheld. This Court in the exercise of its discretion

finds that the Applicant has failed to prove the existence of exceptional circumstances that his release on bail. As a consequence, I am of the opinion that bail ought to be denied in this matter, and I so order.



K. MANZINI
JUDGE OF THE HIGH COURT OF
THE KINGDOM OF ESWATINI

For the Applicant: S. ZWANE (Sithole Magagula Attorneys)

For the Respondent: LOMKHOSI DLAMINI(D.P.P's chambers)