



IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No.: 103/2023

In the matter between:

SAMKETI DLAMINI

Applicant

And

THE KING

Respondent

Neutral Citation: *Samketi Dlamini vs The King* (103/2023) [2023] SZHC 54
(17/03/2023)

Coram: **K. MANZINI J**

Date Heard: 24 February, 2023.

Date Delivered: 17 March, 2023.

SUMMARY: *Application for bail on a charge of murder – Applicant alleges that he meets all the established requirements for the grant of bail – Applicant alleges that he is afflicted with a terminal illness which amounts to an “Exceptional Circumstance” as envisaged in the Criminal Procedure and*

Evidence Act, 1938 – He also alleges that he is the sole breadwinner at his homestead, and supports several dependants from the remuneration that he earns from his employment – The fact that he has several dependants, and also that he is gainfully employed, according to the Applicant, also amounts to Exceptional Circumstances that warrant his release on bail.

Held: The application for bail is dismissed.

JUDGMENT

K. MANZINI – J:

- [1] The Applicant herein is Mr. Samketi Dlamini, a 43 year old adult LiSwati male, who is a resident of the Kutsimleni area, under Chief Maloyi, within the Manzini District.
- [2] The Respondent is the Crown, duly represented by the Director of Public Prosecutions, based at the Ministry of Justice Building, Mhlambanyatsi Road, Mbabane, District of Hhohho.
- [3] The Applicant was arrested by the Police Officers who are based at Mliba Police Station, on the 17th of February, 2023. The Applicant was charged

with the murder of one Philangenkhosi Gamedze on the 16th of February, 2023. According to the Charge Sheet, annexed to the Notice of Application, and Founding Affidavit, the Applicant herein is Applicant Number two (2), and all the accused persons with whom he is charged, each one or all of them acting jointly in furtherance of common purpose of wrongfully, unlawfully and intentionally assaulting the deceased with sticks, kicks and sticks all over his person. The deceased was confirmed dead upon arrival at Dvokolwako Health Centre. The Applicant's Co-Applicants (Co-accused) are:

- **Ciniso Welcome Dololo Masilela**
- **Sipho Sibonakaliso Sibhamu Dlamini**
- **Mandla Shaka Mawela**
- **Thulani Khulekani Ndzinisa**

[4] The Applicant herein in his Founding Affidavit vehemently denied that he is guilty of the charges preferred against him. He admitted though that he was present when the offence was committed, but did not participate in the assault inflicted upon the victim, which assault ultimately led to the demise of the deceased (paragraphs 11 and 12). The Applicant proceeded also to state under oath that he was at the crime scene purely due to the

reason that he owns one of the shops that were robbed, allegedly by the “*deceased and his friends*” (paragraphs 13 and 14).

[5] The Applicant averred that the robbery at his own shop took place on or about the 2nd of February, 2023, and this was duly reported to the Royal Eswatini Police, as well as the Community Police. The Applicant averred further that he was at his shop when the Community Police brought the deceased to his shop on the 16th of February, 2023, and the deceased admitted that he had indeed broken into his shop, and had stolen goods which are valued in excess of E10,000.00 (Ten Thousand Emalangi). According to the averments of Applicant the deceased further produced the said stolen items and also revealed the identities of the “friends” with whom the robberies were committed (paragraphs 14, 15, 16 and 17).

[6] The Applicant stated that after the Community Police and seven (7) other shop owners brought the “friends” to his shop, as well as more stolen items, the members of the community arrived in large numbers at his shop. He averred further that the angry members of the community proceeded to assault the suspects that had been apprehended by the Community Police. The Applicant in his averments submitted that he did try to intervene in a bid to stop the violent attack on the suspects, but his efforts were to no avail (paragraphs 18 to 20).

[7] The Applicant further averred that he did not assault any of the suspects, let alone the deceased, and did not incite any one to commit the violent acts against the suspects. The Applicant herein applied for bail, and stated that he has no reason to evade trial, and undertook to abide by all bail conditions. He averred further that he even handed himself over to the Police, to show his *bona fides* as a law abiding citizen. He stated that in his view, he ought to be granted bail so that he can have regular contact with his attorney, and thereby enable him to effectively prepare for his trial.

[8] The Applicant herein averred that he has high prospects of success at trial, and would not be tempted to evade trial. Counsel for Applicant opined that the bail sum that he would pay, which he does not believe would be less than E5000,00. (Five Thousand Emalangi) in cash, with E45,000.00 (Forty Five Thousand Emalangi) as sureties, would not be jeopardised by him as he has far too many dependents who need that money for their sustenance. It was also contended by the Applicant's Attorney that the Applicant (who in his Founding Affidavit asserted that he was afflicted with an illness whilst in Police custody, which caused him pain in his spinal cord and left leg, as well as stomach ulcers paragraph

9), argued that his client has a “*terminal illness*” which was only detected when he was incarcerated.

[9] The Applicant’s Attorney argued that the fact of the Applicant’s illness, and the fact that his continued incarceration risks his employment, and thereby puts into jeopardy his earning capacity, and ability to maintain his nine (9) dependents amounts to Exceptional Circumstances as envisaged by section **96 (12) (a) of the Criminal Procedure and Evidence Act** (*supra*).

[10] The Applicant’s Counsel submitted that even the likelihood of interference with Crown witnesses on the part of the Applicant if he is released on bail is very slim. It was submitted that he is even amenable to moving from his place of abode at Ekutsimleni, to Matsapha where he is currently employed. The Applicant’s Counsel further contended that in terms of the legal authority being; **S v Jona 1998 (2) SACR 667**, which was referred to in **Kwanele Mncina v Commissioner of Police & Another Case No. 329/2009** it was held that it was sufficient for the Applicant to allege that Exceptional Circumstances exist where he asserts that he has a terminal illness. According to Counsel for Applicant, the Court in that case did not require proof of such illness in the form of medical reports since these are confidential in nature. It was also

contended that in Senzo Motsa v Rex High Court Case No.15/2009 the Supreme Court held that suffering from a terminal illness constitutes an exceptional circumstance.

[11] Counsel for Applicant further submitted that Courts have held that the defence of an alibi may also constitute an Exceptional Circumstance. Counsel further contended further that a witness made a sworn statement that he was present at the scene of the offence, but he did not see the Applicant actually assaulting the victim. The said statement by this witness ought therefore to be taken as an exceptional circumstance, because, although the Crown alleges that there is an eye witness who can testify to the contrary, that evidence is trumped by that of the eye witness who in a sworn statement did not confirm the allegations of the Police. He stated that in any event the tendency that exists is that at trial the statements of witnesses tend to change, hence the hearsay evidence contained in the Investigating Officer's Answering affidavit of a witness (s) who allegedly made sworn statements that the Applicant actually committed the offence, cannot be relied upon to negate the evidence of this exceptional circumstance.

THE RESPONDENT'S CASE

[12] The Respondent's Counsel raised a point of law herein. The said point *in limine* is that the Applicant has not proved the existence of exceptional circumstances as envisaged in, and in compliance with **section 96 (12) (a) of the Criminal Procedure and Evidence Act 67/1938**. According to Counsel for Respondent, and relying on the case of **Senzo Motsa v Rex Criminal Case No. 15/2009**, the Counsel for Respondent stated in his submissions that the term "*Exceptional*" when it comes to bail, must mean more than what can be regarded as "*usual*", and in fact it can be said to mean "*one of a kind*".

[13] The Respondent's Counsel cited a number of authorities such as **Mzwandile Dlamini v Rex Criminal Case No. 83/13, S v Jonas 1998 (2) SACR 667 (South Eastern Cape Local Division), Selby Musa Tfwala & Another v Rex Criminal Case No. 383/12 (B)**. The gist of the findings in all of the cited cases being that the general principle of the law is that a Court is under a legal obligation to order an accused's detention where he has been accused of a schedule 6 offence, and it is only where the Applicant is able to discharge the onus that has been placed on him/her to convince the Court on a balance of probabilities that such Exceptional Circumstances exist, that the Court may find that it is in the interests of justice that he be released on bail.

[14] The Respondent's Counsel opined that since the legislature in section **96 (12) (a) of the Criminal Procedure and Evidence Act 67/1938** placed the onus of proof upon the Applicant, it is the Court's responsibility to ensure that it is satisfied that the Applicant has adduced sufficient evidence of the existence of such exceptional circumstances, which in the interest of justice permit his release. He cited the case of **Wonder Dlamini v Rex Criminal Appeal Case No. 1/2003 at paragraph 18** where the Court stated thus:

“Section 16(7) of the Constitution endorses the general principle that bail is a discretionary remedy. For a person charged with an offence under the Fifth Schedule, Section 96 (12) (a) of the Act requires that the Court had to be satisfied that the Applicant for bail has adduced evidence showing that exceptional circumstances exist which in the interests of justice permit his release. However Section 96 (12) (a) of the Act does not take away the Court's discretion to grant bail. It is the duty of the Court in every bail application to determine if the facts and averments made constitute exceptional circumstances....”

[15] The Respondent's Counsel herein vehemently contended that the Applicant herein has failed to establish before Court that there are Exceptional Circumstances by Counsel herein. He opined that there is nothing exceptional about being a breadwinner, and having numerous dependants. It was also the case of the Respondent's Attorney that even case law provides authority to this effect. To this end Counsel referred to the case of **Mzwandile Dlamini and The King** (*supra*), wherein the Learned Ota J. at paragraph 14 and 15 decided that there is nothing out of the ordinary about being a breadwinner, as well as averring that once out on bail the Applicant will abide by bail conditions. The Respondent's Counsel indeed prayed that the point of law be upheld, and the application duly dismissed.

[16] In the alternative, it was the submission of Counsel on the merits herein that if the Court did not find in their favour as regards the point of law, the Respondent still maintains on the merits that it is not in the interests of justice to release the Applicant on bail. In the Answering Affidavit, the Investigating Officer 5129 Detective/Constable Futhi Nkambule averred that the Mliba Police Force had been in the process of investigating a number of burglaries of shops that had been reported in the Ekutsimleni area in or about February, 2023. The Deponent herein,

further submitted that the Applicant herein did call the Police on or about the 16th of February, 2023 and he informed them that the Community Police of the area had apprehended suspects that were linked to the string of robberies around the area. The Investigating Officer stated that the Applicant did, however, neglect to inform the Police that the said suspects were being assaulted by a mob of people, and that he was part of that mob (paragraph 6.1, 6.2, and 6.3).

[17] The Investigating Officer further averred that the Police further received a phone call from a certain concerned community member who informed them that five (5) local young men were being severely assaulted at the Cabha Grocery Store (owned by the Applicant). According to the Deponent herein the caller urged the Police to rush to the scene because the victims of the assault were in grave danger, and might be killed by the mob. It was the submission of Counsel for Respondent herein that in terms of **Section 96 (4) of the Criminal Procedure and Evidence Act 67/1938** the Courts are enjoined to consider whether the interests of justice will be served if the accused person is released on bail. The said section as cited by the Respondent's Attorney reads as 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 a likelihood that the accused, if released on bail, may undermine or jeopardise 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 the public peace or security.”

[18] It was submitted by Counsel for the Respondent that the offence with which the Applicant is charged is a serious one, and there is overwhelming evidence, that he committed the offence in furtherance of a common purpose, including eye witnesses. If the Applicant is convicted of the murder, this may be visited with a sentence of a period in excess of twenty (20) years.

[19] It was submitted by Counsel herein that the Applicant if released on bail may be tempted to flee, and thereby evade trial on account of the stiffness of the custodial sentence that he may face, as well as the overwhelming evidence against him. It is also feared that the Applicant, if released on bail will engage in in a bid to eliminate and/or intimidate potential witnesses. This is because all the residents of the area, who were at the place where the offence was committed (at shop) are well known to him, and he was actually leading the mob that assaulted the victim, who ended up dying from the beatings inflicted on him (see paragraphs 6 and 6.1 of the Answering Affidavit).

[20] The Respondent's Counsel contended that the Court also has to take into consideration the provisions of Section **96 (5) of the Criminal**

Procedure and Evidence Act 67/1938 in determining if the accused person is likely to endanger the safety of the public or another person, or may commit an offence listed in Part II. The said provision stipulates the following:

“(5) 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 person.....

f) Prevalence of a particular type of offence.”

The Counsel for Respondent entreated the Court to consider the recent upsurge of mob justice incidents in the Kingdom of Eswatini, and in particular an incident that occurred in the Matsanjeni, Lavumisa area. The Respondent’s Attorney urged the Court to show its censure for the act of citizens who take the law into their own hands by inflicting

physical harm on suspects, instead of allowing the law to take its logical course.

[21] The Respondent's Counsel cited the case of **Director of Public Prosecutions v Bhekwako Meshack Dlamini & 20 Others Criminal Appeal Case No. 31/2015**. The case was cited in order to buttress the position that the interests of justice have to be protected by the Courts in considering whether or not the Applicant ought to be released on bail. It was contended by Counsel that the proper functioning of the criminal justice system including evasion of the trial, undermining the safety and security of the public. It was held in that case that the onus to establish on a balance of probabilities that it will be in the interests of justice that he should be released on bail, rests with the Applicant. It was argued that the Applicant herein is well aware of the identities, and is quite familiar with the Crown witnesses because he resides in the same locality as all of the witnesses. It was contended that there would be no effective way of ensuring that he does not communicate with them, therefore

[22] It was submitted that investigations have been completed and witnesses have given their statements, and have agreed to testify. The Respondent's Attorney citing **S v Hlongwa 1979 (4) SA (D & CLD) at**

page 114 – 115, as well as Musa Waya Kunene v Rex Criminal Appeal Case No. 03/2016 page 14 opined that it is a settled legal position that Courts may rely on the Investigating Officer’s opinion that the accused will interfere with State witnesses should he be released on bail, and this opinion ought not be supported by direct evidence.

[23] It was also the submission of Counsel herein that there is likelihood that the Applicant herein will undermine or jeopardise the objectives, or proper functioning of the criminal justice system by causing the disturbance of public order, public peace and security.

ANALYSIS AND CONCLUSION

[24] *“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 also to be considered, namely, the prospects of success in the trial.”*

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

[25] The Applicant herein was arrested on the 17th of February, 2023. He faces a charge of the murder of one Philangenkhosi Gamedze on the 16th of February, 2023. It is trite that bail is a discretionary remedy, and the Court is required to exercise this discretion in a judicious manner, having due and proper regard to legislature provisions applicable, and attendant thereto. The said exceptional circumstances being pertinent to the peculiar circumstances of the case at hand (see **Sibusiso Bonginkhosi Shongwe v Rex Appeal Court Case No. 26/2015**).

[26] The Applicant's bail application falls squarely within the provisions of the Fifth Schedule of the Criminal Procedure and Evidence Act of 1938 (CP&E) as amended. His bail application, because he is charged with murder, is to be determined and dealt with under **Section 96 (12) (a) of the CP&E (supra)**.

[27] The abovementioned section provides as follows:

“ (12) Notwithstanding 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 her 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.”

[28] Indeed the Respondent herein raised as 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 Applicant’s 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 Bhekwakhe Meshack Dlamini and 2 Others Supreme Court Case Criminal Appeal Case No. 31/2015.**

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

29.1 That he is the breadwinner at his home with dependants in excess of nine in number.

29.2 That he suffers from a terminal illness which illness was discovered whilst he was already incarcerated.

29.3 That Courts have held that evidence of an “alibi” as a defence may also constitute an exception circumstance. An eye-witness who was present at the scene of the crime who made a sworn statement that he did not see the Applicant assault the deceased. It was argued that in any event, the averments of the Investigating Officer can only be viewed as hearsay evidence, and cannot trump that of the eye-witness.

[30] The Crown in its submissions in opposition, highlighted that the Applicant makes a very bare submission alleging that he suffers from a terminal illness, which was allegedly discovered whilst he was already incarcerated, but no medical records have been brought and adduced before Court as evidence to buttress these averments by Applicants. The Court herein, bearing in mind that the Applicant bears the onus of proving on a balance of probabilities the existence of exceptional or special circumstances which would warrant his release on bail (see **Wonder Dlamini & Another v Rex (supra)**).

[31] The Court in this regard finds that the Applicant has failed to submit any extrinsic evidence to substantiate the averment that he suffers from a terminal illness. He did not even deign to give the illness a name, let alone provide the Court with medical records to determine, not only its very existence, but also whether or not the illness cannot be effectively treated be it at the medical staff at the Correctional Facility where the Applicant is incarcerated, or even at any of the larger hospitals in the country. The Applicant only alluded to pain in his spinal area and legs, as well as stomach ulcers. This Court cannot be called upon to engage in a guessing game, in an endeavour to establish how serious these alleged ailments are, without the assistance of an expert medical opinion.

[32] In relation to the submission that the Applicant is the breadwinner ,and has more than nine (9) dependants, that on its own cannot be regarded as an exceptional circumstance. There is nothing peculiar about this, nor can it be said to be out of the ordinary. The fact that the Applicant has a minor child, and stands to lose his employment, also cannot be seen to be a circumstance that is out of the ordinary. In **Mzwandile Dlamini v The King** (*supra*) 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 son of bail applicants, ordinary “run of the mill” factors which the court would have been constrained to consider if this was the usual ordinary bail application predicted on an inquiry into the interests of applicant to liberty and the interest of justice.”

[33] Regarding the submissions by Counsel for the Applicant that an alibi as a defence, makes for exceptional circumstances, this submission by Counsel is not one that this Court can give credence to. *In casu*, the Counsel for Applicant stated that the evidence of the Investigating Officer who alleges that there are eye-witnesses who have sworn to statements that they saw the Applicant actually assault the deceased should be considered to be hearsay. He also vehemently opined that he is advised that another eye-witness has sworn to a statement that negates that the Applicant took part in the assault.

[34] In Mzwandile Dlamini v The King Criminal Case No. 83/13, Ota J stated at paragraph 7 the following:

“....The term exceptional circumstances is not defined. There can be 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. To my mind, to incarcerate an innocent person for an offence which he did not commit could

also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence because, e.g. he has a cast-iron alibi, this would likewise constitute an exceptional circumstance.”

[35] The point of departure *in casu*, which distinguishes the Applicant’s circumstances to those referred to by the Learned Ota J in the **Mzwandile Dlamini Case** (*supra*) is that there is no “*cast-iron*” alibi that was even alleged by the Applicant in his Founding Affidavit. *In casu*, the Court herein is swayed by the contents of the Investigating Officer’s Answering Affidavit. This Court is emboldened in doing so, by reliance on the authority of the case of **S v Hlongwa 1979 (4) SA at pages 114 to 115** where the following was stated:

“The Court may rely on the Investigating Officer’s opinion even though his opinion is unsupported by direct evidence.”

[36] Although the Applicant’s Attorney opined that this case is too old, and pre-dates the Bill of rights as contained in our Constitution of the year

2005, this Court is moved to align itself with this finding. This Court aligns itself with various other Judgments of this Court which have cited the **S v Hlongwa Case (supra)** with approval. (see: **Zwelibanzi Simelane v Rex High Court Criminal Case No. 88/22 and Musa Waga Kunene v Rex Criminal Appeal Case No. 03/2016**).

[37] The above cited cases all being determined after the coming into force of our Constitution in the year 2005, but nevertheless, the Learned Justices in those cases saw it fit to align themselves with the **S v Hlongwa Case (supra)**, and cited it with approval. The Court herein, having regard to all of the foregoing, has arrived at a conclusion that the points of law as raised by the Respondent herein is upheld. The Court in the exercise of its discretion, finds that the Applicant has not proved the existence of exceptional circumstances that warrant his release on bail. As a consequence, I am of the view that bail ought to be denied in this matter, and I so order.

K. MANZINI
JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: MR. S. MABILA (IN ASSOCIATION WITH T.L. DLAMINI & CO.)

For the Respondents: MR. T. MAMBA (DIRECTOR OF PUBLIC PROSECUTIONS' CHAMBERS)