

IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 187/2023

HELD AT MBABANE

In the matter between:

KHULEKILE WINFRED DLAMINI

Applicant

And

THE KING

Respondent

Neutral Citation: *Khulekile Winfred Dlamini vs The King* (187/2023) [2023]
SZHC 132 (29/05/2023)

Coram: **J. M. MAVUSO J**

Heard: 16th May, 2023.

Delivered: 29th May, 2023.

SUMMARY: *Criminal Law and Procedure – Applicant out on bail on fraud charges, whilst out on bail allegedly commits further offences of fraud – Bail a constitutional right enshrined in the Constitution, factor in determining whether to grant or deny an Applicant bail, is the interest of justice – In dealing with the interest of justice, the enquiry is whether it is in the interest of justice to release Applicant on bail or not – The enquiry turns on whether Applicant is likely to flee Court's jurisdiction or not and on whether Applicant is likely or unlikely to interfere with Crown witnesses and evidence in the matter – Applicant found to be unlikely to evade trial and to interfere with witnesses – Pending criminal charges cannot by themselves constitute evidence of propensity to commit crimes – Application for bail granted.*

JUDGMENT

J.M. MAVUSO - J

[1] This is an application for bail, the basis of Applicant's application is that:

- (a) It is in the public interest that she be granted bail. She argues that her release on bail, will endanger public safety.

- (b) The living conditions at the Mawelawela Correctional Facility are not conducive, as she suffers from sinus and pneumonia.

(c) That her continued incarceration, whilst awaiting trial, could result in the loss of her income, as a Police Officer based at the Police Headquarters here in Mbabane.

(d) She is a breadwinner with two children and one dependent, her mother to look after.

[2] The Crown opposes Applicant's bail application on the grounds that:

(a) She has defrauded a number of financial institutions, including a number of individuals to a financial loss of just over E900,000.00 (Nine Hundred Thousand Emalangeni).

(b) Applicant has a propensity to commit more offences whilst out on bail. The Court was told that she was currently out on bail on three (3) similar counts of fraud when she was arrested and a further nine (9) counts of these offences were added to the previous three (3) counts.

(c) evidence against her is overwhelming and that her bare denial of having committed the offences makes it possible that she will evade trial in order

to avoid any harsh sanction for her behaviour in the event she is found guilty. This is so because she has no defence to the charges.

(d) it will not be in the interest of justice to release Applicant for the following reasons:

- (i) victims of the fraud are said to be her colleagues and are livid of her actions. Inspector Minah Vilane the Officer who deposed to the Respondent's answering affidavit, at paragraph 6 thereof, states as follows:

“At one stage Applicant was assaulted by one of the victims and Applicant also assaulted a member of the public.....Applicant is also leaving under a threat.”

- (ii) her case is said to have drawn a lot of public interest more particularly from members of the Eswatini Police Service who are complainants.

(e) She was said to be likely to evade trial. Respondent submits that upon realising that she was under criminal investigation, she:

- (i) Tendered a resignation letter to her employer.
- (ii) Attempted to flee the country to South Africa through the Mananga Border gate. It is said that on the 9th May 2023 she was arrested, at the Mananga border gate on her way out of the country.

[3] In the case of Senzo Matsenjwa vs The King, Supreme Court of Eswatini Case No. 30/2017, at paragraph twelve (12) of the Judgment, it is thus stated:

“I hasten to add the sentiments expressed by the Learned Chief Justice that the Constitution of the Kingdom of Eswatini must breath life to both our civil law and criminal law including bail law particularly that all persons are equal before the eyes of the law, and, that they have the right to an impartial, fair and speedy hearing, that a person charged with an offence is presumed innocent until convicted by a Court of law. These rights are enshrined in our Constitution and are fundamental to our justice system.”

After making an analysis of a number of cases in which bail had been sought, at paragraph 18 of its judgment, the Court came to the conclusion that:

“There is a single determining factor whether to grant or deny an accused person bail, namely; the interest of justice.”

At paragraph nineteen (19) of its judgment, the Court went on to state that:

“In dealing with the interest of justice, the enquiry is whether it is in the interest of justice to release the accused person on bail or not. This in turn is dealt with by enquiring as to whether the accused person is likely to flee the jurisdiction or not and whether the accused person is likely or unlikely to interfere with the witnesses and or evidence in the matter.”

[4] Section 96 (1) (a) of the Criminal Procedure and Evidence Act 67/1938 as amended provides as follows:

“(a) In any court 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.”

In the case of Maxwell Mancoba Dlamini and Mario Masuku vs Rex, Supreme Court of Eswatini Criminal Appeal Case No. 46/2014, at paragraph 14 of the Court’s judgment, the Court had the following to say:

“The right to personal liberty is entrenched in the Constitution of this country, hence, an accused is entitled to be released on bail unless doing so would prejudice the interests of justice.....The Court has a discretion to determine bail; however, it is (sic) trite that the court

should exercise that discretion judiciously by weighing the accused's right to liberty with the interests of justice. It is now trite that the interest of justice to be protected in a bail application are two-fold: firstly, that the accused attend trial; and, secondly, that the accused does not interfere with the evidence of the Crown."

- [5] Section 96 (4) of the Criminal Procedure and Evidence Act 67 of 1938 as amended lists circumstances under which bail can be refused:

"96 (4) The refusal to grant bail and the detention of an accused in custody shall be in the interests 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 the 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.”

The Court, in the Senzo Matsenjwa Case (*supra*), stated that substantive evidence is required to justify a refusal to grant bail.

- [6] Section 96 (6) of the Criminal Procedure and Evidence Act 67 of 1938 as amended deals with various grounds which the Court has to consider when determining the likelihood that the accused, if released on bail, may attempt to evade trial.

“96 (6) In considering whether the grounds in section 96 (4) (b) being likelihood of the accused to evade trial has been established, the court may in terms of section 96 (6) of the Criminal Procedure and Evidence Act (as Amended) take the following grounds where applicable into account:

(a) The emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

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

(c) The names, and travel documents held by the accused, which may enable him or her 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 readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) The nature and the gravity of the charge on which the accused is to be tried;

(g) The strength of the case against the accused in the incentive that he or she may in consequences have to attempt to evade his or her 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 or her;

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

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

[7] (A) After a consideration of the above section and of the now trite position, that the interest of justice to be protected, are two fold namely; that the accused will not evade trial and will also not interfere with Crown witnesses. (the underlining is for emphasis purposes)

(i) Arguing against Applicant being granted bail, the Crown has raised the number of financial institutions and individuals, as well as the amount involved, as factors likely to encourage Applicant to abscond trial. Also raised alongside this argument, is that the evidence against the accused is overwhelming and that the resultant sanction could be severer as to encourage her abscond. To further

buttress this argument, in oral argument the Crown submitted that Applicant is a Police Officer and that like other Police Officers who were granted bail in previous instances, she would abscond. As pointed out above, bail is a constitutional right and Applicant has every right to be presumed innocent until found guilty, by a Court of law.

- (ii) In further support of Applicant not being granted bail, the Crown contends that Applicant is a flight risk as she frequently travels between this country and South Africa. To buttress this point, it contends that at the time of her arrest, she was arrested at the Mananga border gate on her way out of this country. From a reading of the papers before Court, there is no indication of Applicant having been made aware of the fact that she was a person of interest to the Police, at any time prior to her travel in and out of the country. It has also been argued that Applicant, at the time of her arrest was out, on bail. The Crown has not placed any evidence before this Court nor has it, informed the Court of Applicant's bail terms and

conditions, in order to enable it ascertain whether or not by travelling outside the country Applicant was violating any condition of her bail, if indeed she was out on bail. In the absence of such evidence, the Court finds Respondent's submission, unmeritorious.

- (iii) In Maxwell Mancoba Dlamini (*supra*) at paragraph eleven (11) of the Court's judgment, the Court observed as follows:

"Certainly a pending criminal charge cannot in itself constitute evidence of propensity to commit crimes."

The above holds true of Applicant's position. For the argument that, whilst out on bail (for which there is no substantive proof) Applicant has proceeded to commit further offences cannot stand, in light of the above dictum.

- (iv) At paragraph 10 of the Judgment in Maxwell Mancoba Dlamini (*supra*) the Court, had the following to say:

“It is only in exceptional circumstances that bail may be refused on the basis of a likelihood to a threat to public order, public peace, or security.”

In casu there is no substantive evidence that admitting Applicant to bail will be a threat to public order, peace or security. When Inspector Minah Vilane states that Applicant was assaulted by one of the victims and that Applicant also assaulted a member of the public, this does not have any weight, for the simple reason that, it is too vague, to be relied upon.

- (v) During oral argument, the Crown placed great emphasis on Applicant being a Police Officer. It argued against Applicant being granted bail because she was a Police Officer and that like other Police Officers who had been

granted bail by this Court, she would evade trial. The right to bail is constitutionally enshrined and Courts are enjoined by the Constitution to treat all persons equally before the law. Each case is to be decided based on its peculiar facts.

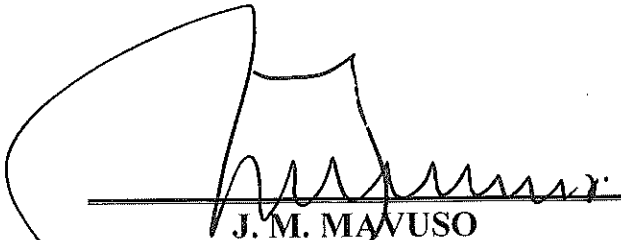
(B) The second aspect of the interest of justice to be protected in bail applications, is the non-interference, with Crown witnesses by an Applicant, seeking bail.

(i) The Crown during oral argument, submitted that there was no mechanism by which communication between Applicant and her, alleged victims, could be monitored. The Court finds this argument unmeritorious because the evidence before it suggests that the act of fraud, was perpetrated against Applicant's colleagues, other police officers and also, with employees of certain financial institutions. Starting with the fraud alleged to have been perpetrated against Applicant's colleagues, the Court is of

the considered view that they would want nothing to do with her. In the event she was granted bail and breached any condition, they would only be too happy to have her placed in custody. Similarly, the officers in financial institutions, who fell prey to the fraud, would most probably share the same sentiments as Applicant's colleagues. Lastly, the Crown has not shown or presented any reason why a warning as commonly administered by the Courts, when an accused is granted bail, would not suffice and be effective in her case.

- [8] The Court has conducted the enquiry, whether it would be in the interest of justice, to release Applicant, on bail or not and having considered, the likelihood of Applicant fleeing the Court's jurisdiction coupled with the likelihood of her interfering with Crown witnesses and/or evidence in this matter. The Court comes to the conclusion that, Applicant is unlikely, on the facts before Court, to flee its jurisdiction and is also unlikely, to interfere with witnesses and/or evidence in this matter.

[9] Accordingly, Applicant is granted bail.



J. M. MAVUSO
JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: MR. B.J. SIMELANE

For the Respondent: MR. MNGOMEZULU