

**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO. 338/2023**

In the matter between:  
**MCEBISI DLAMINI**

**APPLICANT**

**And**

**THE KING**

**RESPONDENT**

**NEUTRAL CITATION:**

**MCEBISI DLAMINI AND THE KING  
(338/2023) SZHC – 352 [11/12/2023]**

**CORAM:**

**BW MAGAGULA J**

**HEARD:**

**19/09/2023**

**DELIVERED:**

**11/12/2023**

**SUMMARY:**

*Criminal Law and Procedure – Bail – Section 96 (12) of the CP&E re-visited – when striking the balance between protecting the rights of liberty of the Applicant and safeguarding the proper administration of Justice, the scale tilts in favour of safeguarding the interests of justice – bail refused.*

---

## JUDGMENT

---

**BW MAGAGULA J**

### **BACKGROUND FACTS**

- [1] The Applicant has brought an urgent application seeking to be admitted to bail upon such terms and conditions as the court may deem fit. The crown is opposed to the granting of bail and has filed an opposing affidavit through 4828 Detective Constable Nomcebo Zikalala. The Applicant has premised his bail application in terms of both Section 16 (7) of the constitution Act of 2005 and Section 96 (1) of the Criminal Procedure and Evidence Act 67/1938<sup>1</sup>.
- [2] The facts pertaining to this matter are more or less common cause.
- [3] The Applicant is an accused person charged with 3 counts of Robbery and Assault with intent to commit Grievous Bodily Harm. The Applicant had been granted bail in respect of other 5 counts of robbery committed on the 18<sup>th</sup> June 2022. The charge sheet in respect of those robbery charges is attached in the answering affidavit as annexure **MD2**. There is also contempt of court charge, emanating from Applicant absconding a remand hearing at Piggs Peak Magistrates' Court on 17<sup>th</sup> May 2023. On the 30<sup>th</sup> July 2023 whilst out on bail committed an assault to cause grievous bodily harm. Again on the 5<sup>th</sup> August 2023 he committed the alleged Robbery charges that he is facing now.

---

<sup>1</sup> See paragraph 4 of the Applicant's founding affidavit.

## The Applicant's Basis for the Bail Application

[4] The Applicant's bail application hinges on the following grounds as set out in his founding affidavit;<sup>2</sup>

4.1 He is innocent of the charges against him as he never committed the offences which he is charged with. He therefore has a *bona fide* and valid defence to the charges.

4.2 In as much as he knows the complainants, but he says they are acquaintances of his brother, one Simo Dlamini. He alleges that whilst he was at a drinking spot, the complainants had accused Simo to have robbed them. This then led to a commotion after which him and his brother decided to run away.

4.2 He has assured the court that if released on bail, he will not interfere with the crown witnesses, as long as he is advised of their particulars. He will also not endanger the safety of the public.

[5] When addressing the requirements of exceptional circumstances since the offence which he has been charged with falls under the fifth schedule of the Act, the Applicant has stated the following;

---

<sup>2</sup> Paragraph 7 - 13

**5.1** *I am innocent of the charges against me and there is no evidence implicating me in the commission of the offence as there were no exhibits found in my possession or linking me to the commission of these offences. I am advised and verily believe that to keep an innocent man in custody only to be acquitted at the conclusion of trial is an exceptional circumstance that the above Honourable Court should take into consideration.*

**5.2** *I am a young man aged seventeen (17) years old and the conditions at the Correctional Centre where I am being kept are not conducive for a person of my age as I am being subjected to bullying by the other inmates.*

**5.3** *My co-accused, one Simo Dlamini, has already been granted bail and so released from custody. I verily believe that a sense of fairness must be practiced when dealing with such matters.*

### **The Crown's Basis for Opposition**

[6] The Applicant has failed to adduce evidence of exceptional circumstances as enjoined by Section 96 (12) of the Criminal Procedure and Evidence Act. What Applicant has submitted falls short of being unique and one of a kind.

[7] The Applicant has a propensity to commit offences as he was already out on bail for a Robbery charge when he allegedly committed other offence. It is

one of his bail conditions that he should not commit other offences whilst out on bail. Which means the Applicant has breached existing bail conditions.

[8] The Applicant is facing a very serious offence which attracts a custodial sentence. As such, he may try to evade trial. There is also a warrant of his apprehension which was issued after he failed to attend a court proceedings he was supposed to attend. He was later apprehended after having commit other offences where violence was involved. Even on the murder charge, where violence was a factor.

[9] The Crown submit that it has overwhelming evidence linking the Applicant to the commission of the offence and therefore Applicant is a flight risk.

[10] The crown also argues that Applicant is in breach of his bail conditions, as enjoined by Section 96 (140 (a) (ii) he is to disclose his pending cases and not commit other offences whilst out on bail. I humbly submit that Applicant has shown that he cannot obey any bail condition this Honourable Court can impose.

[11] The Respondent submits that according to Section 96 (4) of the Criminal Procedure and Evidence Act 67/1938 as amended, the following is stated:-

***“The refusal to grant bail and the detention of an Accused person in custody shall be in the interests of justice where one 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 to destroy evidence;*
- d) *Where there is a likelihood that Accused, if released on bail may undermine or jeopardize the objectives or the proper functioning of the criminal justice system; or*
- e) *Where in exceptional circumstances there is likelihood that the release of the Accused may disturb public order or undermine the public peace and security”.*

[12] The Crown therefore submits that the Applicant falls within the rubric of the above quoted Section 96 (4) (b) and (d). It is argued, Applicant has failed to comply with his conditions of release on bail for the murder charge, hence he will fail to abide by any bail condition even if same can be imposed. It appears from his own conduct he has propensity of failure to follow rules. The court has been referred to the case of **Musa Waga Kunene vs Rex Case No. 439/15 [2015] SZHC (60) (2016)** by Mlangeni J at page 9 – 10 para 14.1 and 16. The court stated as follows:

*“If granted bail the Accused is likely to commit another offence or offences. This is based on the fact that while out on bail, it is*

*alleged the Accused has committed offences some of which are similar to the earlier ones, e.g. in the nature of corruption."*

[13] The Respondent therefore submit that it will not be in the interest of justice to release the Applicant on bail as envisaged in Section 96 (4) (b) and (d). The court has also been urged to take judicial notice of the fact that robbery offences are prevalent in our society and the Court is implored to take a stand and deny the Applicant bail as he has shown to be part of the commission of a string of robberies. As such this has a negative impact to the economy of the country and it scares away potential investors.

[14] The Respondent further submits that the court will be justified in denying the Applicant bail as he is accused of committing an offence whilst out on bail and further committed a contempt of court charge breaching his bail conditions.

[15] The crown also argues that the Applicant is facing a very serious offence whose penalty may reach 25 years imprisonment. **Musa Waga Kunene vs Rex above, page 12 at par 22.** Wherein the Learned Judge stated as follows:

*"It is my considered view that the Applicant falls foul on this ground. This is for the simple reason that his earlier charges and the later charges suggest a strong possibility that upon release*

*he may commit any of the wide-ranging offences listed in Part II of the First Schedule”.*

[16] The Respondent further submits that it will not be in the interests of justice to release the Applicant on bail as Honourable **Justice T. Mlangeni** in the above cited authority **Musa Waga Kunene vs Rex** at page 25 para 2 lines 8 – 11 **supra**, also stated the following:-

*“But if the bail system is not protected, it can easily fall into disrepute by providing a springboard to offenders who might be encouraged to commit crime in the knowledge that they will be out on bail, no matter what the circumstances might be.”*

[17] The crown has also submitted that the Applicant is facing a very serious offence whose penalty may reach 25 (twenty five) years imprisonment.

## **THE LAW**

[18] In **Rex v Joseph Mgungu Qwabe**<sup>3</sup>, the court held that where a bail application is opposed on the ground that there is a likelihood that the Applicant will evade trial, the onus is on Applicant to show on a preponderance of probabilities that he will not evade trial.

---

<sup>3</sup> Supreme Court Case No. 64/2004



[19] In **S vs Mhlawuli and Others**<sup>4</sup> the court enunbrated the legal position to be as follows:-

*“In dealing with an application of this nature, it is necessary to strike a balance as far as that can be done, between protecting the liberty of an individual and safeguarding and ensuring the proper administration of justice...The presumption of innocence operates in favour of the Applicant even where it is said that there is a strong prima facie case against him, but if there are indications that the proper administration of justice and safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing to allow him bail. It seems to me, speaking generally, that before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade standing trial, there should be some evidence or some indication which touches the applicant personally regard to such likelihood.” (Emphasis ours).*

## ADJUDICATION

[20] The Applicant contends that when applying the dicta as laid down in **Sabelo Dalton Ndlangamandla vs The King**<sup>5</sup>, it cannot be said that the evidence placed by the crown before court indicates that the prospects of success are overwhelming so as to induce the Applicant to evade trail. This then warrants

---

<sup>4</sup> 1963 (3) SA 795 ( C) at 796

<sup>5</sup> Criminal Case No. 15/2003

the court to scrutinize the answering affidavit filed on behalf of the Respondent to ascertain if it passes the muster.

[21] The version of Detective Constable Nomcebo Zikalala is that the complainants in count 1 to 3 positively identified Applicant, soon after the commission of the offence. The identification was done to a community police member of the area, one Njabulo Dlamini. This fact appears not to have been controverted by the Applicant, as he has not filed a replying affidavit to do so. The court will therefore consider it as being admitted by the Applicant.

[22] The evidence before court<sup>6</sup>, also state that the complainants point at the Applicant and his co-accused as the ones who robbed them of their cellphones. The Applicant in particular, is said to have threatened the complainant with a knife and demanded money. He eventually took E650-00 (**Six Hundred and Fifty Emalangi**) from her. In as much as the value of the goods forming subject of the robbery, may appear to be low. It is the conduct of the Accused whilst out on bail is concerning. It appears that he continued to use a dangerous weapon and committed an offence while out on bail. Again, such scathing allegations have not been denied by the Applicant in reply. This then leads the court to inextricably link this uncontroverted fact to the point in *limine* taken by the crown:

---

<sup>6</sup> In paragraph 8 of the answering affidavit

[23] The crown has argued that the Applicant in his application for bail, has failed to comply with Section 9614 (a) (ii). This Section enjoins an Applicant in a bail application to disclose his pending cases and also not commit other offences whilst out on bail. I have taken time to consider the Applicant's founding affidavit, there is no averment whatsoever in his affidavit where the Applicant discloses that he is facing other charges of robbery, fiver to be precise. He has also not disclosed that he had been granted bail in respect of those charges. He also did not disclose that there is a pending contempt of court charge emanating from him absconding a remand hearing at the Piggs Peak Magistrate Court on the 17<sup>th</sup> May 2023.

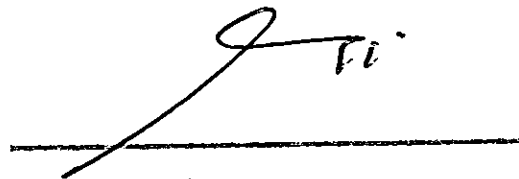
[24] It is therefore the finding of this court that the Applicant has shown a propensity to commit crimes where violence is involved. The court also makes a finding that the Applicant has breached the bail conditions in respect of the robbery charges, by committing another crime of robbery whilst out on bail. This must definitely lead to the revocation of his bail. He has breached his bail conditions. I share the sentiments expressed by my brother, **His Lordship T. Mlangeni J**<sup>7</sup> that if the bail system is not protected, it can easily fall into disrepute by providing a springboard to offenders who might be encouraged to commit crime in the knowledge that they will be out on bail no matter what the circumstances might be. This is exactly the attitude and conduct that the Applicant has exhibited in the matter at hand. He was given bail on the 27<sup>th</sup> July 2022, less than a year later, on the 5<sup>th</sup> August 2023 he had forgotten that his bail conditions entailed that he may not commit similar offences whilst out on bail. He went ahead and allegedly committed an offence of robbery again.

---

<sup>7</sup> In *Musa Waga Kunene vs Rex* at page 25

At least as per the charge sheet. It appears that the Applicant does not only have disregard for the law and the bail system under which he now desires to benefit from, but for the law generally. He cannot be allowed to manipulate the right to bail as provided for in the constitution. His disregard for the bail conditions must have consequences, otherwise the rule of law will be a mockery, which is not sustainable for society. It may lead to anarchy.

[25] The Court has carefully struck the balance between protecting the rights of liberty of the Applicant and ensuring that the proper administration of justice is safeguarded. The scale tilts against the Applicant due to his conduct whilst out on bail. The Court is not inclined to grant the Applicant bail. As such, the Applicant's application to be admitted to bail is dismissed.

A handwritten signature in black ink, appearing to read 'BW Magagula', is written over a solid horizontal line.

**BW MAGAGULA**

**JUDGE OF THE HIGH COURT OF ESWATINI**

For the Applicant:

Mr S. Mhlanga: Mabila Attorneys in Association  
with N. Ndlangamandla

For the Respondent:

Miss N. Mabila: Director of Public Prosecutions  
Chambers.