IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 717/2024**

In the matter be ween:

RICARDO DE SOUSA

VERSUS

REX

JUDGEMENT ON BAIL

Neutral citation:	*Rex vs Ricardo De Sousa (717/2024) SZHC 22 (20th February 2025).*
Coram:	*S.M. MASUKU J*
Date heard:	*19th November 2024*
Date delivered:	*20th February 2025*
Flynote:	*Criminal law and Procedure- opposed bail application. The Crown opposed bail on the ordinary equitable tests of the interest of justice determination in accordance with the*

exemplary lists of consideration set out in section 96(4) to (10) of the CP & E Act. The balance of the grounds on which bail is opposed are applied differently under section 96 (12) (a) where the lawgiver makes it quite plain that a formal onus rests on the detainee to 'satisfy the court' that exceptional circumstances exists which in the interest of justice permits his release.

Held: *That the interest of justice favours that the Applicant be released on bail with enforceable conditions attached to his release. The court is further satisfied that evidence of exceptional circumstances sufficiently exists which the interest of justice permits his release on bail.*

[1] The Applicant is facing two counts of Murder, one count of Arson and a charge for contravening section 77 (1) (d) of the Sexual Offences and Domestic Violence Act 15 of 2018.

[2] He was arrested on the 28th October 2020, taken to Mbabane Magistrate's Court wherein he was remanded into custody at Sidvwashini Correctional Facility pending committal to the High Court. On the 6th February 2023 he appeared before the High Court for a roll call for allocation of trial dates. The court referred his case back to the Registrar to re-allocate his case to another court. The result is that he has been kept at the correctional facility since then making it four years four months pre-trial detention.

[3] Neither the Crown nor the Registrar has made any indication of when he is likely to be tried. The crown averred in its answering affidavit that the Applicant should be patient as he is not the only one that has waited for such a period of time to have his day in court for trial.

[4] The contested background facts leading to the charges laid against the Applicant are that during the month of September 2020 Investigating Officer 5269 D/Constable Z.Dlamini received a report through 999 that a shack owned by the deceased in count one (Dan Duma) was on fire. When they (Police) proceeded to the scene, they found the shack made of corrugated iron sheets and planks in flames.

[5] The deceased in count 1 who was inside rushed to the door only to find it was locked. He jumped out through the window and he was in flames. He raised alarm to the neighbors who came out and assisted to forcefully open the burning shack from outside. They got hold of the deceased in count 2 (Thembisile Lukhele) and called the 977 emergency service that took them to Mbabane Government Hospital. They were later transferred to Raleigh Fitkin Memorial Hospital owing to the fact that the Intensive Care Unit (ICU) in Mbabane Government Hospital was not functional.

[6] The deceased in count one passed on after 4 days in hospital and the other deceased in count two also met her death a week and few days later. The Investigating Officer averred that the deceased in count 2 (Thembisile Lukhele) had been attacked by the Applicant prior to the fire incident in the presence of the deceased in count one (Dan Duma). A case was opened, statements were recorded from the two deceased and a case was still under investigation when the fire incident occurred. The Applicant was an immediate suspect. The police investigation revealed further that he used petrol to douse the shack on fire. This is how he got to be arrested and filed the bail application before court. The facts are refuted by the Applicant but this is not his trial for this court to verify them. They have been used to give a background of his arrest and how he got to be in custody.

[7] The Applicant submitted that it is in the interest of justice that he be released on bail for the following reasons:

7.1 He is not a flight risk. He is Swazi with no dealings or connections outside the country. His family consisting his mother, his sister and her daughter stay at Flame Tree Park, Siteki in the Lubombo district. He testified that he is prepared to comply with all bail conditions that may be attached on his release. He said he will stay with his father at Moneni Manzini away from Sidvwashini where the alleged offence occurred.

7.2 He said the alleged offences of murder that he is facing are offences listed in the 5th schedule of the Criminal Procedure and Evidence Act 1938 which requires him to adduce evidence which satisfies the court that exceptional circumstances exist, which is the interest of justice permits his release. In that regard the exceptional circumstances are *inter-alia;-*

7.2.1 Section 136 (1) of the Criminal Procedure and Evidence Act provides that persons committed for trial before the High Court shall be brought to trial the first session of such court or else shall be admitted to bail if thirty one (31) days have lapsed between such date of commitment and the time of holding such session. He argued that he has been in custody four years four months without trial and that constitute exceptional circumstances.

7.2.2 He said he has an *alibis* for when the offences were committed he was at his home, Dalriach East Mbabane with his mother Delores De Sousa until the next morning. He concluded that his *alibis* constitutes an exceptional circumstances.

7.2.3 He stated further that he suffers from two terminal illness, classified as incurable namely, autism and fits. He could not get any medical

assistance because he is currently in the correctional facility and could not get his family to support him on it.

7.2.4 Lastly he submitted that he is the only surviving parent for his minor child five (5) years of age who is currently under the custody of his mother. Her mother is unemployed and cannot take good care of her.

[8] The Crown is opposed to his bail on the basis that he has not adduced evidence that exceptional circumstances exist which in the interest of justice permits his release on bail. The Crown submitted that;-

8.1 The accused has previously been denied bail by the court, and on those basis he is not eligible to benefit from section 136 (2) of the CP & E Act.

8.2 There is likelihood that if released on bail the Applicant may evade trial. The Applicant, it is said faces lengthy jail term in the event he is convicted of the offences he is facing.

8.3 That his released on bail may cause outrage and unrest in the community wherein the offences were committed.

Whether or not Applicant has discharged the onus as required under section 96 (12) (a) of the CP & E Act which requires him to adduce evidence which satisfies the court that exceptional circumstances exist, which in the interest of justice permits his release on bail.

Applicable law

[9] Murder is an offence listed in the fifth schedule of the Act and in terms of this section, the Applicant is compelled to prove, on a balance of probabilities, that circumstances exist which permit his release in the interest of justice and that such circumstances are exceptional.

[10] A particular focus in bail applications is that they are not a trial. In S v Branco 2002 (1) SACR 531 (w) at 535 D-E the court held that a, "*bail application is not a trial. The prosecution is not required to close every loophole at this stage of the proceedings.*"

[11] In S v Schietekat 1998 (2) SACR 707 (c) at 713 H-J the court held that *bail proceedings are "...sui genesis. The application may be brought soon after arrest. At that stage all that may exist is a complaint which is still to be investigated. The state is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take account of whatever information is placed before it in order to form what is essentially an opinion or value judgement of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the state in order to decide whether the accused has discharged the onus of showing that 'exceptional'circumstances exist which in the interest of justice permit his release".*

What are exceptional circumstances?

[12] Section 96 (12) of the Criminal Procedure and Evidence Act is framed similar to section 60 (11) of the South African Criminal Procedure Act. I have explored a series of South African Authorities on this concept and discovered a wider net of what it entails.

[13] S v Barendse and Another (A01/2023) [2023] ZAWCHC 63 (21 May 2023) cites the following case S v Petersen 2008 (2) SACR 355 (C) at paragraph [55] it was held as follows: .. *"generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable peculiar or simple different. There are of course varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference".*

[14] S v Mazibuko and another 2010 (1) SACR 433 (KZP) at [19] it was held that *"... for the circumstances to qualify as sufficiently exceptional to justify the accused's release on bail it must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong or compelling".*

[15] In S v H 2001 (1) SACR at 659 (C) at 668 it was held... *"exceptional circumstances must be circumstances which are not found in an ordinary bail application but pertain peculiarity... to an accused's specific application ... as a whole, in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to rely under section 60 (11) (a)".*

What are the Applicant's peculiar circumstances?

[16] The Applicant has been in custody from 28th October 2020, which makes four (4) years four (4) months as at the date of the Application. On the 6th February 2023 his matter was allocated for trial at the High Court but was referred by the Court to the Registrar for re- allocation. He still awaits allocation for his trial.

[17] Section 136 (1) of the Criminal Procedure and Evidence Act provides that persons committed to be brought to trial shall be brought to trial at the first session of such court for trial of criminal cases held after the date of their commitment or else shall be admitted to bail, if 31 days have lapsed between such date of commitment and the time of holding such session.

[18] Section 136 (2) provides that the Applicant would be entitled to apply for his discharged if he was not brought to trial on the first session after the expiration of six months after the date of committal.

[19] The Prosecution argued that because the Applicant was previously denied bail by the court on the basis that it would not be in the interest of justice to be

released on bail, he was therefore not eligible to benefit from section 136 (2). The Prosecution cited Celani Maponi Ngubane v The DPP High court case No.11/2000 page 7 and Mncedisi Dassa Thobela v The DPP criminal Appeal case 26/2013 for the proposition.

[20] The prosecution's objection to the application is too fold, in the first instance it is that section 136 (2) is not available to litigants who have had their application turned down previously. Secondly, that the subsection is not available to Applicants who were unable to convince the court that it would be in the best interest of justice to admit them to bail. The exposition was expressed by T.S Masuku J in the Celani Maponi Ngubane case (*supra*) and T.Mlangeni J in the High Court Judgement Mcedisi Dassa Thobela v The King as dealt with by Z.W Magagula A JA (as he then was) in the Appeal court – Mncedisi Dassa Thobela (*supra*).

[21] The preferred position as expressed by Z.W Magagula AJA in the Mncedisi Dassa Thobela Appeal case 26/2013 is that when applying the provisions of subsection 2 of 136, to the court ought to be guided by what is in the best interest of justice.

[22] The Supreme Court per Z.W Magagula AJA expressed this sentiments at paragraph [11] when it said;

"[11] with respect to the Learned Judges (referring to the opinion of both T.S.Masuku and T.Mlangeni)... I do not think that the application of section 136 is meant for Applicants who "qualify" to be admitted to bail. It is my view that this section is available to all Applicants who meet the criteria provided for in subsection 1 and 2...

[12] The purpose of a discharge under section 136 is to limit the period of pre-trial detention. To make sure accused persons are brought to trial at the earliest possible opportunity. This should apply to both accused

persons who were granted bail but could not afford to pay and accused whose application was turned down by the court".

[23] I read the judgement to be proposing that each case must be considered on its merits.

[24] I gather from the merits of the application that the Applicant has been detained long without trial. He was brought to court for allocation of trial date and/or trial but could not be given trial dates, his matter was referred back to the Registrar for re-allocation and that has not happened. He is eligible to apply for bail or to be released in terms of section 136 (1) and (2) as he was not brought back for trial as was directed by the court. I agree with the notion that the purpose of section 136 is to limit the period of pre-trial detention.

[25] I find that his circumstances as stated above sufficiently qualify as exceptional and one which weighs in his favour to make a compelling case for his release on bail pending his trial due to the period he has awaited trial.

The *Alibis*

[26] The Applicant said his *alibis* defence should be held to be exceptional in the circumstances. He said it in his defence that when the offences were committed he was at his house at Dalriach East Mbabane. To support this fact has obtained an affidavit from his mother that he could not have been at the crime scene.

[27] The question whether an alleged weakness of the State's case (in relation to an *alibi* defence) constitutes exceptional circumstances was set out in S v Matsebula 2010 (1) SACR 55 (SCA) at paragraph 12.

"But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to test. In order successfully to challenge the merits of such a case in bail proceedings an applicant need to

go further. He must prove on a balance of probability that he will be acquitted of the charges".

[28] It seems to be a tough call for the Applicant to rely on his *alibi* to be held as exceptional. In *casu* although he has averred his whereabouts on the night when the crimes were committed has not proved that he will on a balance of probabilities be acquitted. The Investigating Officer said they have CCTV footage that identifies the Applicant purchasing petrol at a filling station which was suspected to have been used for committing the crimes. His *alibi* is challenged.

[29] The mere fact that the Applicant says he intends raising an *alibi* as a defence does not automatically convert his circumstances to "exceptional". Thus, when one relies on an *alibi* as 'exceptional' circumstances, one has to prove on a balance of probabilities that one will be acquitted of the charges. The challenge that his *alibi* faces a challenge in the form of CCTV footage renders his prove on a balance of probabilities less likely to suceed and as such it cannot be exceptional in his bail application.

Terminal illness, classified incurable illness Autism and Fits.

[30] The Applicant states under oath that it is exceptional that he suffers from two terminal illness, classified as incurable namely autism and fits. He said the correctional services are not giving him the attention due to the shortage of drugs in the country. He stated that he could not get a medical certificate from a doctor in proof because of his incarceration. He said he could also not get his family to support his affidavit.

[31] In response the Investigating Officer simple disputed the Applicant's assertion and said, it should be rejected because he has not attached any medical report

to claim. He said the Correctional Services have medical facilities for all ill inmates. The facility has qualified staff who also look after those sick in the facility and Applicant is no exception. There are many of inmates with ailments at the facility therefore his sickness is not exceptional.

[32] It is correct that the Applicant has not supported his ailment assertions by medical report or by historical testimony from his family. He has however provided a reasonable explanation under oath why he has been unable to support his condition. The Police Investigating Officer took it upon himself to profess matters of the Correctional Services. His response is generally focused on the support inmates receive at the facility as if the information he has is first hand when he is not even an officer in that facility. There is no supporting affidavit from the officials from the facility. It should also be noted that his response or reply does not address the Applicant's perculier ailments. For example he says there are many in mates who have ailments at the correctional services therefore Applicant's sickness is no exception.

[33] When balancing the facts under oath by the Applicant and those of the Investigating Officer, it is more probably than not that the Applicant's version depicting his personal state of health is an account to be accepted than the general assertions made by the Investigating Officer who does not address Applicant's alleged peculiar ailments. In that regard, the Applicant's state of ailment is exceptional in the circumstances.

Likelihood that if released on bail Applicant may evade Trial.

[34] The Crown averred that for reasons that the Applicant is facing two counts of murder, he is a flight risk. If convicted for the crimes, he will face lengthy sentences that may induce him to flee his trial.

[35] The court should however take into account the following undisputed facts presented by the Applicant in this regard. He is a Swazi citizen with no business or dealings outside the country. His parents are Swazis who reside within the country. His biological father Jose De Sousa has filed a confirmatory affidavit that if Applicant is released on bail he would come to stay with him at House at No.1 Hill and Dale Farm, Moneni in the Manzini District, a place he has lived at since 1987. Moneni is a place far from Sidvwashini where the alleged crimes were committed. In that regard it may well be envisaged that stringent bail conditions may be enforceable to monitor the Applicant's movements so as to ensure he attends trial.

Will the Applicant's release cause an outrage and unrest in the community.

[36] Right at the end of his answering affidavit as if it is an afterthought the Investigating Officer state that; 'may I further state that the release of the Applicant on bail may cause outrage and unrest in the community wherein the offence was committed'. He averred that this is because the applicant was attacked by a group of people on the morning of the 26th September 2020 at Sidvwashini. They assaulted him suspicious that he was the cause of the fire that burnt the shack. He was saved by the police who took him to hospital. Thus it was argued it will not be in the interest of justice to release him.

[37] The Applicant said the mob was unjustified to assault him with intent to cause grievous bodily harm because he never committed the offences. This may well be his defence. The question is would his release be likely to cause outrage and unrest to the Sidwashini community?

[38] I am inclined to think not. The Applicant has been in pre-trial detention for a period of four(4) years and four (4) months, whatever angered the community on the 26th September 2020 must have subsided by present day. In any event

if released on bail the Applicant and his parents have undertaken to provide alternative residential area (Moneni Manzini) where he will stay pending trial.

Conclusion

[39] The dissenting judgement in the case of Mafe v S [2022] ZA WCHC 108 (31 May 2022) at paragraph [95] gives a good summary of what has to be weighed by a court in reaching a value judgment in bail applications. This judgement is cited on the basis that section 96 (12) (a) of our Criminal Procedure and Evidence Act is crafted similar to section 90 (11) of the Criminal Procedure Act of South Africa.

[40] The Honourable Justice Lekhuleni in the Mafe case (*supra*) said the following regarding the presumption of innocence, which is equally applicable as a conclusion in this bail application:-

"*In summary, the presumption of innocence is one of the factors that must be considered together with the strength of the state's case. However, this right does not automatically entitle an accused person to be released on bail. What is expected is that in schedule 6 offences the accused must be given an opportunity, in terms of section 60 11 (a), to present evidence to prove that there are exceptional circumstances which, in the interest of justice, permit his released. The state, on the other hand, must show that notwithstanding the accused's presumption of innocence, it has a prima facia case against the accused. In reaching a value judgement in bail application, the court must weigh up the liberty interest of the accused person, who is presumed innocent, against the legitimate interest of society. In doing so, the court must not over-emphasize this right at the expense of society*"*(underlining my own).*

[41] His Lordship Van Zyl A J in S v Barendse and Another *(supra)* the court at Paragraph [118] opined:-

"[118] In a situation, therefore, where both parties elect to advance their case in the form of affidavits, the State's version must be accepted where there is conflict, unless appears improbable. This is because the onus in a schedule 6 bail application is on the applicant to show exceptional circumstances, and not the state. Importantly, this is clearly not the introduction of the so called Plascon-Evans rule, applicable in civil motion proceedings, in bail proceedings. It is simply a consideration of whether the onus placed on the Appellants has been discharged."

[41] In *casu,* the various grounds upon which the Crown opposed the Applicants bail as contained in this judgement are based on the ordinary equitable test of the interest of justice determination according to the exemplary list of considerations set out in section 96(4) to (10) of the Act. The consideration is different under section 96 (12) (a) where the law giver makes it quite plain that a formal *onus* rests on the detainee to 'satisfy the court'.

[42] In the ordinary equitable tests of interest of justice, are applicable to the likelihood that if released on bail he may evade trial, that he may disturb public peace and cause unrest in the Sidvwashini Community. In that regard the court has found that for the reasons as canvassed in the judgement, the interest of justice favors that he be released on bail with enforceable conditions attached to his release.

[43] As for the Applicant's circumstances under section 96 (12) (a) of the Act, save for his *alibi* defence, the court is satisfied that evidence of exceptional circumstances sufficiently exist which the interest of justice permits his release on bail.

[44] In the circumstances and for the reasons aforesaid, the Applicant is admitted to bail with the following bail conditions;

1. Bail is set at E50 000-00 (Fifty thousand emalangeni).
2. E10 000-00 (Ten thousand emalangeni) to be secured by cash.
3. The balance of E40 000-00 (Forty thousand emalangeni) be secured by the provision of sureties.
4. The Applicant to surrender his travel document, valid international passport to the Investigating Officer and not to apply for new ones after release from custody.
5. To report on the last day of every month at the charge office at Manzini Police station between the hours of 08h00 and 16h00, first report to be on the first Friday of his release.
6. To relocate upon his release from custody and to stay with his father Jose De Sousa at House No.1 Hill and Dale Farm, Moneni in the Manzini district until his trial days.
7. To refrain from communicating or interfering with the crown witnesses. In the event unknown to him he ascertained from the Investigating Officer.
8. Upon service of summons or other lawful order for his trial, honor the directives.

S.M. MASUKU

JUDGE - OF THE HIGH COURT

For the Applicant: Mr Vamsile Ntshangase

For the Accused: Ms L.S Dlamini – DPP'S Chambers.