IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CIVIL CASE NO. 519/24**

In the matter between:

NKOSINATHI WINSTON NGOZWANE Applicant

And

THE KING Respondent

Neutral citation: *Nkosinathi Winston Ngozwane v The King (519/24) [2025] SZHC 18 (18 February 2025)*

CORAM: **N.M. MASEKO J**
FOR APPLICANT: **ATTORNEY MS. N. NDLANGAMANDLA**
FOR RESPONDENT: **ATTORNEY MS. N. ZWANE**

DATE OF HEARING: **15 OCTOBER 2024**
DATE OF DELIVERY: **18 FEBRUARY 2025**

Preamble: *Criminal Procedure – Bail application – Charge based on Schedule 5 of the Criminal Procedure and Evidence Act 67/1938 as Amended – Section 96 (12) (a) dictate to the accused to establish exceptional circumstances which in the interest of justice permit his release on bail*

Held: *Applicant's bail application is hereby denied on account of failure to adduce evidence of existence of exceptional circumstances, and on account of the Crown's evidence in possession of the Crown.*

JUDGMENT

MASEKO J

[1] On the 1st August 2024 the Applicant launched these bail proceedings for an order to release him on bail pending his trial.

APPLICANT's CASE:

[2] The Applicant states that he is an adult male South African of Pretoria in the Republic of South Africa, and that he was arrested by the Manzini Police on the 27th May 2024 after he had surrendered himself, and charged with one (1) Count of Murder, two (2) Counts of Robbery and one (1) Count of Kidnapping. He states that he is advised that the charges preferred against him by the Crown cannot be dealt with immediately due to some lengthy pre-trial processes, and therefore he wishes to be admitted to bail in the meantime whilst awaiting his trial.

[3] The Applicant states that he is innocent of the charges preferred against him and that he will plead not guilty to the charges as contained in the Indictment. He states that on the fateful day he was in the company of one of his co-accused when the said co-accused received a call which was seeking for transport services, and because he had a motor vehicle he decided to assist. He together with his co-accused drove to Matsapha Industrial Site where his other co-accused had series of meetings and he also drove to certain warehouses in Matsapha where his co-accused persons were having meetings.

[4] The Applicant states that after some time, they left for Mahhala Shopping Complex where they enjoyed some drinks, and in the evening around 9.30pm, one of his co-accused received a phone call, and they returned to the warehouse owned by the deceased and he was instructed to remain in the car whilst his co-accused proceeded into the warehouse and kidnapped the Security Guard and pushed him into the back of his car and then ordered him to follow them as they drove in the deceased's motor vehicle. As he was following them he noticed the deceased and his girlfriend who looked very scared, and he suggested that she be allowed to

come to his car and they agreed and indeed she came to his car and they drove to Mahhala. He states that he then received a phone call to drive to Bethany to collect ATM cards from the deceased and he did that and went on to withdraw E8 000-00 and returned to Bethany. He was given E2 5000-00 for his services and he then drove to Mbabane after releasing the Security Guard and the girlfriend to the deceased who he gave E200-00 to board a taxi home.

[5] He states that he has co-operated with the investigating team and has provided all information within his knowledge, and insists that he was never involved in the murder of the deceased. He states that if released on bail he will stay at his co-accused Liyandza Mhlanga's home with Liyandza's parents at Gundvwini area in the Manzini District. These are family friends, a relationship that is over ten (10) years.

[6] He states that if released on bail he will not interfere with Crown witnesses, further that he will not endanger the safety of the public or any particular person and that he will not undermine the criminal justice system in any manner whatsoever in particular the bail system.

[7] It is common cause that the father of Liyandza Mhlanga has deposed to an affidavit wherein he states that he will accommodate the Applicant if released on bail and ensure that the Applicant avails himself before Court when directed to do so.

CROWN's CASE:

[8] The Crown has filed the Answering Affidavit of 5727 Detective Sergeant Ayanda Dlamini, who is the Principal Investigator of this case. Officer Dlamini has raised a point *in limine* that the Applicant has failed to

establish exceptional circumstances warranting his release on bail because he is charged with Schedule Five offences in terms of 96 (12) (a) of the Criminal Procedure and Evidence Act No. 67/1938 as Amended.

[9] Detective Sgt. Dlamini states that the Applicant participated fully in the planning as well as in the murder of the deceased, including the robbery, committed at the deceased's home after the murder of the deceased. Officer Dlamini states that the Applicant was responsible for withdrawing money from Mahhala and also at Ezulwini. Detective Sgt. Dlamini states further that the Applicant played various roles during the commission of the offences both at planning level and at execution level.

[10] Detective Sgt. Dlamini states further that after the murder of the deceased the Applicant fled to South Africa, and upon his return to Eswatini the police were tipped that he was at the Mbabane Club where he was arrested. Officer Dlamini denies that the Applicant handed himself over to the police.

[11] Detective Sgt. Dlamini states that they have overwhelming evidence against the Applicant and that it would be contrary to the interests of justice to have him released on bail as he is likely to abscond his trial. Officer Dlamini states that the Applicant even kidnapped the lady who was found in the company of the deceased and prevented her from reporting to the police until the deceased was killed. Officer Dlamini states that the Applicant and his co-accused acted in furtherance of a common purpose.

[12] Detective Sgt. Dlamini states further that the Applicant is someone who is knowledgeable in information technology (IT) because he is the one who

had a gadget which verified whether the bank cards' PIN numbers of deceased's accounts were operational or not. Officer Dlamini states that the Applicant was literally using his gadget whilst the deceased was revealing the numbers before he was killed.

[13] Detective Sgt. Dlamini states that the Applicant has no ties to Eswatini because he is a South African citizen, and further that the possibility of a lengthy jail sentence in the event of a conviction can induce the Applicant to abscond his trial and escape to South Africa. Detective Sgt. Dlamini states further that if released on bail, the Applicant is likely to intimidate Crown witnesses who are known to him, for example the lady whom they dropped at Mahhala and who identified him during the ID Parade.

ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE

(i) Section 96 (12) (a) of Act 67/1938 as Amended

[14] The Applicant has in my view **dismally failed to adduce evidence of the existence of exceptional cases** which in the interest of justice permit his release on bail. Section 96 (12) (a) provides as follows: -

> "96 (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 he 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;"

[15] The Applicant both in his Founding and Replying Affidavits has dismally failed to adduce evidence which satisfies this Court that exceptional

circumstances exist which in the interest of justice justify his release on bail.

[16] The Applicant has alleged the following in his bid to establish exceptional circumstances:-

(i) that he made means to surrender himself to the police through A4's father;

(ii) that he made full disclosure of the facts leading to the arrest of the people who are implicated in the commission of the offence;

(iii) that there is no evidence implicating him in the commission of the offence.

[17] These allegations described by the Applicant as being his exceptional circumstances have easily been negated by Detective Sgt. Dlamini when he testified in the following manner: -

(i) that immediately after the murder and robbery of the deceased the Applicant fled or escaped to South Africa.

(ii) that the Applicant was arrested at the Mbabane Club (Albert Millin) in the middle of the night and that he didn't surrender himself to the police. This was after the police had received a tip-off about his presence in the country;

(iii) that there is overwhelming evidence against the Applicant who participated both in the planning of the crime until the murder, and after the murder, the robberies and withdrawal of monies from ATMs at Matsapha, Ezulwini and even at ALZU in the Republic of South Africa. Detective Sgt. Dlamini

testified further that the Applicant is the one who was using an electronic gadget which verified whether the numbers were operational or not and that it was the Applicant who was given the PIN numbers by the deceased whilst he was being tortured before he was brutally murdered by the accused persons who were all acting jointly and in the furtherance of a common purpose.

[18] Authority is legend in this jurisdiction that exceptional circumstances are relative because each case is to be treated on its own merits in the determination of the existence of exceptional circumstances. The Applicant argues that he never participated in the murder of the deceased but state it himself in his affidavit that he was the one who withdrew the money from the deceased's bank accounts through the ATMs. In fact Detective Sgt. Dlamini states that the Applicant attempted to withdraw further monies from an ATM at ALZU in the Republic of South Africa. The Applicant himself states that they shared the money he had withdrawn from the ATMs. Detective Sgt. Dlamini testified further that the Applicant used informal crossing into RSA, he did not use the formal border post to cross into RSA.

[19] The issue of exceptional circumstances has been dealt with at length by this Court and the Supreme Court. Both Counsels Ms N. Ndlangamandla and Ms N.F. Zwane have referred to number of authorities applicable in bail proceedings and the Court is appreciative to both Counsel.

[20] In dealing with exceptional circumstances as per Section 96 (12) (a) of Act 67/1938 as Amended the Supreme Court stated as follows in the case of

the Court stated as follows at paras 7, 8, 9, 10, 11 and 12: -

'[7] In defining exceptional circumstances Magid AJA, in Senzo Menzi Motsa v Rex Appeal Case No. 15/2009 stated as follows at para 11: -

> "In my judgment, the word "exceptional" in relation to bail must mean something more than merely "unusual" but rather less than unique which means in effect "one of a kind".

[8] Section 96 (12 (a) makes it clear that an applicant for bail in respect of a schedule five offence bears a formal onus to satisfy the Court that exceptional circumstances exist which in the interest of justice permit his release; the applicant discharges the onus only by adducing the requisite evidence failing which his detention in custody continues pending finalisation of the trial. Admittedly the onus has to be discharged on a balance of probabilities.

[9] The offences listed in the Fifth Schedule consist of serious and violent offences, and, which upon conviction are accompanied by severe penalties. It is apparent that when Parliament enacted this law, the purpose was to render the granting of bail in respect of these offences most stringent and difficult to obtain by placing the onus on the accused to adduce evidence showing the existence of exceptional circumstances. The legislation seeks to protect law-abiding citizens against the upsurge in violent criminal activity. The legislation does not deprive courts of their discretion in determining bail applications in respect of the Fifth Schedule offences but it requires evidence to be adduced showing the existence of exceptional circumstances. It further places the onus of proof upon the applicant. Parliament enacted Section 96 (12) (a) in order to deter and control serious and violent crimes as well as to limit the right of an accused person to bail in the interest of justice.

[10] The South African Statute dealing with bail applications in respect of serious and violent crimes is Section 60 (11) (a) of the Criminal Procedure Act 51 of 1977, and its wording is substantially the same as our Section 96 (12) (a) of the Act. In South Africa these offences are listed in the Sixth Schedule. The South African Constitutional Court in the case of S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (2) SACR 51; 1999 (4) 623 (CC) dealt with the issue of "exceptional circumstances" in bail applications. The issue before the Constitutional Court was whether or not Section 60 (11) (a) of the Act infringes upon the accused's right to personal liberty by the requirement of "exceptional circumstances" which places a rigorous test to bail.

[11] Kriegler J who delivered the unanimous judgment of the Court stated the following at paragraphs [60] and [61]: -

"[60] --- an accused on a schedule 6 charge must adduce evidence to

> satisfy the Court that exceptional circumstances exist which permit his or her release.

[61] --- under ss 11(a) the lawgiver makes it quite plain that a formal onus rests on a detainee to "satisfy the Court". Furthermore, unlike other applicants for bail, such detainees cannot put relevant factors before the Court informally, nor can they rely on information produced by the prosecution; they actually have to adduce evidence. In addition the evaluation of such cases has the predetermined starting point that continued detention is the norm. Finally, and crucially, such applicants for bail have to satisfy the Court that "exceptional circumstances" exist.

[12] His Lordship at paragraphs [63] and [64] of the judgment analysed the change to bail applications which has been introduced by the amendment in Section 60 (11) (a) of the Act. He stated the following:

"[63] Section 60 (11) (a) applies only when an accused is charged with one of the serious offences listed in Schedule 6. It is true that the seriousness of the offence, and with it the heightened temptation to flee because of the severity of the possible penalty, have always been important factors relevant to deciding whether bail should be granted. So too, have been the possibility of interference with the course of the case, and the accused's propensity to interfere in the light of his or criminal record. Indeed those are factors that are expressly mentioned in the list of "ordinary" circumstances contained earlier in Section 60.

[64] These are factors therefore, which in the past would have been considered in determining whether bail should be granted. However, S 60 (11) (a) does more than restate the ordinary principles of bail. It states that where an accused is charged with Schedule 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise --- in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60 (11) (a) contemplates an exercise in which the liberty interests of the accused and the interests of society in denying the accused bail will be resolved in favour of the denial of bail, unless "exceptional circumstances" are shown by

on the accused to establish the existence of exceptional circumstances. At page 678 His Lordship stated the following: -

> "From the aforesaid provisions it is clear that a Court is obliged to order an accused's detention where he stands charged of a Schedule 6 offence and a Court will only be empowered to grant bail in those instances provided the accused can advance exceptional circumstances why he should be released. The effect of this provision is to shift the onus to the accused to convince the Court on a balance of probabilities that such circumstances exist. The Schedule 6 offences are serious offences such as murder, rape and robbery where there were aggravating circumstances present when they were committed.
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> The term "exceptional circumstances" is not defined. There can be as many 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 exceptional circumstance."

[24] *In casu* I have considered the applicant's case as well as the Crown's case. It is my considered view that the applicant has not adduced evidence of the existence of exceptional circumstances warranting his release on bail.

[25] Consequently, I hereby hand down the following judgment: -

1. The application for bail is hereby dismissed.
2. The Applicant shall remain in custody pending completion of his trial.

N.M. MASEKO
JUDGE