



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Criminal Appeal Case No: 01/2014

In the matter between:

**RODNEY MASOKA NXUMALO**

**FIRST APPELLANT**

**MPENDULO MASIBEKELA GAMEDZE**

**SECOND APPELLANT**

**MPHIKELELI MTHINI DLAMINI**

**THIRD APPELLANT**

**VS**

**REX**

**RESPONDENT**

Neutral citation:

*Rodney Masoka Nxumalo & Two Others vs Rex (01/2014)*  
*[2014] SZSC30 (30 May 2014)*

**CORAM:**

**A.M. EBRAHIM, JA**  
**M.C.B. MAPHALALA, JA**  
**DR. B.J. ODOKI, JA**

Heard

07 May 2014

Delivered

30 May 2014

**Summary**

Criminal Appeal – bail – appellants charged with various counts of Theft by False Pretences – court *a quo* dismissed their bail applications on the basis that it was not in the interests of justice to release them – sections 96 (4) (a) as read with section 96 (5) (e) and (f) of the Criminal Procedure and Evidence Act 67/1938 considered – held that the appellants were part of a syndicate specialising on defrauding people of their money – held further that they were repeat offenders and if released on bail, there is a likelihood that they would commit similar offences – appeal accordingly dismissed.

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## JUDGMENT

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### **M.C.B. MAPHALALA, JA**

[1] The appellants lodged a bail application in the court *a quo* on an urgent basis. It is not in dispute that the appellants are charged with a number of counts of Theft by False Pretences. Their bail application was opposed by the Crown on the basis that they are part of a big syndicate which defrauds members of the public of huge sums of money. The Crown further contends in its Answering Affidavit that the appellants are repeat offenders with a disposition to commit the offence of Theft by False Pretences which is an offence listed in Part II of the First Schedule. It is the Crown's contention that the appellants if released on bail would commit similar offences as envisaged in sections 96 (4) (a) as read with section 96 (5) (e) and (f) of the Criminal Procedure and Evidence Act 67/1938. In addition the Crown contends that the second appellant as well as the third accused have previously been convicted of similar offences.

[2] The appellants were part of a group of eight accused persons who were charged with several counts of Theft by False Pretences; the total amount defrauded from the complainants amounted to E673 300.00 (six hundred and seventy three thousand three hundred emalangen). During their bail hearing in the court *a quo*, three of the accused withdrew their bail applications. The three appellants proceeded with their bail application; however, it was dismissed by

the court *a quo* on the basis that there was a likelihood that if released on bail, they would commit similar offences. The offences were allegedly committed within a period of five months.

[3] The appellants did not file a replying affidavit dealing with the serious allegations against them arising from the Answering Affidavit. These include, firstly, allegations that the appellants are part of a big syndicate specialising on the crime of Theft by False Pretences; secondly, that some members of the syndicate including the second appellant are repeat offenders previously convicted of similar offences; thirdly, that certain members of the syndicate have not yet been arrested and that if the appellants are released, they are likely to tamper with the Crown's evidence; fourthly, that the syndicate knows all the complainants who are also Crown witnesses including their background, particulars and physical addresses; and, that there is a likelihood that the appellants, if released on bail, would intimidate them or interfere with the Crown's evidence.

[4] Furthermore, it is not disputed that the third appellant leases an apartment from a certain Sifiso Nxumalo, who is a member of the syndicate and a fugitive from justice for the same offences; hence, there is a likelihood that the third appellant could evade trial if granted bail. The second appellant did not dispute the allegation that he was previously convicted and granted bail pending appeal on a similar offence before the Magistrate's Court. In terms of the indictment the

first appellant is alleged to have participated in various counts of Theft by False Pretences amounting to E231 800.00 (two hundred and thirty-one thousand eight hundred emalangeni). He is charged with committing an offence listed in Part II of the First Schedule of the Criminal Procedure and Evidence Act, which justified that he should be refused bail.

[5] The court *a quo* dismissed the bail applications pending appeal on the basis that the appellants were part of a syndicate specialising in Theft by False Pretences and defrauding members of the public, and that certain members of the syndicate including the second appellant were repeat offenders. The court *a quo* further held that the appellants, if released on bail, were likely to commit similar offences. In light of the evidence the court *a quo* concluded that it would not be in the interest of justice to grant bail to the appellants.

[6] The appellants subsequently lodged an appeal before this court. Two grounds of appeal have been stated in the Notice of Appeal: Firstly, that the court *a quo* erred both in fact and in law by finding that the appellants were repetitive offenders on the same offences when the commission of the offences had not been proved and it had not been shown that the appellants had participated in the said offences. Secondly, that the court *a quo* misdirected itself in law by adopting a blanket approach in dealing with the bail applications yet bail applications are in personam in nature and that the court ought to have dealt with each appellant's bail application on an individual basis and on its own merits. However, the failure by the appellants to file a replying affidavit

disputing the allegations that they are part of a big syndicate or that the second appellant and other co-accused are repeat offenders is fatal to their appeal; such a failure presupposes that the evidence in the answering affidavit stands uncontroverted. The evidence further shows a disposition on the part of the appellants to commit the offence of Theft by False Pretences.

[7] Bail is a discretionary remedy. *Frank J in Rex v. Pinero* 1992 (1) SACR 577 (NW) at p. 580 said the following:

**“In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all embracing issue: will the interests of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced. Four subsidiary questions arise. If released on bail, will the accused stand trial? Will he interfere with State witnesses or the police investigations? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and the security of the State? At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release of bail.”**

[8] The appellants are charged with several counts of Theft by False Pretences which is an offence listed in Part II of the First Schedule to the Criminal Procedure and Evidence Act 67/1938. Section 96 (4) (a) of the Act provides 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 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.”**

[9] Section 96 (5) of the Act is a sequel to section 96 (4) (a) of the Act, and, it provides as follows:

**“96. (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:**

.....

**(e) any disposition of the accused to commit offences referred to in Part II of the First Schedule as is evident from the accused’s past conduct;**

**(f) the prevalence of a particular type of offence.”**

[10] Furthermore, apart from the failure of the appellants to depose to a replying affidavit and deal with the damning allegations raised in the Answering Affidavit, only the first appellant deposed to the founding affidavit outlining his personal circumstances. The second and third appellants did not place before the court their personal circumstances detailing, *inter alia*, their defence, their marital status and family orientation, their place of employment and residence, whether or not they will attend trial and the bail amount affordable in the event they are granted bail.

[11] Accordingly, I am of the view that it would not be in the interests of justice to admit the appellants to bail pending appeal. The appeal is hereby dismissed.

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M.C.B. MAPHALALA  
JUSTICE OF APPEAL

I agree

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A.M. EBRAHIM  
JUSTICE APPEAL

I agree

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DR. B.J. ODOKI  
JUSTICE OF APPEAL

For the Crown

Senior Crown Counsel  
Elsie Matsebula

For the Defence

Attorney N. Ndlangamandla

DELIVERED IN OPEN COURT ON 30 MAY 2014