



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Criminal Appeal case No: 46/2014

In the matter between:

**MAXWELL MANCOBA DLAMINI  
MARIO MASUKU**

**FIRST APPELLANT  
SECOND APPELLANT**

**VS**

**REX**

**RESPONDENT**

Neutral citation: *Maxwell Mancoba Dlamini & Another v Rex (46/2014) [2014] SZSC 09 (29<sup>th</sup> July 2015)*

**CORAM:** **M.C.B. MAPHALALA ACJ,  
J.P. ANNANDALE AJA,  
R. CLOETE AJA.**

**Heard** 14<sup>th</sup> July 2015  
**Delivered** 29<sup>th</sup> July 2015

**Summary**

**Criminal Appeal – bail – appellants charged under the Suppression of Terrorism Act as well as the Sedition and Subversive Activities Act – general principles for granting bail considered – court refused bail on the basis that appellants are a flight risk, a threat to national security and that first appellant had a propensity to commit crimes – on appeal held that appellants had discharged the onus that it is in the interest of justice that they should be granted bail – appeal accordingly granted.**

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**JUDGMENT**

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**M.C.B. MAPHALALA, ACJ**

[1] The appellants were charged with two counts of contravening section 11 (1) (a) and (b) of the Suppression of Terrorism Act No. 3 of 2008 as well as one count of contravening section 4 (a), (b), (c) and (e) of the Sedition and Subversive Activities Act No. 46 of 1938 as amended. The fourth count relates to the contravention of section 5 (1) read together with section 5 (2) (a) (i) and (ii) (b), (c), (d), (e) and (f) of the Sedition and Subversive Activities Act No. 46 of 1938 as amended. Their first bail application was dismissed by the court *a quo* on the grounds that they were a flight risk and a threat to national security. In addition the court *a quo* found that the first appellant had a high propensity to commit crimes.

[2] Subsequently, the appellants lodged a second bail application before the court *a quo* on the basis that new circumstances had arisen which warranted that they should be released on bail. Firstly, that they had lodged three separate applications challenging the constitutionality of the Sedition and Subversive Activities Act of 1938 as amended as well as the Suppression of Terrorism Act of 2008. They argued before the court *a quo* that their criminal trial could not proceed until the constitutionality of the two pieces of legislation had been determined. They contended that in the event that the court found in their favour, it would strike down the legislation, and, consequently the charges would fall away. It is common cause that the challenge to the two legislative provisions is pending before a full bench of the High Court. The court *a quo*

dismissed this new ground on the basis that it was a delaying tactic. The court held that the appellants had lodged the constitutional challenge to the legislation under which they are charged when their trial date had already been allocated and their trial was about to commence.

[3] Another new circumstance presented by the second appellant warranting bail was his deteriorating health. He argued that he was suffering from diabetes and arthritis and that the poor conditions at the remand centre had impacted negatively on his health. The court *a quo* took the view that the ill-health of the second appellant was not a new circumstance on the basis that it featured in the earlier bail application. The court further mentioned that the correctional facility has adequate medical facilities for inmates; and, that inmates are always referred to the country's major hospitals when the need arises.

[4] The third new factor alleged by the first appellant was the interruption of his education at the University of Swaziland. It is common cause that the first appellant, at the time of arrest in May 2014, was writing his examination at the University where he was registered for the degree of Bachelor of Commerce. Again the court *a quo* found that he had included this issue in his earlier bail application, and, that it did not constitute a new circumstance warranting bail. It is trite that an accused cannot be allowed to repeat the same application for bail based on the same facts on the basis that it constitutes an abuse of the court process. A subsequent bail application should be premised on new

circumstances which did not exist when the first application was made. See *S v Vermaas* 1996 (1) SACR 528 (T) at 529.

[5] Where the court makes specific findings refusing bail, it is not open to the same court in a subsequent bail application to review its own decision under the guise of new circumstances. The court becomes *functus officio*, and, the matter should be taken up on appeal. It is only the appeal court which could deal with the specific findings of the court *a quo*. On the other hand it is open to the court of first instance to vary its decision with regard to bail conditions where bail was granted.

[6] Section 96 (18) and (19) of the Criminal Procedure and Evidence Act No.67 of 1938 as amended supports this conclusion:

**“96. (18) Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail-**

- (a) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority;**
- (b) with regard to any place to which the accused is forbidden to go;**
- (c) with regard to the prohibition of or control over**

communication by the accused with witnesses for the prosecution;

- (d) with regard to the place at which any document may be served on him under this Act;
- (e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused;
- (f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.

**(19) Subject to the provisions of this Act-**

- (a) Any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, subject to the provisions of sections 95 (3) and 95 (4), increase or reduce the amount of bail so determined, or amend or supplement any condition imposed under subsection (15) or (18) whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application;
- (b) If the court referred to in paragraph (a) is a superior court, an application under that paragraph may be made to any judge of that court if the court is not sitting at the time of the application.

[7] The circumstances under which bail could be refused are outlined in section 96 (4) of the Criminal Procedure and Evidence Act 67/1938 as amended; however, substantive evidence is required to justify the refusal to grant bail.

**“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.”**

[8] The court *a quo* dismissed their bail application on the basis that the appellants were a flight risk. The court *a quo* emphasised that the appellants were facing serious charges which are likely to attract very harsh sentences upon conviction

including lengthy custodial sentences. Section 96 (6) of the Criminal Procedure and Evidence Act 67/1938 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 the trial.

**“96. (6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely:**

- (a) The emotional, family, community or occupational ties of the accused to the place at which the accused shall be tried;**
- (b) the assets held by the accused and where such assets are situated;**
- (c) the means, and travel documents held by the accused, which may enable the accused 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 the accused flee across the borders of the Kingdom of Swaziland in an attempt to evade trial;**
- (f) the nature and the gravity of the charge on which the accused shall be tried;**
- (g) the strength of the case against the accused and the incentive that the accused may in consequence 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.”**

[9] It is interesting to note that the court *a quo* did not consider the other factors enumerated above including the strength of the case against the appellants and the incentive that the appellants may in consequence be inclined to evade trial. It is apparent from the evidence that the appellants dealt with the circumstances mentioned in section 96 (6) of the Criminal Procedure and Evidence Act 67/1938 as amended which warranted the granting of bail. The court merely relied on the seriousness and gravity of the offences with which the appellants were charged without any substantive evidence that they were likely to evade trial.

[10] The court *a quo* further held that the appellants were a threat to public order and national security. Section 96 (4) (e) of the Criminal Procedure and Evidence Act 67/1938 as amended provides that the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice 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. In coming to this conclusion the court *a quo* did not consider as it should have



done, the circumstances outlined in section 96 (9) which provides the following:

**“96. (9) In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely:**

- (a) Whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;**
- (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;**
- (c) whether the safety of the accused might be jeopardized by his or her release;**
- (d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;**
- (e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or**
- (f) any other factor which in the opinion of the court should be taken into account.**

The court *a quo* failed to appreciate the requirement of the law in section 96 (4) (e) of the Criminal Procedure and Evidence Act No. 67/1938 as amended relating to exceptional circumstances. 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. It is therefore implicit in this legislative provision that substantial evidence was required to show that the appellants posed a threat to public order or national security.

[11] The court *a quo* further made a third finding that the first appellant had a propensity to commit crimes; however, this is not supported by the evidence. The court conceded in its judgment that the first appellant was acquitted and discharged on the previous charge of being found in possession of explosives; hence, he had no previous convictions.

The court *a quo* further sought to deny bail to the first appellant on the basis of a particular charge of sedition allegedly committed in 2013 and for which the criminal trial was pending. However, this does not constitute evidence of a propensity to commit crimes on the part of first appellant. Certainly a pending criminal charge cannot in itself constitute evidence of propensity to commit crimes. In coming to this conclusion the court *a quo* relied upon section 96 (4) (d) read with section 96 (8) of the Criminal Procedure and Evidence Act 67/1938 as amended which provide the following:

**“96. (4) (d) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice 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 . . . .**

. . . .

**(8) In considering whether the ground in subsection (4) (d) has been established, the court may, where applicable, take into account the following factors, namely:**

- (a) The fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;**
- (b) whether the accused is in custody on another charge or whether the accused is on parole (where applicable);**
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or**
- (d) any other factors which in the opinion of the court should be taken into account.”**

[12] Section 96 (8) (b) of the Criminal Procedure and Evidence Act No. 67/1938 as amended cannot be used to deny bail to an accused on the basis that he is charged with another offence. This would violate the bill of rights enshrined in the Constitution. Section 21 (1) and (2) of the Constitution provide that in the determination of civil rights and obligations, an accused shall be presumed to be innocent until he is proved guilty. Accordingly, the “propensity to commit offences” in section 96 (8) (b) of the Criminal Procedure and Evidence Act should relate to instances where the accused has previously been convicted of the offences and not merely charged. See the judgment of *Mavangira J* in *Tsvangirai v S* (2003) JOL 12141 (ZH) at page 19.

[13] It is well-settled in our law that an accused person is entitled to be released on bail either unconditionally or upon reasonable conditions including in particular such conditions as are reasonably necessary to ensure that the person appears at a later day for trial or for proceedings preliminary to trial. See section 16 (7) of the Constitution of the Kingdom of Swaziland Act No. 001 of 2005.

Section 96(1) (a) of the Criminal Procedure and Evidence Act No. 67/1938 as amended provides the following:

**“1. (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 interests of justice that the accused be detained in custody.”**

[14] The right to personal liberty is specially 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. See section 16 of the Constitution of the Kingdom of Swaziland Act No. 001 of 2005 as well as section 96 (1) and (4) of the Criminal Procedure and Evidence Act 67/ 1938 as amended.

The court has a discretion to determine bail; however, it 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 interests of justice sought 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. Kriegler J in *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) at 641 para 11 had this to say:

**“Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of a trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main protecting the investigation and prosecution of the case against hindrance.”**

Similarly, Mahomed AJ in *S v Acheson* 1991 (2) SA 805 (NH) at 822 held:

**“An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will**

**therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.”**

[15] Section 96 (10) of the Criminal Procedure and Evidence Act 67 of 1938 as amended deals extensively with the weighing of the rights of the accused to the liberty of the accused person against the interests of justice, and, it provides the following:

**“96. (10) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice the accused is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely:**

- (a) the period for which the accused has already been in custody since his or her arrest;**
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;**
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;**
- (d) any financial loss which the accused may suffer owing to his or her detention;**
- (e) any impediment to the preparation of the**

**accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;**

- (f) the state of health of the accused; or**
- (g) the age of the accused, especially where the accused is under sixteen (16) years;**
- (h) where a woman has murdered her newly born child;**
- (i) any other factor which in the opinion of the court should be taken into account."**

[16] Ndou J in *Ndlovu v S* (2001) JOL 9073 (ZH) at page 3 had this to say with regard to bail:

**"The primary question to be considered is whether the applicant will stand trial or abscond. Of equal importance is whether he will influence the fairness of the trial by intimidating witnesses or tampering with evidence. A further consideration is whether the applicant, if released, will endanger the public or commit an offence.**

**In bail applications the court will strike a balance between the interests of society (the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused (who pending the outcome of his trial, is presumed to be innocent).**

**Grounds for refusal of bail should be reasonably substantiated . . . . The Court should always grant bail where possible and lean in favour of the liberty of the applicant provided that the interests of justice will not be prejudiced. . . .**

**The onus is upon the applicant to prove on a balance of probability that the court should exercise its discretion in favour of granting him bail. In discharging this burden the applicant must show that the interests of justice will not be prejudiced, namely, that it is likely that he will stand his trial or otherwise interfere with the administration of justice or commit an offence.”**

[17] Harcourt J in *S v Smith and Another* 1969 (4) SA 175 (N) at 177 had this to say:

**“The general principles governing the grant of bail are that, in exercising the statutory decision conferred upon it, the Court must be governed by the foundational principles which is to uphold the interests of justice; the Court will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby (*McCarthy v R.*, 1906 T.S. 657 at p. 659; *Hafferjee v. R.*, 1932 N.P.D. 518). One particularly relevant consideration is that the Court must earnestly consider whether, upon the facts before it, the applicant is likely to appear to stand his trial in due course – (*McCarthy’s case supra*). These principles have been formulated and expressed in varying fashion, but basically the Court’s task is to balance the reasonable requirements of the State in its interest in the prosecution of alleged offenders with the requirements of our law as to the liberty of the subject.”**

Miller J in *S v Essack* 1965 (2) SA 161 (D) at p. 162 quoted with approval the judgment of Demont J in *S v Mhlawuli and Others* 1963 (3) SA 795 (C) at 796 said:



**“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 the 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 the 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 his trial, there should be some evidence or some indication which touches the applicant personally regard to such likelihood.”**

[18] Ironically, when this matter was heard before this Court, the prosecuting counsel informed the Court that the Crown was no longer opposing the appeal. The Crown was conceding that the pending constitutional challenge to the two legislative provisions amounted to new evidence warranting the granting of bail. Nevertheless, this Court would like to point out that despite the concession made by the Crown, the evidence contained in the record shows clearly that the appellants had good prospects of success on appeal in the absence of substantial evidence that their release on bail was not in the interests of justice.

[19] Accordingly, the Court makes the following order:

(1) The appeal in respect of the first and second appellants is allowed.

(2) Bail is granted and fixed at E15 000.00 (fifteen thousand emalangeni) cash for each of the appellants.

(3) The appellants are directed to observe the following bail conditions:

(a) To surrender their passports and travelling documents to the investigating officer at the Manzini Police Station and not apply for new passports and travelling documents pending finalization of their criminal trial.

(b) To report monthly at the Manzini Police Station between the hours of 8 am and 4 pm on the last Friday of every month commencing in August 2015.

(c) Not to interfere or communicate with Crown witnesses

(d) To attend Court for their trial whenever directed to do so.

(e) To refrain from addressing public political gatherings pending finalisation of the criminal trial.

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M.C.B. MAPHALALA  
ACTING CHIEF JUSTICE

I agree:

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J.P. ANNANDALE  
ACTING JUSTICE OF APPEAL

I agree:

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R.J. CLOETE  
ACTING JUSTICE OF APPEAL

FOR Appellants

Advocate Annemarie de Vos  
Instructed by Attorney Leo Gama

FOR Respondent

Senior Crown Counsel Macebo Nxumalo

**DELIVERED IN OPEN COURT ON 29<sup>th</sup> JULY 2015**