IN THE SUPREME COURT OF SWAZILAND

Criminal Appeal Case No. 26/2013

In the matter between:

MNCEDISI DASSA THOBELA **Applicant**

And

THE KING **Respondent**

Neutral Citation: *Mncedisi Dassa Thobela vs The King (05/2015)* [2016] SZSC 75 (30th June 2016)

Coram: M. C. B. MAPHALALA, CJ
S. P. DLAMINI, JA
Z. W. MAGAGULA, AJA

Date Heard: 24th MAY 2016

Date Handed Down: 30th JUNE 2016

JUDGMENT

MAGAGULA AJA.

[1] The practice of law is “reason without emotion”.

[2] Application by the Appellant to be discharged from imprisonment in terms of Section 136 (2) of the Criminal Procedure and Evidence Act 67/1938 (as amended) was dismissed by T. M. Mlangeni J. Appellant has now appealed to this court.

[3] In his grounds of appeal, Appellant argues that;

(1) The court of appeal erred in fact and in law by finding that because the application (Appellant) had previously moved an application for bail and same was rejected on the basis that he failed to discharge the onus which the law placed on him, then he cannot be released in terms of Section 136 (2) of the Criminal Procedure and Evidence Act No. 67/1938 (as amended).

(2) The Court *a quo* erred in fact and in law in dismissing Applicant's application when it was found that the discharge in terms of Section 136 (2) of the Criminal Procedure and Evidence Act No. 67/1935 (as amended) is unconditional.

(3) The Court *a quo* erred in fact and in law by failing to consider the Applicant's submission that to detain him without his trial having been heard is in contravention of the right to a fair and speedy hearing in terms of Constitution Act (2005).

[4] Briefly recounted, the facts are that, Appellant was arrested on the 29th day of May 2014 and charged inter alia with murder and the unlawful possession of a fire-arm without a permit. He moved a bail application before the High Court which was refused on the grounds that he had failed to discharge the onus placed upon him that exceptional circumstances exist which in the interest of justice permit his release. Appellant was on the 13th day of December 2014 committed to the High Court; a pretrial

conference was convened. To all intents and purposes the matter is ready for trial save that a trial date has not been allocated. It is common cause that at the time the proceedings were instituted in the Court *a quo*, Appellant had been in custody for a period of 14 months, and 7 months had elapsed since he was committed to the High Court for trial. Appellant argues then that he is entitled to be discharged from imprisonment in terms of Section 136 (2) of the Act.

[5] The application in the Court *a quo* was opposed by the Director of Public Prosecution (DPP) who argued that a letter had already been written to the registrar of the High Court requesting a trial date and that the interest of justice would be best served by the refusal to discharge Appellant.

[6] Section 136 (1) provides:

> ***"Subject to the provision of this Act as to the adjournment of a court, every person committed for trial or sentence whom the Attorney General has decided to prosecute before the High Court, shall be***

brought to trial at the first session of such court for trial of criminal cases held after his commitment or else shall be admitted to trial, if thirty-one days have elapsed between such commitment and the time of holding such session unless:

(a) …

(b) …

(2) If such a person is not brought to trial at the first session of such court held after the expiration of 6 months from the date of his commitment, and has not previously been removed for trial elsewhere, he shall be discharged from his imprisonment for the offence in respect of which he has been committed".

[7] In terms of subsection 2 of Section 136 the Appellant would be entitled to apply for his discharge if he was not brought to trial on the first session after the expiration of six months after the date of his committal. Assuming that he is correct that he was committed on the 13th December 2014, then the six months period would expire in June 2013. Appellant would then be eligible to apply in terms of the subsection if he was not brought to trial at the end of the 3rd session of the High court. This court is not privy

to the dates of the court sessions in the relevant legal calendar therefore no conclusion can be drawn whether the Appellant qualified at the relevant time. The Respondent has not raised any objection relating to the qualification of the Appellant to invoke Section 136 (2). It therefore seems safe to assume that he qualifies.

[8] The crown's objection to the application is twofold. In the first instance the crown argues that Section 136 (2) is not available to litigants who have had their application turned down by the court. Secondly 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.

[9] In support of the first point, council for the Respondent has referred this court to the judgment of Masuku J. in Celani ***Maponi Ngubane v The Director of Public Prosecutions High Court Case 11/2000 Page 7***. Masuku J. in that case remarked:

> ***"I am of the firm view that in such cases, bail applications must first be determined and that if refused, the bail Applicant cannot therefore approach***

the court for relief in terms of the provision of Section 136 because the court would have investigated all the important variables and would have found that it is not in the interests of justice to admit the applicant to bail. He cannot therefore, in my view, be discharged if his bail application has been unsuccessful".

Mlangeni in the Court *a quo* also quoted with approval the dictum by Masuku J. in the Celani Maponi Case (Supra):

"By inferential reasoning, bail Applicants who have dim prospects of being admitted to bail should not expect to benefit from the provision of Section 136. The court must be given an opportunity to first decide whether or not the interests of justice would be served by admitting the accused to bail".

[11] With respect to the Learned Judges who are both known for their careful use of language and clarity of thought, 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 in available to all Applicants who

meet the criteria provided for in subsections 1 and 2. The Applicant must be one whom the DPP has decided to prosecute in the High Court, who has been committed for trial, who has not been brought to trial at the first session held six months from the date of his committal. There may be similarities between admitting an accused person to bail and discharging an accused from imprisonment under Section 136 (2), in that in both instances the accused person is afforded the opportunity to await his trial out of custody, but the consequences are different.

[12] The purpose of a discharge under Section136 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 bail application was turned down by the court. ***Didcott J. in S vs Lulane & Others 1976 (2) SA 204 at 208 F-G*** had this to say of Section 150 (b) of the South African Criminal Procedure and Evidence Act, which is in pair material with one Section 136 (2):

"The object of the subsection is plain. It is devised to meet the situation in which an accused person is detained while he awaits trial or unable to get bail in the ordinary way; its aim is to limit this period during which someone in that situation must remain in custody. But for its provision, his captivity would have lasted until his trial began when ever that happened to be".

[13] The consequences of discharging an accused person in terms of Section 136 are also different from the consequences admitting him to bail. This Section does not require to attach any condition to his release. As Justice T. M. Mlangeni adequately put it in the Court *a quo* and with respect I agree with the Learned Judge's sentiments:

"Would it be in the interests of justice to unconditionally release a person in the Applicants position, with the result that the charges against him would, at least for some time, be in consequential".

[14] It is my considered view that in applying the provisions of subsection 2 of Section 136, the court ought to be guided by what is in the best interest of justice. I am bolder in

this view by the words of Harcourt J. in ***S vs Smith & Another 1969 (4) SA 175 at 177 (E-F):***

> ***"The General Principles governing the grants of bail are that, in exercising the statutory discretion conferred upon it the court must be governed by the fundamental principle, which is to uphold the interests of justice…"***

Miller J. in ***S vs Essack 1965 (2) SA 161 at 1963 N*** said of an application for bail:

> ***"In dealing with an application of this nature, it is necessary to strike a balance, as far as can be done, between protecting the liberty of the individual and safe guarding 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 justifies in refusing to allow him bail".***

Miller J. continued at page 167 (G-H):

"Each case must be considered on its merits".

I see no reason why the court should not make the same consideration when confronted with an application in terms of the Section.

[15] The court must not only be satisfied that the Applicant meets requirements of the section, but that the interests of justice would be served by discharging the applicant.

In this connection this court needs to take into account that the Appellant has been charged with an offence of murder, robbery, contravention of the Arms and Ammunition Act which are all serious and if proved at trial may be visited with lengthy custodial sentences. See the judgement of Hlophe J. in ***Mcondisi Dassa Thobela v Rex High Court Case No. 239/2014*** (Unreported bail application). It was also the finding of the court that Appellant has a house in a neighbouring country.

[16] The conclusion I have reached is that it is that it is far from clear that the interests of justice would not be damaged by the discharge of the Appellant. Indeed I consider that

there is a real and substantial likelihood that, if free to so the Appellant would flee.

[17] There is however a disturbing feature in this matter. The Registrar of the High Court was ordered by Hlophe J. his judgment delivered on the 8th day of August 2014 as follows:

> ***"[30.2] The Registrar of this court (High Court) be and is hereby directed to forthwith allocate the matter to an available judge who can hear it on account of its being ripe for trial as signified by the finalization of the indictment and the grant of a summary trial in terms of Section 88 bis of the Criminal Procedure and Evidence Act of 1938".***

[18] When the matter was argued before this court counsel for the crown could only say the DPP had written to the Registrar to request that a trial date; The record shows that sais letter was written on the 12th August 2015 and there does not seem to be a follow up on it.

[19] The court was deprived of the benefit of the Registrar's response. This court was not informed of any difficulties that the crown was encountering in having this matter brought to trial. Although the order was directed to the Registrar of the High Court, (and I believe the Honourable Judge was correct to do so) the *dominis litis* in criminal matters is the Director of Public Prosecutions and it is his duty to "bring the accused" to trial. Section 21 (1) of the Constitution of Swaziland Act No. 1 of 2005 provides:

> ***(1) "In the determination of civil rights and obligations or any <u>Criminal Charge</u> a person <u>shall</u> be given a <u>fair and speedy public hearing within a reasonable</u> time by an independent and impartial court or adjudicating authority established by law"*** (My Emphasis).

The Respondents in this matter have not only defied an order of the court by way have infringed on Appellants constitutional rights.

[20] It believes; repeating that no reasons were advanced to this court why the Appellant is not brought to trial after two years in pre-trial detention. The refusal of the court to

admit Appellant to bail or even the refusal by the Court *a quo* to discharge Appellant from imprisonment in terms of Section 136 is not a and should not be construed as some form of pre-judging or a determination of whether he is guilty or not. The delay in bringing the Appellant to court or accused persons generally runs counter to the well professed preferred function of the court; to dispense justice.

[21] Consequently the following order is made:

1. The appeal is dismissed.
2. The Registrar of the High Court is directed and ordered to allocate a date or dates for the trial of Appellant's matter during the next session of the High Court.
3. No order as to costs.

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Z. W. MAGAGULA
ACTING JUSTICE OF APPEAL

I Agree

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M. C. B. MAPHALALA
CHIEF JUSTICE

I also Agree

S. P. DLAMINI
JUSTICE OF APPEAL

For the Appellant: Ms. N. Ndlangamandla

For the Crown: Mr. S. Maseko