IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case 03/2018

In the matter between:

DUMISA PHILEMON MNISI **1st Appellant**

SOLOMON MSONGELWA MABILA **2nd Appellant**

And

THE KING **Respondent**

Neutral citation: Dumisani P. Mnisi and Another vs The King *(03/2018) [SZSC] 59 [2018] (30th November, 2018).*

Coram: **M.C.B. MAPHALALA CJ**
S.B. MAPHALALA JA
J.P. ANNANDALE JA

Heard: **8th August, 2018**

Delivered: **30th November, 2018**

Summary: *Criminal Procedure – High Court refused applications for bail on the grounds **inter alia** that Appellants are likely to abscond due to their*

close proximity with the Mozambican boarder – this Court is of the view that there are no sufficient averments to support the contention that the Appellants are a flight risk - the judgment of the court ***a quo*** *is set aside, and the appeal is allowed.*

JUDGMENT

S.B. MAPHALALA JA

Introduction

[1] The Appellants appeared before the High Court (per **M. Dlamini J**) on the 14 February, 2018 under a Certificate of Urgency seeking an order that they should be admitted to bail. The Crown opposed the Application. The court *a quo* refused their Applications in its *ex tempore* judgment on the same day.

[2] The Appellants being dissatisfied with the refusal of bail by the court *a quo* then filed a Notice of Appeal setting out the following grounds:

1. **The court *a quo* erred in law and in fact in holding / assuming that being charged for what it dubbed a serious crime is a ground for refusal to grant bail.**

2. **The court *a quo* erred in law and in fact in holding/ assuming that the fact that the crown is ready for trial is a ground for refusal to grant the Appellant bail.**

3. **The court *a quo* erred in law in refusing to admit the Appellants to bail without considering whether or not they were a flight risk, whether or not they would abscond trial, whether or not they had a defence to the offences charged.**

[3] On the 23rd March, 2018 Appellants filed a Notice of Intention to amend their Notice of Appeal in the following terms:

1. By adding the following grounds; 3 and 4.

"3 The court a quo erred in law in refusing to admit the Appellants to bail without considering whether or not they were a flight risk, or not they would abscond trial, whether or not they had a defence to the offences charged.

4. The court a quo erred in law in refusing to admit the Appellants to bail by allowing itself to be influenced by or by taking into consideration facts that were not pleaded or argued before it".

Brief history

[4] The material facts of the appeal are captured in Appellants' Heads of Arguments at paragraphs 1 to 5 as follows:

1. The Appellants were first charged with four counts of contravening the Game Act No. 51 of 1953 as Amended and one count of contravening section 6 (5) of the Wild Life and flora Act.

2. The Appellants were admitted to bail of E3000.00 (Three thousand Emalangeni) by the Simunye Magistrate court and awaited the commencement of trial.

2.1 Appellants were out on bail from the year 2015 awaiting the commencement of their trial; until the 11th December 2017.

3. On the 11th December, 2017 the Appellants attended court / remand on the charges aforesaid and they were then charged with

the offence of murder, it being alleged that upon the 13th July 2015 the Appellants (accused persons) either one or both of them acting in furtherance of a common purpose did unlawfully and intentionally cause the death of one Sikhumbuzo Dlamini, a game security and did thereby commit the crime of murder.

[5] On the 12 December, 2017, the Appellants instituted urgent proceedings in the court *a quo* seeking an order that they should be admitted to bail. The Application was opposed. The basis of the opposition to the bail application was that in the main, the Appellants came from Ka-Shewula area in the Lubombo district, and that there was therefore a likelihood that if admitted to bail, they may attempt to evade trial by skipping the boundary of Eswatini into Mozambique. A further point raised by the Crown was that they may destroy evidence as they had allegedly colluded with a car dealer to have the motor vehicle allegedly used in the commission of the offence released to them.

The parties' contentions

[6] According to the Appellants the gravamen of the appeal is that the court *a quo* did not approach the application for bail in the conventional or traditional way. The court *a quo* did not consider whether it was in the interest of justice to deny the Appellants bail. Furthermore the court *a quo* did not consider the peculiarity of the matter such as that the Appellants had been admitted to bail in 2015, and, that there was no complaint that they:

- Interfered with witnesses
- Attempted to evade trial
- Have or are likely to undermine the proper functioning of the criminal justice system; or
- That they may or likely to disturb the public order

[7] The Appellants contend that the court *a quo* erred in law in holding that the mere fact that the Crown indicated that it was ready for trial was a good ground upon which a refusal to grant bail could be grounded.

Furthermore, the Appellants contend that the suggestion by the Crown in the opposing affidavit that the proximity of the Appellants to the Mozambique boarder constitutes a flight risk is without foundation. In this regard it is argued for the Appellants that there is no suggestion that the Appellants have any connection with Mozambique, that they have relatives or residencies in Mozambique or that they are so financially liquid that they could be able to sustain life on the run.

[8] Lastly, the Appellants attack the reasoning regarding the refusal to grant on the ground that there were unable to convince the court *a quo* that they had a defence to the charge of murder. In this respect the attorney for the Appellants cited the Supreme Court case of **Maxwell Mancoba Dlamini & Another vs Rex, Criminal Appeal Case No. 46/2014** to support his contention in this regard.

[9] On the other hand the Crown contends that the court *a quo* did not refuse to admit the Appellants to bail on the ground that they have been charged with a serious crime, and that there is nowhere in the record of proceedings or the judgment that the bail was refused on grounds that the Appellants were charged with a serious crime. The court *a quo* observed that the Appellants failed to reply to the averments by the investigating officer.

[10] The Respondent contends that the court *a quo* in refusing to admit the Appellants to bail did consider that they were a flight risk who absconded trial, and, that they failed to adduce evidence as to their defence. The court *a quo* stated the following in paragraph [19] of its judgment:

"Applicants failed to file a reply to such averments. The court was left with no evidence in contra to that of the investigator. In brief, the evidence by the investigator that the Applicant failed to abide by one of the conditions of bail, i.e. reporting at the police station, their likelihood that they may escape as both were from ka-Shewula, an area adjacent to Swaziland and Mozambique border and that they had interfered with one of the exhibits to the charges was not controverted".

[11] Further arguments were advanced in the Heads of Arguments citing the decided case of this Court in case of **Elvis Mandlenkosi Dlamini vs Rex Criminal Appeal No. 30/11.**

The court's analysis and conclusions

[12] After assessing the affidavits of the parties and the arguments of the attorneys in this case, the only basis for the refusal of bail in this case was the close proximity of the Appellants to the Mozambican boarder that it constitutes a risk not to grant them bail. In my opinion this is a far-fetched approach as there is no suggestion that the Appellants have any connection with Mozambique, that they have relatives in Mozambique. On the Answering Affidavit no facts are canvassed to support this position.

[13] According to the learned authors **Du Toit and Others in the Commentary on the Criminal Procedure ... (Juta at page 9 – 18 to 9 – 19** on the question of the likelihood to evade trial section 60 (4) (b) as read with section 60(6) cited the South African case **S vs Vermaas 1996 (1) SACR 528** as to the 'Prime consideration' that is whether the accused will stand his trial. In our law section 96 (4) (a) of the Criminal Procedure and Evidence Act (as Amended) is the equivalent of the South African statute.

[14] In considering whether the grounds in section 96 (4) (b) being likelihood of the accused to evade trial has been established, the court may in terms of section 96 (6) of the Criminal Procedure and Evidence Act (as Amended) take the following grounds where applicable into account:

(a) The emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) The assets held by the accused and where such assets are situated;

(c) The names, and travel documents held by the accused, which may enable him or her 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 he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) The nature and the gravity of the charge on which the accused is to be tried;

(g) The strength of the case against the accused in the incentive that he or she may in consequences 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.

[15] In the present case it does not appear that any of the above facts were averred by the Crown or none were considered by the court *a quo.* More particularly subsection (e) of section 96(4) of the Criminal Procedure and Evidence Act (as amended) outlined above. According to the learned authors **Lansdown Campbell, South African Criminal Procedure (Vol V) 1982** at page 324 to

the legal principle that there should be acceptable reasons for finding that an Applicant for bail is not likely to stand trial or that he is not likely to comply with the conditions of his bail. In support of this legal principle the learned authors have cited the case of **Mbele vs Prokureur – Generaal 1966 920 H 272 (T).**

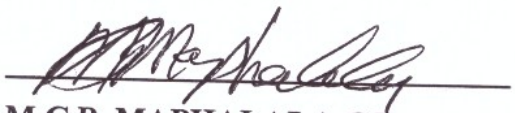
[16] In the result, for the aforegoing reasons, the judgment of the court *a quo* is set aside. The following orders do issue:

(a) The appeal is allowed.

(b) The matter is referred back to the court *a quo* to determine appropriate bail conditions for granting bail.

S.B. MAPHALALA JA

I AGREE



M.C.B. MAPHALALA CJ

I ALSO AGREE

J.P. ANNANDLAE JA

For the Appellants: Mr. Z. Magagula
of Zonke Magagula & Co.

For the Respondent: Mr. S.M. Dlamini
Prosecuting Counsel
Director of Public Prosecution