IN THE SUPREME COURT OF ESWATINI

JUDGMENT

In the matters between:

Criminal Appeal Case No: 19/2020

BHEKITHEMBA SHONGWE **Appellant**

and

THE KING **Respondent**

Criminal Appeal Case 20/2020

SIFISO SIPHO MNISI **Appellant**

and

THE KING **Respondent**

Neutral citation: Bhekithemba Shongwe and Sifiso Sipho Mnisi v The King *(19/2020 and 20/2020) [SZSC] ... [2020] (13th January 2020)*

Coram: **S.J.K. MATSEBULA AJA**
J. MAVUSO AJA
J.M. VAN DER WALT AJA

Heard: 21st December 2020

Delivered: 13th January 2021

Summary:

Criminal Procedure – Appeal - Bail – Urgency – Requirements for urgent enrolment stated

Criminal procedure – Appeal - Bail – Considerations - Appellants charged with theft under false pretences - High Court refused applications for bail on the ground of likelihood of interference with prosecution witness – important Crown witness an immigration official based in South Africa – technically justifiable factors for refusing bail which relate to difficulty of effectively policing bail conditions existing but such insufficient standing alone when measured against holistic requirement that Court is to exercise its discretion judiciously having regard to legislative provisions applicable, the peculiar circumstances of the case as well as the Bill of Rights enshrined in the Constitution - matters to be decided by weighing the interests of justice against the right of an accused person to his or her personal freedom and in particular the prejudice the accused person is likely to suffer if he or she were to be detained in custody – as for trial, possible that witness may only testify in some years' time – in the circumstances not contrary to interests of justice to release

Appellants on bail - any objection to release on bail can suitably be met by appropriate bail conditions – appeals allowed and bail accordingly granted

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JUDGMENT

J.M. VAN DER WALT AJA

INTRODUCTION

[1] The Appellants (for the sake of convenience referred to herein as "Appellant Shongwe" and "Appellant Mnisi" respectively) appeared as co-accused before the High Court (per **Mlangeni J**) on the 30th October 2020 pursuant to separate urgent applications under Certificates of Urgency, seeking orders that they should be admitted to bail. The applications were opposed by the Crown.

[2] The Court *a quo* heard the matters contemporaneously and dismissed the applications in an *ex tempore* judgment delivered on the same day. The written reasons for the judgment were furnished on the 5th November 2020.

[3] The Appellants being dissatisfied with the refusal of bail by the Court *a quo*, filed Notices of Appeal on the 11th November 2020, followed by applications date stamped the 16th November 2020 in respect of Appellant Shongwe and the 12th November 2020 in respect of Appellant Mnisi, for their appeals to be heard urgently. These applications consists of a Notice of Application setting

out the relief sought, supported by affidavit. The relief sought was stated to be as follows:

"1. Enrolling and hearing the Applicant's appeal against bail refusal on an urgent basis.

2. Upholding the Applicant's appeal against refusal to be admitted to bail.

3. Admitting the Applicant to bail under such terms and conditions as the above Honourable Court may deem fit.

4. Further and/or alternative relief."

[4] The applications were opposed by the Crown, who on the 27th November 2020 filed an Answering Affidavit dealing with both applications wherein the following points of law were raised:

"3.1 The Applicant has failed to annex the Certificate of Urgency in support of the application.

3.2 The Applicant has failed to request this Honourable Court to dispense with the normal forms, manner and procedure to hear this matter of urgency."

[5] The Record of Proceedings as regards Appellant Mnisi was certified by the Registrar of this Court on the 13th November 2020 and as regards Appellant Shongwe on the 16th December 2020. The Appellants' Heads of Argument

were filed on the 17th November 2020 and those of the Crown on the 2nd December 2020.

[6] The matter came before this Court on the 21st December 2020, by which time the respective Records of Proceedings as well as Heads of Argument on the merits by all parties, had already been filed. All parties were ready to argue and the matters were then entertained contemporaneously.

A RULING ON URGENCY

[7] As regards the issue of urgency, none of the parties could refer this Court to any authoritative pronouncements on the procedural requirements for urgent enrolment of bail appeals. This Court reserved its ruling on the issue of urgency and proceeded to hear the matters on the merits.

[8] It was made clear to the parties that the hybrid procedure thus adopted should not be regarded as a precedent in that the aim of this Court was to make a statement on the requirements for urgent bail enrolment in an eventual ruling on urgency, in an endeavour to obviate any uncertainties in respect thereof.

[9] What is to follow, is confined to appellants who are enjoying legal representation, as is the case *in casu.* With reference to for instance Rule 8(1) of this Court, which deals with the lodging of appeals by appellants who are in gaol, different considerations may well apply in respect of urgent bail appeals because of the unrepresented status of such appellants.

[10] For current purposes, *inter alia* the following are taken into account in respect of represented appellants:

10.1 Neither the Court of Appeal Act, 1954 nor the Rules promulgated under it, currently deal with appeals in respect of bail and in particular, neither contain any provisions in respect of form, service and/or time limits. However, it can be accepted that a Notice of Appeal is required as the formal point of departure in that Rule 6(1) stipulates that: ***"Every appeal shall be instituted in the form of notice of appeal..."***

10.2 All bail related applications can be said to be inherently urgent. However, in the case of a "*bail appeal*" this Court is not the court of first instance and a lower Court would already have afforded the matter judicial consideration and exercised its discretion whether to grant or refuse bail. An appellant seeking urgent enrolment therefore must demonstrate why his or her bail appeal should be elevated above other similar appeals and why it should not await its turn to be allocated a date for hearing, in the ordinary course.

10.3 High Court Rule 6 (25), which deals with civil matters, stipulates the following as regards urgent applications:

> *"(25) (a) In urgent applications, the court or judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the court or judge, as the case may be, seems fit.*
>
> *(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."*

10.4 In addition to the requirements of Rule 6(25)(b), it is settled civil law practice that urgent applications must be brought under the Certificate of Urgency.

10.5 There does not appear to be any reason why the above civil procedural law requirements, which have stood the test of time, should not be made applicable, *mutatis mutandis*, to purportedly urgent appeals in respect of bail.

10.6 The only indicated difference would be, since no time limits, forms or service to date have been formally prescribed in respect of bail appeals, that a prayer for such stipulations to be dispensed with i.e. a prayer for condonation, would not be necessary.

[11] From the above it follows that the appropriate requirement for urgent enrolment of bail appeals by represented appellants would be a substantive application:

11.1 Under a Certificate of Urgency;

11.2 With a Notice of Application setting out the relief sought and affording the Crown the opportunity to file a Notice of Intention to Oppose and an Answering Affidavit/s should the Crown elect to do so; and

11.3 Supported by an affidavit/s setting forth explicitly the circumstances which the Applicant/Appellant avers render the matter urgent and the reasons why he/she claims that he/she could not be afforded substantial redress at a hearing in due course.

[12] Further, taking into account the *forum*, a ruling on urgency has to issue first. Should the matter be held to be urgent, an urgent date and/or time for hearing would be allocated; should the matter be held not to be urgent, the appeal shall await its turn in the ordinary course.

[13] As regards the matters of Appellants Shongwe and Mnisi currently before this Court, the above requirements cannot find retrospective application, which again serves to underscore that the hybrid approach adopted earlier shall not serve as a precedent. By the same token, the consideration of the merits of the instant matters by this Court shall not be construed as a finding, implied or otherwise, that the matters are indeed urgent and/or that the papers filed in respect thereof pass muster when measured against the above stated requirements.

B MERITS

B.1 Background

[14] The Appellants as co-accused stand charged with two counts of Theft by False Pretences, it being alleged by the Crown that the Appellants, at or near the Ngwenya border gate, acting in furtherance of a common purpose, did unlawfully and with the intent to defraud and to steal misrepresent to one Masomakati Adellate Dlamini that they were assisting her in purchasing motor vehicles in the Republic of South Africa and did by means of the said misrepresentation obtain from the said Masomakati Adellate Dlamini the

sums of E 90 000.00 (Count 1) and E 207 000.00 (Count 2) respectively, which money the Appellants did steal.

[15] The Appellants' applications for bail were opposed by the Crown on a threefold basis being jeopardising ongoing investigations, likelihood to evade trial and interfering with Crown witnesses.

[16] The basis of the third ground of opposition, as per the Answering Affidavits deposed to by the investigating officer, Senior Superintendent N Jele, was that the Crown witnesses, some of whom are accomplice witnesses, are known to the Appellants. In particular, that one such witness, a South African female named Cynthia, worked at the Oshoek border gate and allegedly would receive the cash procured through the false pretences, which would then be collected from her by Appellant Mnisi, who was subsequently caught red-handed smuggling a shoebox filled with cash across the border into Eswatini. It is alleged further that this South African female is the girlfriend of the Appellant Shongwe and as such they are bound to communicate and may therefore interfere with the case. Both Appellants in their Replying Affidavits declared that they would abide by any bail conditions, including not interfering with witnesses and Appellant Shongwe further denied that the South African witness is his girlfriend.

[17] The Court *a quo* did not uphold the first two grounds of opposition, including rejecting as speculative the Crown's allegations that Appellant Mnisi, an attorney practising in Eswatini, also works in South Africa. Both applications

were refused on the third ground of opposition, the Court *a quo* holding as follows in Paragraph [3] 3.3 of the Judgment:

"This court has no authority over a foreign jurisdiction. The result of that is that it has no control over what happens or may happen to a witness who is in that foreign jurisdiction. The witness in question is an immigration officer whose workstation is Oshoek Border post, on the Mpumalanga Province side. It is a matter of common sense that this witness is easily reachable, directly or through a third party, physically or by electronic communication. In response to this the applicants submit that upon release of the applicants, the police would be in a position to monitor their movements and their means of communication, and that with appropriate restrictions imposed by the court the applicants would be prevented from making contact with the witness.

The difficulty with such an arrangement is that it would most likely not work without the full- co-operation of the witness who is in a foreign jurisdiction. This witness, who is said to be the girlfriend of the first applicant, is likely to be more loyal to the accused persons rather than to this State, and therefore vulnerable to pressure or persuasion. This, as a result, would impose an ongoing, onerous responsibility to the police to police this matter until the witness in question has testified, probably next year, in 2022 or 2023. This suggests to me that it is in the interest of justice not to release the applicants on bail. Because they are charged on the basis of common purpose, this applies equally to both applicants,"

followed by the Conclusion in Paragraph [5] that:

"... [I]t is apparent that the Crown has a prima facie case against the accused persons and obviously the stakes are high. There is enough incentive to interfere with the course of justice as alluded to above. It is not necessary for the Crown to show that interference will actually occur."

[18] The Appellants' Notices of Appeal contain identical grounds, being the following, quoted *verbatim*:

> *"1.* ***The court aquo*** [sic] ***erred both in fact and in law by dismissing the Appellants bail.*** [sic]
>
> *2.* ***The court aquo*** [sic] ***failed to appreciate that the usage of the words "...may attempt to influence or intimidate witnesses..." requires that facts and/or actions attributable to a bail applicant must be apparent on the pleadings serving before the court, that such facts must be demonstrated ex facie the papers as knowledge of and/or relationship with witnesses is not a bar being admitted to bail.***
>
> *3.* ***The court aquo*** [sic] ***erred both in fact and in law by relying on its lack of authority over a foreign jurisdiction on the issue of other witnesses when the consideration should be focused on actions and/or conduct of a bail Applicant towards attempting to interfere with the witness as bail is in personam thus focuses on an accused and not witnesses.***
>
> ***3.1 The court failed to appreciate that it had the authority to send a warning to the Applicant not to interfere with the witnesses in any manner whatsoever (failing which bail will be cancelled).***
>
> *4.* ***The court aquo*** [sic] ***erred both in fact and in law by applying the doctrine of common purpose in Appellant's bail application as it is trite that in a bail application focus should be on each individual accused as opposed to adopting a blanket approach with findings and/or observations of co-accused.***
>
> *5.* ***The court aquo*** [sic] ***erred both in fact and in law by applying common law principles in Appellant's matter when bail is now wholly statutorily governed under Part VII*** [sic] ***of the Criminal Procedure and Evidence Act 67/1938.***
>
> ***51.*** [sic] ***Consequently, the court aquo*** [sic] ***erred both in law and in fact by placing the onus in the Appellant when it lays on the Crown as per section 96(4).***

5.2 *The court aquo* [sic] *failed to appreciate that section 96(1) of the Criminal Procedure and Evidence Act gave an accused person the right to bail at any stage of the proceedings which can only be taken away upon the Crown discharging its onus in terms of section 96(4) thereof.*

5.3 *The court aquo* [sic] *erred both in fact and in law by finding and holding that a prima facie case established by the Crown, raising the stakes, was enough incentive to interfere with the course of justice when section 96(4) of the Criminal Procedure and Evidence Act makes no provision for such consideration.*

6. *The court aquo* [sic] *erred both in fact and in law by effectively interpreting "exceptional circumstances" as meaning "peculiar circumstances to an individual.""*

B.2 The Issues and the Law

[19] Appeal Grounds 4 and 6 were not pursued by the Appellants. As for Grounds 5, 5.1 and 5.2 the Appellants did not either in their Heads of Arguments or in the course of oral submissions specify any paragraph in the Judgment saddling the Appellants with the onus, as alleged by the Appellants, and these grounds need not be considered any further.

[20] During the course of oral argument the issues became crystallised, the thrust of the Appellants' argument being that the Court *a quo* misdirected itself in attaching too much weight to the question of a *prima facie* case; that communications are still possible while a person is incarcerated for instance by way of cellular telephones; that the mischief sought to be avoided can be controlled by way of appropriate bail conditions and in conclusion, that the Crown had failed to demonstrate, on the evidence, that it would not be in the interests of justice to release the Appellants on bail.

[21] The Crown countered *inter alia* by emphasising that the (alleged) fact that the witness was able to receive moneys and give same to Appellant Mnisi at the behest of the Appellant Shongwe, her alleged boyfriend, manifests a position of influence over her and adding that the case is rendered unique by the fact that the witness in issue is in South Africa, thereby underscoring the difficulty of extra-territorial monitoring. In conclusion, the Crown submitted, the Court *a quo* did not misdirect itself, therefore that there is no merit in either appeal.

[22] The pertinent statute law provisions pertaining to bail are:

22.1 **Section 16(7)** of the Constitution, 2005, which is the supreme law of the Kingdom, stipulates that: ***"If a person is arrested or detained as mentioned in subsection 3(b)*** [upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence] ***then without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that person appears at a later date for trail or for proceedings preliminary to trial".***

22.2 Bail itself is governed by the provisions of Part VIII of the Criminal Procedure and Evidence Act, 1938 as amended and **section 96** is of particular application,

22.3 The subsections germane to the likelihood of interference with witnesses, with pertinent portions underlined, are:

(a) **Section 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."

(b) **Section 96(7)**: *"In considering whether the ground in subsection 4(c) has been established , the court may, where applicable, take into account the following factors, namely – (a) the fact that the accused is familiar with the identity of the witnesses and with the evidence which they may bring against him or her; (b) whether the witnesses have already made statements and agreed to testify; (c) whether the investigation against the accused has already been completed; (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated; (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be; (f) whether the accused has access to evidentiary material which is to be presented at his or her trial; (g) the ease with which evidentiary material could be concealed or destroyed; or (h) any other factor which in the opinion of the court should be taken into account."*

22.4 As regards the interests of justice in general, **section 96(10)** provides that:

"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."

[23] The above statutory provisions have enjoyed thorough exposition and the apposite principles are succinctly captured for instance in ***Senzo Matsenjwa and the King 30/2017) [2018] SZSC 45(06/11/2018):***

"[16] The Supreme Court of Eswatini has had occasion in several cases to authoritatively pronounce itself on the issue of bail. (See Supreme Court of Eswatini judgments in ***Dilawar Hussain v Rex Appeal Case No. 01/2018, Sibusiso Bonginkhosi Shongwe v Rex Appeal Case No. 26/2015, Maxwell Mancoba Dlami & Another v Rex Appeal Case No.46/2014, Musa Waga Kunene v Rex Appeal Case No 74/2017, Lucky Matsenjwa v Rex Appeal Case No.13/2017 and Director of Public Prosecutions &2 others Vs Celani Maponi Ngubane Appeal Case No.04/1016****).*

In ***Maxwell Mancoba Dlamini and Another vs Rex*** *(Supra), his Lordship M. C. B. Maphalala ACJ, as he then was, stated that;*

"[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.

[**section 96(4)** set out]

[17] Also, our courts must not lose sight of the relevancy of binding and enforceable International Treaties and Instruments that are part of our law regarding personal rights and freedoms including pre-arrest and post-arrest rights of accused persons.

[18] An analysis of the above-mentioned cases demonstrates that the principles relating to bail law are now settled in our jurisdiction. There is a single determining factor whether to grant or deny an accused person bail, namely; the interest of justice.

[19] In dealing with the interest of justice, the enquiry is whether it is in the interest of justice to release the accused person on bail or not. This in turn is dealt with by enquiring as to whether the accused person is likely to flee the jurisdiction or not and whether the accused person is likely or unlikely to interfere with the witnesses and/or evidence in the matter. The Court exercises its discretionary powers in granting or denying bail.

In ***Dilawar Hussain vs Rex*** *(Supra), His lordship J.P. Annandale JA stated that;*

"[17] Once arrested, the detainee has every right to hedge his expectations of release on bail on the horses running under the banner of the Constitution. Section 16 (7) thereof provides that:

"If a person is arrested or detained as mentioned in subsection 3(b), then without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure

that person appears at a later date for trial or for proceedings preliminary to trial"."

[20] His lordship Justice M. C. B. Maphalala ACJ, as he was then, in **Sibusiso Shongwe v. Rex** *(Supra) had this to say:-*

> ***"19. It is trite that bail is a discretionary remedy; however, the court is required to exercise that discretion judiciously having regard to legislative provisions applicable, the peculiar circumstances of the case as well as the bill of rights enshrined in the Constitution. The purpose of bail in every constitutional democracy is to protect and advance the liberty of the accused person to the extent that the interests of justice are not thereby prejudiced. The protection of the right to liberty is premised on the fundamental principle that an accused person is presumed to be innocent until his guilt has been established in court. It is against this background that the court will always lean in favour of granting bail in the absence of evidence that doing so will prejudice the administration of justice."***

Also, his lordship Justice M. C. B. Maphalala CJ in **Musa Waga Kunene v. Rex** *(Supra) stated that:*

> ***"10. It is a trite principle of our law that bail is a discretionary remedy. Similarly, it is well-settled that an appeal court cannot interfere with a decision of a lower court in the absence of a misdirection by the court in the exercise of its discretionary power to determine bail. Furthermore, an accused bears the onus to show on a balance of probabilities that it is in the interests of justice that he should be released on bail."***

In **Rodney Masoka Nxumalo and Two Others v Rex** *Criminal Appeal No.1/2014, his Lordship M. C. B. Maphalala JA, as he then was, at paragraph 7 stated that;*

> ***"[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 on bail.' "***

[24] Also in the case of ***Sibusiso Bonginkhosi Shongwe v Rex (26/2015) [2012] SZSC 04 (29th July 2015)*** alluded to above, this Court referred with approval to **S v Acheson 1991(2) SA 803 (Nm)** in terms of which relevant considerations concerning likelihood of interference with witnesses would include:

> ***"Was there a reasonable likelihood that, if the accused were released on bail, he would tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted? The determination of this issue involved an examination of other factors, such as***
>
> ***(a) whether or not the accused was aware of the identity of such witnesses or of the nature of such evidence;***
>
> ***(b) whether or not the witnesses concerned had already made their statements and had committed themselves to giving evidence or whether it was still the subject-matter of continuing investigations;***
>
> ***(c) what the accused's relationship with such witnesses was and whether or not it was likely that they might be influenced or intimidated by him; and***
>
> ***(d) whether or not any condition preventing communication between such witnesses and the accused could effectively be policed."***

B.3 The Court's analysis and conclusions

[25] At the outset, it is noted that the Court *a quo* rejected opposition on the bases of likelihood of jeopardising ongoing investigations and/or evading trial, which served to set the bar higher for successful opposition on the basis of likelihood of interference with witnesses.

[26] It is evident that the Court *a quo* was faced with the logistical complexity of securing and monitoring non-interference with an important witness who is outside its area of jurisdiction. Clearly, it would be very difficult, if not impossible, to effectively police any bail condition preventing or limiting communication or contact between one or both of the Appellants and this witness. The Court *a quo* then perforce had to exercise its discretion in answering the core question whether the interests of justice would be prejudiced if the Appellants were granted bail.

[27] On appeal, it is not a question of this Court sitting as a court of first instance and possibly reaching a different conclusion. The decision of the Court *a quo* can only be interfered with in the event of a misdirection by the Court *a quo* in the exercise of its discretionary power to determine bail.

[28] The Court *a quo* based its refusal to grant bail, in a nutshell, on the difficulty of enforcing and policing appropriate bail conditions or restrictions. This approach is fully in accordance and commensurate with **section 96(7)** of the Act which includes in (e): "***How effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be***" and the consideration set out in the **Acheson** case: "***(d) whether or not any condition preventing communication between such witnesses and the accused could effectively be policed.***"

[29] However, a holistic perspective is required. The following statement by His Lordship Justice M. C. B. Maphalala ACJ, as he was then, in ***Sibusiso Shongwe v Rex*** (*supra)* merits repetition:

> ***"19. It is trite that bail is a discretionary remedy; however, the court is required to exercise that discretion judiciously having regard to legislative provisions applicable, the peculiar circumstances of the case as well as the bill of rights enshrined in the Constitution. The purpose of bail in every constitutional democracy is to protect and advance the liberty of the accused person to the extent that the interests of justice are not thereby prejudiced. The protection of the right to liberty is premised on the fundamental principle that an accused person is presumed to be innocent until his guilt has been established in court. It is against this background that the court will always lean in favour of granting bail in the absence of evidence that doing so will prejudice the administration of justice."***

[30] **Section 96(10)** calls upon a Court to 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."* This underscores that a Court should exercise its discretion judiciously with due regard to all relevant factors which includes, in **section 96(10)(b)** "*the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail."*

[31] The Court *a quo* 's statement that monitoring compliance "*...as a result, would impose an ongoing, onerous responsibility to the police to police this matter until the witness in question has testified, probably next year, in 2022 or 2023. This suggests to me that it is in the interest of justice not to release the*

applicants on bail," recognises that it is probable that it may be years before the witness in question testifies.

[32] The issue of a probably protracted period of detention immediately raises a red flag. This aspect was not articulated by the Appellants as a Ground of Appeal. In terms of **Rule 7** of this Court an appellant is confined to his/her Grounds of Appeal, however, this Court in deciding the appeal shall not be confined to the grounds thus stated by an appellant, and will therefore proceed to scrutinise this issue, more so because of its possible constitutional implications.

[33] Even though technically justifiable factors for refusing bail which relate to effective policing of appropriate bail conditions do exist *in cas*u, such are insufficient standing alone when measured against the all-inclusive requirement that a Court is to exercise its discretion judiciously having regard to legislative provisions applicable, the peculiar circumstances of the case, as well as the Bill of Rights enshrined in the Constitution.

[34] The Court *a quo* seemingly did not regard prolonged incarceration as a factor possibly favouring the granting of bail but rather deemed the probable time period prior to the witness's testimony, to be an impediment precluding the release of the Appellants on appropriate bail conditions.

[35] In so doing, insufficient weight was afforded to the principle that matters are to be decided by weighing the interests of justice against the right of an accused person to his or her personal freedom and in particular the prejudice the accused person is likely to suffer if he or she were to be detained in custody.

[36] It then follows that the Court *a quo* failed to weigh all the competing considerations as are intended by the legislature and case authorities. As such, an appropriate judicial balance was not struck and in all the circumstances, the Court *a quo* misdirected itself.

[37] In conclusion, it would not be contrary to the interests of justice to release the Appellants on bail and the objections to release on bail can suitably be met by appropriate bail conditions. In view of the above findings, it is not necessary to deal any further with the Grounds of Appeal as stated by the Appellants.

[38] The parties were requested to reach consensus on which bail conditions would be appropriate should the appeals succeed and the parties did so, providing this Court with a draft document for its consideration and modification where necessary. [The reference to "*Adelade Dlamini*" therein appears to be a reference to the complaint stated to be "*Masomakati Adellate Dlamini.*"]

[38] Accordingly, the following order is made:

The appeal is allowed, the judgment of the Court *a quo* is set aside and substituted with the following order:

Bail is granted to the Appellants and fixed at E50 000.00 (fifty thousand emalangeni) subject to the following conditions:

1 Prior to their release on bail, each Appellant shall:

1.1 Deposit with the Treasury the sum of E 15 000.00 (fifteen thousand emalangeni).

1.2 Provide sureties in the sum of E 35 000.00 (thirty five thousand emalangeni) to secure the surrender of the Appellants to custody at the time and place directed.

1.3 Surrender their passports or other valid travel documents to the Investigating Officer at the Mbabane Police Station and not to apply for new passports or travel documents.

2 After their release on bail, each Appellant shall:

2.1 Once every fortnight, in person, report at the Mbabane Police Station between the hours of 08h00 hours and 16h00 hours. The first reporting shall be on the first Friday after their release and thereafter, every Friday of the subsequent fortnight.

2.2 Refrain from speaking with or communicating with or otherwise contacting or interfering with any prosecution witnesses in the case especially Cynthia Watt, Adelade Dlamini and Thokozani Ntshingila. In the event that the Appellants do not know the identities of the Crown witnesses, that the investigating officer furnishes them with further and fuller details of the other Crown witnesses.

2.3 Remain within Eswatini.

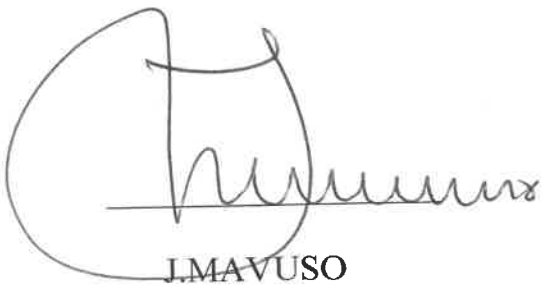
2.4 On release provide the investigating officer with their residential addresses forthwith, for *inter alia* purposes of *domicilium citandi*.

J.M. VAN DER WALT
ACTING JUSTICE OF APPEAL

I agree:

S.J.K. MATSEBULA
ACTING JUSTICE OF APPEAL

I agree:



J.MAVUSO
ACTING JUSTICE OF APPEAL

For the Appellants: Adv M Mabila instructed by Linda Dlamini & Associates (Appellant Shongwe) and by Sithole Magagula Attorneys (Appellant Mnisi)

For the Respondent: Principal Crown Counsel M Nxumalo