CASE NO.1549/2001

In the matter between:

SEAN BLIGNAUT **Applicant**

And

DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

CORAM : MASUKU J.

For Applicant : Adv. M. van der Walt (Instructed by Millin & Currie)
For Respondent: Mrs. Mumcy Dlamini

JUDGEMENT
25th June,2001

In this application, the Applicant prays for an Order admitting him to bail in terms of the provisions of Section 105 of the Criminal Procedure and Evidence Act 67/1938, as amended. The Crown opposes the application and both parties have filed papers in support of their respective cases.

The Facts

In his Founding Affidavit, the Applicant states as follows: He is a twenty-three year old bachelor who lives with his parents in Pine Valley. He is a Zimbabwean national, having attained his nationality by *jus soli.* He has been resident in Swaziland from the age of six (6) and his father

runs a business known as Busiquip. He studied at Sifundzani School in Mbabane, whereafter he proceeded with his studies at a college in Pretoria, returning to Swaziland in 1999. He and his family regard Swaziland as their home.

On the 31st December, 2000, he was arrested by the Royal Swaziland Police on a charge of murder, it being alleged that he murdered one Tanya Grobler on the 25th November, 2000. In his papers, the Applicant protests his innocence and as a result caused certain written submissions to be made to the Respondent on his behalf. In the representations, which are annexed to this application, a chronicle of events and explanations from his side are given to the Respondent with a view that the latter should have considered releasing the Applicant from custody.

The Applicant further states that he has been in custody for more than five(5) months on a holding charge. He contends that the Police have had ample time to conclude their investigations and to charge him formally but to no avail. He contends further that in view of the notorious fact that there is a serious backlog of criminal cases awaiting trial, he is likely to remain in custody awaiting trial for about three (3) years. He states that he harbors no intention of estreating his bail if granted and contends that had he harboured any such intention, he would have not returned to Swaziland after attending the deceased's funeral in Nelspruit, South Africa because at that stage, he was aware that he was likely to be charged with the deceased's murder. Finally, he undertakes to abide by any and all such conditions as may to the Court seem meet. An undated surety bond in the amount of E100,000.00 by the Applicant's father was filed for the Applicant's due performance of all his obligations arising from the bail application.

The Respondent opposes the application basically on two grounds:

> (a) the applicant is of Zimbabwean extraction and is a holder of that country's passport, facts which render it highly likely that he will abscond his trial;
>
> (b) there is no extradition treaty between Zimbabwe and Swaziland, a factor which render it impossible for the Applicant to be returned to this country to stand his trial should he abscond.

The Police further allege in the Opposing Affidavit that before the Applicant's arrest, the Investigating Officer received information that the Applicant was preparing to leave for England where his brother is resident. In response to this allegation, the Applicant's father, in his own affidavit denied its truthfulness, stating that had it been true that the Applicant was indeed preparing to leave as alleged, he would have known about it. He further stated that the Applicant does not have the money to travel abroad and in any event, the Applicant's brother in England is not resident there but is temporarily on a work holiday visa.

The Law Applicable

In Swaziland, as opposed to the Republic of South Africa, (with the advent of their Constitution), the *onus* is on the accused to satisfy the Court on a balance of probability that he will not abscond or tamper with the Crown witnesses. If there are substantial grounds for opposition, bail will be refused. See **Ndlovu vs Rex 1982 - 86 SLR 51 at 52 E-F.** In the aforesaid case, Nathan C.J. proceeded to propound the law as follows at page 52 paragraph F to G:

> *"The two main criteria in deciding bail applications are indeed the likelihood of the applicant standing trial and the likelihood of his interfering with Crown witnesses and the proper presentation of the case. The two criteria tend to coalesce because if the applicant is a person who would attempt to influence Crown witnesses it may readily be inferred that he might be tempted to abscond and not stand his trial. There is a subsidiary factor also to be considered, namely, the prospects of success in the trial."*

In an earlier case of **Jeremiah Dube vs Rex 1979-81 SLR 187 at 190 E-F**, Cohen J. summed up the legal position as follows:

> ***"****Summing up therefore, it seems to me that in a case of this kind, there is an initial* ***onus*** *which the applicant has to discharge on a balance of probability that he will neither abscond nor interfere with Crown witnesses. If bail is opposed by the Director of Public Prosecutions and the indications are that the Crown case is of sufficient strength on its*

merits or the other surrounding circumstances are such as to indicate that it is in the interests of justice that he should remain in custody, the applicant must further establish special facts before bail will be granted. The views of the Director of Public Prosecutions on the application are generally speaking not readily discarded by the court.'

In addition, there is what I consider a *locus classicus* judgement on the question of bail by the late Mahomed J.(as he then was), in **S vs Acheson 1991 (2) SA 805 (NmHC) 822-823 C**. So compelling was his exposition that I am constrained quote *in extenso* therefrom and I dare say that his lucid remarks on this subject are instructive to this and other Courts in our jurisdiction regarding the considerations to be taken into account. His Lordship enumerated the factors as follows:

"1. Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail? The determination of that issue involves a consideration of other sub-issues such as

(a) *how deep are his emotional, occupational and family roots with the country where he is to stand trial;*
(b) *what are his assets in that country;*
(c) *what are the means that he has to flee from that country;*
(d) *how much can he afford the forfeiture of the bail money;*
(e) *what travel documents he has to enable him to leave the country;*
(f) *what arrangements exist or may later exist to extradite him if he flees to another country;*
(g) *how inherently serious is the offence in respect of which he is charged;*
(h) *how strong is the case against him and how much inducement there would therefore be for him to avoid standing trial;*
(i) *how severe is the punishment likely to be if he is found guilty;*
(j) *how stringent are the conditions of his bail and how difficult would it be for him to evade effective policing movements.*

2. The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again involves an examination of other factors such as

(a) *whether or not he is aware of the identity of such witnesses or the nature of their evidence;*
(b) *whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject of continuing investigations;*
(c) *what the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;*
(d) *whether or not any condition preventing communication between such witnesses and the accused can effectively be policed.*

3. A third consideration to be taken into account is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. This would involve again an examination of other issues such as for example

(a) *the duration of the period for which he is or has already been incarcerated, if any;*
(b) *the duration of the period during which he will have to be in custody before his trial is completed;*
(c) *the cause of the delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such delay;*
(d) *the extent to which he might be prejudiced in engaging legal assistance for his defence and in effectively preparing his defence if he remains in custody;*
(e) *the health of the accused."*

Arguments by Counsel

Ms. Van der Walt argued that the fact that the Applicant is of Zimbabwean extraction does not *per se* indicate that he is likely to abscond. She submitted that in view of the fact that the Applicant has lived in this Kingdom from a tender age and the fact that he regards this country as his home is indicative of the fact that he has a great connection with this country. This fact therefor renders him unlikely to abscond, she further submitted. It was further submitted on his behalf that he had a glaring opportunity to leave before his arrest and at a time when he already knew that he could be charged but he did not.

Regarding the issue of preparation to leave for England, it was argued by his Counsel that from his father's affidavit, it is clear that the allegation by the Police in untrue, moreso because the source of that information was not disclosed to the Court. It was also pointed out that the Applicant's father had further stated that if indeed the Applicant had been preparing to leave as alleged, the father would have known, considering the fact that the Applicant did not have the financial means to travel abroad. It was also submitted that it would be impossible for the Applicant to travel to England as he would have to surrender his passport if admitted to bail.

Ms. van der Walt further submitted that the Applicant had good prospects of success at his trial in view of the reasonable possibility that a third person could have gained access into the house and killed the deceased, and also in view of the fact that the deceased does not appear to have had any motive for killing his own cousin. The allegation by the Police that there is a strong case against the Applicant was attacked on the basis that the grounds for such a bald but confident declaration were not disclosed to the Court.

Mrs Dlamini argued that the Applicant's nationality coupled with the fact that there is no extradition treaty with Zimbabwe are factors that render it likely that the Applicant would abscond and nothing could be done to return him to this Court's jurisdiction. She argued further that there is nothing to gainsay the Police information that he was preparing to leave before his arrest. So accurate was the Police information, argued Mrs Dlamini that without being informed by the Applicant's parents, they were able to ascertain that the accused has a brother in England, which has been conceded by the Applicant's father.

She further argued that no significance should be attached to the absence of motive for the Applicant to kill the deceased who was his cousin because some people are known to kill even closer relatives. In closing, Mrs Dlamini referred to cases in which persons had absconded whilst on bail but for less serious offences, *viz* **Guy Allen and Nonhlanhla Dlamini.**

In my view, there is a lot to be said for the Crown's submissions in this matter. Certain weighty factors seem to tilt the scales against the accused. I propose to deal with the main considerations as expounded in the cases above cited.

1. **Likelihood of the Applicant standing his trial**

The Applicant is a Zimbabwean national and presently holds that country's passport. He has no assets in this country as he was working in the family business at the time of his arrest. The amount of bail tendered together with the security have all been put up by the his parents. I take judicial notice of the notorious fact that in this country that many people illegally cross the borders into the neighbouring countries i.e. South Africa and Mozambique without any travel documents. Any person desirous enough of leaving this country would not be impeded by the absence of a travel document as there are well known crossing points, through some of which even vehicles are smuggled in or out of this country.

Although the strength of the case cannot at this stage be gauged, particularly in view of the fact that certain crucial results are being awaited from forensic experts in South Africa, it is however common cause that the case faced by the accused is a very serious one and that should he be convicted, he faces a very serious punishment, including a death sentence. The other factor that weighs heavily against the Applicant is that there is no extradition treaty between this country and Zimbabwe, the country of which he is a national.

This factor weighs heavily in some cases as evidenced by the conclusions of Diemont J. in **S v MHLAWLI AND OTHERS 1963 (3) SA 795 (C) at 796 E,** where he stated as follows:-

"*It has been said by the Courts on several occasions that where the inducement to*

flee is great – as in this case – and where no extradition from neighbouring protectorate would be possible- again as in this case – the Court will not readily grant bail if the Attorney – General opposes this application. It seems to me that this consideration is conclusive in deciding this matter against the applicants, even though it may result in hardship to them."

There is also the allegation by the Police that immediately before his arrest, the accused was preparing to leave. The Applicant did not respond to this allegation but was content to leave the reply thereto to his father, whose depositions in this regard contain hearsay material and which do not assist the Applicant in effectively denying this allegation.

The cumulative effect of the above factors lead me to the inescapable conclusion that in this case, there are many factors which would serve as a sufficient inducement for the accused not to stand his trial. His long association with this country alone is insufficient as properly pointed by Mrs Dlamini that the case of Nonhlanhla Dlamini was one which a Swazi national abandoned her children and family for a less severe case of theft. It is my finding in view of the foregoing that the Applicant is not unlikely to abscond trial.

(2) **Reasonable Likelihood of Applicant tampering with witnesses.**

It is not immediately clear that the Applicant knows the identity of the witnesses, nor whether these witnesses have committed themselves to give evidence. It is however clear from the papers that the accused's father will be a Crown witness. It is also clear from the papers that should be Applicant be admitted to bail, he will live with his parents at their home, which incidentally was the scene of the deceased's death. The relation is of such a nature that it is likely that the accused may at the least influence his father in the testimony he will adduce. Any order that would be issued preventing communication between the father and son in this case cannot be effectively policed. The present arrangement is such that although the Applicant's father has access to the Applicant, the communication takes place under the watchful eye of the Correctional Services Warders. No such guarantee can be made if the accused is admitted to bail.

Nothing has been said by the Respondent regarding whether the Applicant is likely to interfere with the evidence at his home, where as I have said, the deceased met her death. From the Applicant's Affidavit, particularly Annexure "SB 1", a lot of reference is made to a multiplicity of the features of the house. There may be a reason for interfering with certain aspects thereof in order to suit the accused's case and this possibility also weighs against the Applicant in this regard.

(3) **How prejudicial it might be if Applicant is not granted bail.**

The Applicant has been in custody for around six months and is likely, regard being had to the backlog of criminal cases that he will be in custody for a longer time. This on its own is however a less prejudice when compared with the prejudice likely to be occasioned to the interests of justice if he is admitted to bail. From the papers, no mention was made of the Applicant's financial obligations which his father cannot attend to on his behalf. It is also noteworthy that the Applicant was working in the family business and has no dependants who would suffer as a result of him being denied bail. No mention is also made of any health condition suffered by the Applicant and which could be prejudicial to him if he remains in custody. There is no intimation also that legal assistance for his defence will be prejudiced if he remains in custody. To the contrary, he has instructed a competent firm of attorneys to represent him and the services of competent Counsel have been engaged. There is, in my view, no fear that the accused may be prejudiced in effectively preparing his defence by being denied bail.

In sum, I am of the view that the Applicant, who bears the onus, has failed to discharge the same on the balance of probability that the granting of bail will not prejudice the interests of justice. In the result, the application is dismissed.

As an aside, I note that the anticipated lengthy stay in custody is not a reality faced by this Applicant alone. It faces many others. There is however, a lot that the Government can do to ensure that the period spent by inmates awaiting trial in custody is dramatically reduced. More Judicial Officers should be appointed, more prosecutors recruited and more court rooms should be constructed and these are matters that need urgent attention, for the right to a fair trial includes

easy access to the Courts of law and within a reasonable time. The situation in which in-mates wait for up to three years for trial is clearly intolerable and also constitutes a heavy burden on the country's fragile economy.

T.S. MASUKU
JUDGE