IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 102/2015

In the matter between

NDUMISO NKULULEKO SHABALALA Applicant

And

THE NATIONAL COMMISSIONER OF POLICE 1st Respondent

THE DIRECTOR OF PUBLIC PROSECUTORS 2nd Respondent

THE ATTORNEY GENERAL 3rd Respondent

Neutral Citation: *Ndumiso Nkululeko Shabalala Vs The National Commissioner of Police & two Others (102/2015)*

[2015] SZHC 121 (29th June 2015)

Coram: Hlophe J.

For Applicant: Miss L. Simelane

For Respondent: Mr. A. Matsenjwa

Date Heard: 06 May 2015

Date Delivered: 29 June 2015

Summary

Bail application – Applicant facing three counts comprising Robbery, Contravention of Section 12 (1) of the Theft of Motor vehicle Act 0f 1991 as well as Contravening the Opium and Habit Forming Drugs Act and applies for bail – Application opposed by the crown on the grounds that it would not be in the interests of justice to release Applicant on bail – Whether to release Applicant on bail in the circumstances – Grant of bail in these circumstances not in the interests of justice – Application dismissed.

JUDGMENT

[1] The Applicant who informed this court that he was arrested on the 26th April 2015 and charged with various counts which include Robbery, Contravention of Section 12 (1) of the Theft of Motor Vehicle Act of 1991 and violating the Opium and Habit Forming Drugs Act, has instituted application proceedings before this court seeking *inter alia* an order releasing him on bail upon such terms as this court may deem appropriate.

[2] In his Founding Affidavit, the Applicant does not inform this court what is alleged to have happened leading to the commission of the offences including how he is allegedly being linked to the charges and what his defence thereto is. The bail application is therefore bare and is not supported by facts. This makes it difficult for this court to properly exercise its discretion.

[3] On why he submits he should be released on bail, the Applicant says he runs a transport business which conveys children to school; that he assists his parents with family chores and that he will abide with all the terms or conditions this court may impose if it granted him the relief sought, namely the release from custody.

[4] This court has noted the growing tendency by Applicants in bail applications, where other than disclosing that they were arrested and charged with a certain offence and that they now pray for an order releasing them on bail, they shy away from placing before court any material informing the court on how the charges were allegedly committed including how they are allegedly linked therewith, including what their defence is. Instead they rush

to make undertakings about their commitment to observe all the conditions the court may attach to their release. This, in my view is not enough.

[5] The value in placing such information before court is that it enables the court exercise its discretion properly after having been able to ascertain the seriousness of the matter and whether or not, there are any prospects of success. Instead of working to the Applicant's advantage, I found that it more often than not works against the Applicant, because the potentiality that what would be a less serious version of a charge could end up being construed as a more serious one, deserving to be treated more harsher when perhaps had the background been revealed, the circumstances would have justified a more lenient treatment of same.

[6] A bail application should contain much more and the court should be given a sound background which is among other things one capable of informing it of the seriousness of the charges levelled against the Applicant including how the interests of justice would best be served in the matter. I can only hope that Applicants or all parties in bail applications will ensure that proper and full information in such applications is placed before court so as to avoid

the maximization of opportunities for their not obtaining the reliefs they seek in situations where they would have obtained the said reliefs had all the necessary information been placed before the concerned court.

[7] The Respondent opposed Applicant's application and to that end filed an answering affidavit deposed to by one 5727 Detective Constable Ayanda Dlamini who identified himself as the Investigating Officer in the matter. The deponent whilst confirming that the Applicant was charged with three counts, went on to annex thereto a copy of the charge sheet from which this court is able to glean the circumstances under which the offences were allegedly committed, including the extent of the Applicants implication in the commission of the offences as well as their seriousness. Like I said, this may not necessarily reflect the accurate information but if such was not being placed before court, then the court would only make do with what it has.

[8] For instance the charge sheet reveals that the Robbery was committed in circumstances where the victim was hacked with a bush knife on the left leg and the head with two motor vehicles and gate keys being taken as a result.

The value of the two vehicles is said to be a sum of E95, 000.00. On the other hand the Contravention of Section 12 (1) of the Theft of Motor Vehicles Act 1991, is shown as having occurred when the Applicant allegedly damaged the dashboard of a BMW motor vehicle and therefrom stole a Panasonic Navigator. This conduct allegedly resulted in damages in the value of about E18000.00 to the victim of the crime. The offence of violating the Opium And Habit Forming Drugs act is shown as having arisen from the Applicant's being allegedly found in possession of "an Opium and Habit Forming Drug", allegedly weighing some 0.407 (whatever) undisclosed measurements, that is whether it is grams or kilograms.

[9] Except for the third count which is expressed in very shabby, sloven and unclear language, the other offences appear to be very serious particularly that of Robbery. The seriousness of these two offences was also pleaded in the answering affidavit, making this the only information properly before this court and admissible as such.

[10] The Respondents further contended in their answering affidavit that, it would not be in the interests of justice to release the Applicant on bail because of the seriousness of the Robbery charge as informed by the violence applied against the victim of the Robbery and its effect on the latter. Because of this offence it was contended that Applicant stood to be sentenced to a long period of imprisonment upon being convicted of the said offence. Owing to this consideration it was argued, Applicant was likely to evade trial if released on bail. It was alleged as well that there was also overwhelming evidence against the Applicant, which however remains a mere allegation as no such evidence has been placed before this court. Being that as it may and when considering the cases of the parties herein, the Respondents are the only ones who properly placed sound material before this court for it to determine whether or not it would be in the interests of justice to grant bail.

[11] Flowing from the very shallow allegations made by the Applicant, it became apparent that if his application was opposed, the Applicant would then be forced to try and embellish his case in the Replying Affidavit. This of course is not allowed. If the facts which should have been contained in the Founding Affidavit are only placed before court through the Replying

Affidavit that is an afterthought. Such allegations fall to be struck out and not to be considered by the court. There is by now in existence a clear principle or rule of practice that a party stands or falls by his founding papers. Indeed in his Replying Affidavit, and in an apparent attempt to now ameliorate the glaringly serious case against him, the Applicant alleged that whereas three people had been charged with the offences in question, he was the only one that remained in custody, his co-accused having been granted bail. This he submitted ought to work in his favour.

[12] As indicated these are facts that should have been contained in the Founding Affidavit for them to be considered with the other side being given an opportunity to say what it could have in response and thereby to decide whether to confirm same as a fact or to clarify how same came about. Owing to this aspect having been filed in Replying Affidavit, the other party can no longer respond thereto. In so far as they were not so pleaded in the Founding Affidavit, I am therefore obliged to strike them out at this point and not to consider them in the determination of this matter.

[13] I am in any event convinced that the offences shown as having been committed by the accused person are very serious in nature and the Respondent has in my view shown that it would not be in the interests of justice to release the accused persons from custody. I agree with Crown Counsel that owing to the seriousness of the offences allegedly committed by the Applicant he stood to be given a lengthy sentence in the event of conviction which brings about the likelihood that he would evade trial. This would adversely affect the interests of justice.

[14] For the foregoing considerations, I am of the considered view that the Applicant's application cannot succeed and that it should be dismissed. Consequently I make the following order:-

[14.1] The Applicant's application be and is hereby dismissed.

N. J. HLOPHE

JUDGE – HIGH COURT