IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No. 205/2014

In the matter between:

PHUMLANI MONGI NKAMBULE **1st Applicant**
THULANI BUKHOSI NKAMBULE **2nd Applicant**
MUZI MZOZO NKAMBULE **3rd Applicant**
SIBUSISO MAKHANYA **4th Applicant**

And

REX **Respondent**

Neutral citation: *Phumlani Mongi Nkambule & 3 Others Vs Rex (205/2014) 2015 SZHC 188 (22nd October 2015)*

Coram: Hlophe J

For Applicant: Mr. M. Mbhamali

For Respondent: Mr. A. Makhanya

Date Handed Down: 27th October 2015

JUDGMENT

27th OCTOBER 2015

[1] Following their arrest on or about the 20th October 2014, whereafter they were all subsequently charged with four counts of robbery committed in various parts of the country; the Applicants approached this court asking for bail. They were said to have committed these offences whilst acting in furtherance of a common purpose.

[2] The second accused was further charged with theft of one hundred and thirteen tryes stolen from his employer together with an alleged contravention of Section 14 (1) of the Arms and Ammunition Act of 1964, it being alleged he was found in possession of a luger pistol without a licence.

[3] The 3rd Applicant on the other hand was further charged with the contravention of Section 14 (1) of the Arms and Ammunition Act, it being alleged that he was found in possession of a shot gun without a licence. He was also charged with House breaking with Intent to steal and theft it being alleged he had broken into the house owned or occupied by Cynthia Mamba and thereat stole items or goods worth E27, 900.00.

[4] In their said application, all the Applicants prayed that they be released on bail claiming to be innocent and contending they would plead not guilty to the charges preferred against each one of them. They also claimed that they would attend trial and that they would do nothing that jeopardises the interests of justice if released on bail, which are the usual undertakings made by accused persons in applications of this nature.

[5] Otherwise the Applicants did not take the court into their confidence on why they ended up being charged or even how they came to be allegedly associated with the charges in question. To compound this, other than a bare claim that they were innocent (which is a claim almost every Applicant makes) they could not disclose what their individual defences to the charges were in the merits of the charges against them.

[6] I have observed in numerous applications for bail, the growing tendency by the Applicants to avoid placing relevant facts and material before court so as to enable it tell the seriousness of the charges against the Applicant including how remote or removed he is from the charges as well as what his defence is in the merits. This growing tendency makes it very difficult for the courts to properly exercise the discretion they have in such matters which they otherwise can only do on whether if all the material facts or information is placed before it. The counts otherwise

cannot properly exercise this discretion if not all the information is placed before them. This often results in matters where realistically bail should be granted not being granted or where it should not be granted being granted, which situations would no doubt, end up having a bearing on the confidence the public accords the courts.

[7] It suffices for me to disclose that the current application was opposed by the crown which sought to place as much information before court as was possible. In this regard it was disclosed that the Applicants had committed various counts of robberies in various homes situated in various parts of the country such as Ezulwini and Siphofaneni. As they allegedly committed the said offences, they were allegedly armed with either dangerous weapons (such as knives and bush knives) or with firearms. According to the opposing papers when these offences were committed at the said homestead around the country, the first accused is alleged to have hired at least on two occasions a motor vehicle from a certain car dealer in Manzini known as Daket Investments in order for him and his companions to be transported to the targeted places where the robberies were to be carried out such as Ezulwini and Siphofaneni. This was clearly indicative of the crimes committed having been carefully planned before they were carried out which makes them very serious

offences as they tend to disturb the peace, law and order whilst adversely affecting or interfering with the fibre of society.

[8] It was during one of these escapades and at Ezulwini when the Applicants are alleged to have, whilst acting in furtherance of a common purpose, robbed, whilst armed with bush knives, one Futhi Dlamini of his two guns; namely a luger pistol and a shot gun. They are alleged to have further robbed him of cash in the form of 500.00 US Dollars and E480.00.

[9] At Siphofaneni, they are all alleged to have, whilst acting in furtherance of a common purpose, robbed one Vusi Tsabedze of a Nokia worth E600.00 plus E1000.00 in cash whilst armed with the shot gun and the pistol apparently stolen from Futhi Dlamini during an earlier robbery and in particular the one referred to above which forms the basis of count 1.

[10] Again at Siphofaneni, the Applicants are accused of having, whilst acting in furtherance of a common purpose, and on two different occasions, forming the basis of counts 3 and 4, robbed Bernard Zwane and Banele Ndlovu of their cell phones being Nokia 1100 phones and money in the sum of E1000.00 each. As they did this they were allegedly armed with

the shot gun and the luger pistol (referred to above and) apparently stolen from Futhi Dlamini under the circumstances referred to above.

[11] The second Applicant allegedly stole 113 tyres from Eyethu Spares where he was employed. This Applicant was further charged with the contravention of the Arms and Ammunition Act, it being alleged he was found in possession of a Luger pistol without valid licence. This firearm is as pointed out above, one of those allegedly used in carrying out the robberies referred to above. The third Applicant on the other hand faces charges of Contravening the Arms and Ammunition Act in that he was allegedly found in possession of a shot gun. Again this shot gun is one of the firearms allegedly used in the commission of the robberies referred above. This Applicant is further alleged to have broken into the house of Cynthia Mamba at Engculwini where goods or items valued at E27, 000.00 were stolen.

[12] It was contended by the crown that the offences allegedly committed by the said accused were of a serious nature with the evidence linking the them to same being strong on its own as it did not only consist of the Applicants being found in possession of some of the items forming the

proceeds of the crimes concerned but with some of the weapons used in the commission of the offences having been found in some of the accused's possession taken together with the fact that the accused persons had actually been identified during a formal identification parade. Furtherstill the cruel manner in which the offences, particularly the robberies and house breaking were committed do bothers the conclusion it would not be in the interests of justice to grant the accused persons bail. It was submitted as well that there was an accomplice witness to link the accused persons with the offences in question. In this regard it was contended that it would not be in the interests of justice for the Applicants to be released on bail.

[13] When the matter came before me for hearing of the bail application, I, after having heard argument by the parties' counsel including having read the papers filed of record, dismissed the application and undertook to avail my full written reasons in due course. I actually handed down an extempore judgment whilst undertaking to hand down the fully reasoned one in due course. This text comprises such reasons.

[14] Before proceeding to give my reasons it is imperative for me to comment on a growing irregular practice in this court which has the effect of undermining the interests of justice in the long term. No sooner have bail applications been refused than one discovers that the Applicants prepared a fresh application which they now register individually unlike the one they had filed jointly. This practice should obviously stop because it operates against the settled principles of our law that once decided a matter cannot be reopened before the same court. This is in line with the principle that the said court shall have become functus officio. This principle has the effect in law that once a court decides a matter, it automatically divests itself of the power or authority to deal with the same matter even if it is convinced the earlier court was wrong.

[15] This practice or growing tendency defeats the established principle of our courts that courts of the same jurisdiction (as in Judges of the same court and standing), or of equal jurisdiction cannot contradict each other in judgments in the same matter as they cannot legally and realistically review each other. Once a court of equal standing has decided a matter, the next level of its hearing should be a higher court which in these circumstances is a court of appeal which in our jurisdiction known as the Supreme Court, and not a judge of the same court as the earlier one. I

have no doubt that if in any matter it happens otherwise, then the second court to have heard the matter and contradicted an earlier decision by the same court would no doubt have acted irregularly necessitating that a higher court intervenes and order appropriately, which would often result in the irregular order being reversed.

[16] It was brought to my attention that subsequent to the judgment I referred to above as having been handed down extempore in this matter, the Applicants have now attempted to have their matters reopened with this court notwithstanding that it is the same one that determined the earlier matter. This is clearly undesirable and should not be allowed to gain ground. The remedy of the Applicants as earlier refused bail lies in them approaching the Supreme Court on an appellate basis should they have grounds for not being satisfied with the earlier judgment.

[17] In their current applications as shown to me the Applicants decided not to be candid with the court. They now said that their matters had bail not determined because the court allegedly said Christmas was approaching. Nothing can be further from the truth. The truth is that the court heard, determined and refused their applications, clarifying the offences with

which they were charged, were of a serious nature with strong evidence linking them to the offences including the identity of the accused as established at an identity parade and the evidence of an accomplice witness which was corroborated by the facts. Furtherstill offences of a similar nature, the robberies had repeatedly been committed indicating a disposition to command such offences by the same accused after there was strong prima facie evidence linking them to the charges.

[18] I must therefore mention that the Applicants' applications are functus officio and that this court cannot reopen same whatever the correctness or otherwise of its earlier decision. The Applicants' current applications have to fail on this ground alone which means that I must clarify that these new applications brought individually by the second and third Applicants are dismissed. If it is true that their co-accused were released on the same grounds after their bails had already been refused by this court that is indicative of an irregularity which I have no hesitation the Supreme Court can deal with, if it was brought to its attention.

[17] According to Section 96 (4) as read with Section 96 (5) (e) of the Criminal Procedure And Evidence Act of 1938, it shall be in the interests of justice to keep an accused person in custody where there is a likelihood

that if released on bail, he may commit an offence listed in part II of the First Schedule to the Criminal Procedure And Evidence Act. According to Section 96 (5) (e), the accused would be likely to commit the offence referred to in the second part of the first schedule where he is shown to have a disposition to commit the offence in question. In the present matter, although the accused have not yet been convicted, there is strong prima facie evidence they committed the robberies with which they are charged with on various occasions and within a short space of time after having carefully planned the said crimes. Robbery is one of the offences listed in Part II of the First Schedule to the Criminal Procedure And Evidence Act and the accused's repetitive commission of same is indicative of the disposition referred to in the Criminal Procedure And Evidence Act referred to above, and should justify the refusal of bail where a strong prima facie case is led against the accused or Applicants

[18] There is another consideration, which in my view is even stronger than that referred to in Section 96 (4) (a) read with Section 96 (5) (e) referred to in the foregoing paragraph. According to Section 96 (4) (b) read with Section 96 (6) (f), (g) and (h) of the Criminal Procedure And Evidence Act of 1938, it shall be in the interests of Justice to refuse an accused person bail where there is a likelihood that such person, if released on

bail, may attempt to evade trial. In terms of Section 96 (6) (f) there is a likelihood an accused may attempt to abscond trial where the nature and gravity of the charges on which the accused shall be tried is serious. The same thing applies according to Section 96 (6) (g) where the case against the accused is backed by strong evidence which is to say there is a likelihood he could be convicted of the serious offence. This brings about Section 96 6 (h) which provides that if a lengthy sentence is likely to be imposed then there is a likelihood an accused person will abscond trial.

[19] I have already indicated the gravity of the offences committed including their seriousness and the strength of the evidence against the Applicants. I think it can never be doubted that robbery is considered a grave offence hence its being one of the scheduled offences. The crown seems to have impeccable evidence if it relies on the proof of identity of the accused persons as coupled with the evidence of an accomplice and the fact that some of the proceeds of these crimes were found in their possessions. This coupled given with the lengthy sentence likely to be imposed given that robbery ranges between 5 and 15 years, there is every likelihood the accused persons are likely to abscond trial.

[20] It is apparent therefore that the release of the Applicants on bail in this matter would not be in the interests of justice and should be refused. I refer to the case of ***Rodney Masoga Nxumalo and Others vs The King, High Court (Bail Application) Case No. 115/2012*** in which bail was refused for more or less the same considerations, and confirmed on appeal.

[21] It was for these considerations that I came to the conclusion I did, whereat I dismissed the Applicant's application for bail. For the removal of doubt I now make the following orders herein:

1. The Applicants' bail application be and is hereby dismissed.

2. The new bail applications by the 2nd and 3rd Applicants currently pending before this court be and are hereby declared irregular processes and are dismissed.

3. In view of the time the matter has taken pending before the courts, The Director of Public Prosecutions be and is hereby directed to ascertain the stage at which the criminal matter to which this application relates is including the court before which same is pending so that if it has not yet commenced before any court, he advises the Registrar accordingly for the intervention by the Chief

Justice for a proper way forward on it including an order as contemplated by Section 88 *bis* of the Criminal Procedure and Evidence Act if it has to be dealt with by the High Court.

N. J. HLOPHE
JUDGE - HIGH COURT