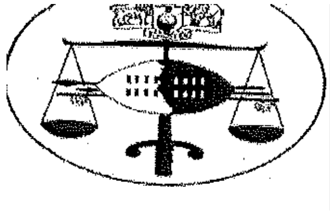

IN THE HIGH COURT OF ESWATINI

HOLDEN AT MBABANE Civil Case No: 218/2021

In the matter between:

MDUDUZI BACEDE MABUZA	FIRST APPLICANT
MTHANDENI DUBE	SECOND APPLICANT

And

REX	RESPONDENT

Neutral Citation: *Mduduzi Bacede Mabuza and Another v Rex (218/2021) [2021] SZHC 130 (6th August, 2021)*

Coram M DLAMINI J.

Heard 29th July, 2021

Delivered 6th August, 2021

.. .a litigant who initiates legal proceedings bears the duty to establish his case. In civil matters, the degree of discharge is one of

prepondera11ce of probabilities while i11 crimi11al matters, is beyond reasonable, and certainly not any, doubt. This duty remains fixed on the party who has put to motion the machinery o.f justice. . . .this burden of proof is referred to as the onus. [para. 23]

.; .. ***duty keeps on shffting from one party to the other, depending 01i tlte issues advanced. In law, this duty is referred to as the evidential burden of proof. This is the duty to advance material and relevant evidence to be put on the scales o.fiustice. . ....the courts do not expect a litigant to come to court and remain mum on the ground that its opponent bears the Q!!:.fil of proof in as much as it does (unless of course !f the applicant's or plaint! ff's case is so far-fetclted or flimsy such that it is not worth the paper*** it ***is written on). Worse still,*** it ***does not anticipate a bare denial from the party's opponent under the same guise. Each party is expected to discharge the evidential burden of proof.*** [para. 24]

.. ***.a bare denial in our law is not regarded as sufficient defence to defeat an allegation by an oppone11t.*** [para. 37]

Summary: Serving before me is a strenuously opposed bail application.

<u>Background</u>

1. The two applicants appeared before me at the instance of the respondent for a first remand on a holding indictment for Contravening the Suppression of Terrorism Act 2008 as amended by Act No. 11 of 2017. On that first appearance after their remand into custody, the duo moved a bail application on a stringent urgency ground, giving the respondent a matter of three hours to answer on an application filed from the bar. After a

lengthy deliberation on extreme urgency, the bail application was postponed for hearing to the fourth day and the parties put to the terms on the timelines for filing of further pleadings.

The applicants

2. In terms of their founding affidavits, the 1st and 2nd applicants are both adult Emaswati males of Hosea and Ngwempisi (not Ngwempisana as corrected from the bar by Counsel) constituencies respectively.

1st applicant's grounds for release on bail

3. In supp01i of his application for bail, the 1st applicant has averred:

> *"It is common cause that I am a Liswati businessman (operating over eight (8) Hardware Shops across the country) and a married man with minor children, and I have no other citizenship and/or country of residence save the Eswatini one, consequently I am not a flight risk.*[1]

4. On his intended defence, the l st applicant asserted:

> *"Though not in possession of statements by potential crown witnesses I submit that I am innocent of the charges against me as I never committed any of the alleged offences. On a perusal of the charges, it is apparent that the charges emanate J,-om execution of*

[1] See para 14 page 8 of Book A

the mandate given to me by people under the Hosea lnkhundla, Shiselweni Region, whom I am their elected Member of Parliament. The Charge Sheet itself indicates that what we are alleged to have done was infitrtherance of our duties as lvlembers of Parliament and as such we are protected ji·om arrest as a result as Parliamentary Immunities and I am advised that this [sic] a complete defence in law." [2]

5. The rest ofhis averments were in support of his application for urgency and for that reason I shall not refer to them as that question was put to rest on the first remand hearing.

2nd applicant's case

6. The second applicant attested of his personal circumstance:

"It is *common cause that I am a Liswati businessman operating a Feed Lot and a married man with minor children, and I have no other citizenship and/or country of residence save the Eswatini on, consequently I am not_a fl1·ght ns· ,c7 . "* [3]

7. On the indictment facing him, he deposed:

"Though not in possession of statements by potential crown witnesses I submit that I am innocent of the charges against me as I never committed any of the alleged offences. On a perusal of the charges, it is apparent that the charges emanate ji•om execution of the mandate given to me by people

[2] See paras 12 & 13 page 8 of Book A

[3] See para 11 page 9 of Book B

under the Ngwempisana lnkhundla, Shiselweni Region, whom I am their elected Member of Parliament.

The Charge Sheet itself indicates that what we are alleged to have done was infi1rtherance of our duties as Members of Parliament and as such we are protected from arrest as a result as Parliamentary Immunities and I am advised that this [sic} a complete defence in law." [4]

8. He also stated:

l"J *humbly request the above Honourable Court to take into consideration that during and/or upon my arrest, I fully co-operated with the Police (-whom I must indicate acted professionally), which is a sign that I am a law abiding citizen.*"[5]

9. He then undertook as follows:

"I submit that if admitted to bail I will not inte1fere with any Crown ,vitnesses, whose names and identities are not even known to me, and neither will I tamper and/or conceal any evidence, which when looking at the nature of the charges do not involve any tangible thing/item.

Furthermore, my release on bail will not endanger the safety of the public or any particular person or commit any offence listed in Part 11 of the First Schedule or undermine or jeopardize the objectives or the proper fimctioning of the criminal justice system inclusive of the bail system. [6]

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[4] See paras 9 & 10 pages 8-9 of Book B

[5] See para 14 page 9 of Book B

[6] See para 12 & 13 page 9 of Book B

Respondent's counter grounds

1st applicant

10. In respect of first applicant, the respondent disputed 1st applicant's assertion that the drawn indictment was as a result of his office as a Member of Parliament and a consequence of his mandate by the people of Hosea. It was stated in that regard:

a) *The contents of these paragraphs are denied. It is not in dispute that the applicant has not yet been fi1rnished with statements of the witnesses, Applicant's claim that he I innocent of the charges alleged is neither here nor there. Respondent will lead evidence to prove commission of the offences that he is charged with. These offences do not emanate ji·om the mandate given to him by the people under Hosea Inkhundla. Applicant does not state as to where and when he was given the said mandate by the people from his constituency. In any event, in law, a peoples' mandate is not a defence against a crimin(,il charge.*

b) *I am advised that the immunities of the House fall into two broad categories. The first is the immunity of members and other persons taking part inproceedings in Parliament, usually referred to as freedom of speech. This immunity means that members and persons participating in proceedings in Parliament cannot be sued or impeached in the courts for anything they may say there. The second is the immunity that attaches to the proceedings in Parliament as such, including decisions of the House and the publication of debates and proceedings,*

c) *Wherefore, may I state that the Applicant when he committed these offences was not acting under Parliamentary immunities as such he cannot claim protection ji-om arrest as a result of his utterances to the effect that the public must revolt against the Constitutionally established Government of Eswatini. The basis of the charges against the Applicant emanate from utterances a;1d conduct made outside Parliament or Parliamentary proceedings.* "[7]

11. On his personal circumstance, the respondent opposed partly:

"During the course of trial and/or pre-trial proceedings applicant will get know the names and the identity of crown witnesses. Some of these crown witnesses are ji-01n his Constituency where he obviously has influence and power. Further to that Applicant is a renowned business person and therefore has .financial means to inte1fere with the said witnesses. On the other hand, once applicant is released on bail, the Crown will not have the necessary resources/mechanism to monitor or police against the said likely inte1ference.

May I further state that even though the Applicant has business, family and emotional ties in this jurisdiction there is nothing that can prevent him from selling his businesses and assets and relocate together with his said family to another jurisdiction,. With the said .financial resources Applicant can easily re-establish a new life elsewhere, possibly but not limited to the Republic of South Africa where he has a biological brother residing in Pretoria. "[8]

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[7] See para 7 page 16-17 of Book A
[8] See para 8 page 18 of Book A

12. It was also averred against the 1st applicant:

"May I state the Crown has a strong case against the Applicant in the nature of--

a) *Video recordings capturing Applicant committing the offences ·he is charge with, and*
b) *Statements by witnesses who witnessed the commission of the said offences.*

May I therefore state that the above evidence is. overwhelming and will establish the guilt of the Applicant beyond reasonable doubt. A conviction under Section 5(1) of the Suppression of Terrorism Act 2008 as read with Section 2(a) to (d) of the Act as amended attracts a mandatory custodial sentence of not more than 15 years imprisonment without an option of a fine. The strength of the Crown's case coupled with the severity of the prescribed possible sentence will induce the Applicant to flee the jurisdiction of this Court. "[9]

13. It was also deposed on behalf of the respondent:

"The contents of this paragraph are disputed. As we have stated in the above paragraph, the Applicant being a flight risk, inte1fering with evidence and jeopardizing public peace and stability therefore it would not be in the interest if [sic] justice that he be granted bail. Further to that the fact that Applicant was out on bail when he committed these offences demonstrates that he has a propensity to commit offences." [10]

[9] See para 8 pages 19-20 of Book A
[10] See para 12 page 21 of Book A

2nd applicant

14. Respondent challenged 2nd applicant's undertaking that if ad1nitted to bail, he shall abide by the fixed conditions. It was pointed as follows:

"The contents this paragraph are disputed. If released on bail the applicant ·will not abide by the bail conditions. There is a likelihood that he might flee because of the seriousness of the offence that he is facing/charged with. There is a likelihood that he may interfere with crown witnesses or even intimidate them as he is a Member of Parliament and he is influential in society.[11]

15. The respondent challenged 2nd applicant's averments on his innocence of the indictment and disclosed that on trial, the respondent would lead evidence proving commission of the offence and that same did not arise from the business of the House of Assembly where 2nd applicant is a member. It disputed the attestation by 2nd applicant that the offences arose from his mandate given by the constituency ofNgwempisi.

16. Respondent asserted that 2nd applicant was a flight risk and that there was a likelihood of interference with Crown witnesses who were from his constituency.

17. On his personal circumstances, the respondent buttressed:

"May I further state that even though the Applicant has a business, family and emotional ties in this jurisdiction there is nothing that can prevent him

[11] See para 5 page 16 of Book 8

from selling his business and assets and relocate together with his said family to anotherjurisdiction."[12]

18. The respondent deposed further that extradition processes were a cumbersome exercise. Respondent also pointed out that it was in possession of direct evidence in a fonn of video recordings and eye witnesses on the commission of the offence.

19. The respondent attested that the indictment reflected a serious offence with a harsh custodial sentence and such would induce 2nd applicant to flee the jurisdiction of this comi.

20. On the aspect of endangering public safety, the respondent asserted similarly in respect of 2m1 applicant that some public officials had received threats following his arrest.

The legal principle

Onus

21. Much time was spent by both Counsel for the applicants and the Crown on the question of the burden of prove. Mr. Mabila on behalf of the applicants contended that the *onus* lies with prosecution while the respondent submitted on the contrary. Both Counsel submitted a plethora of cases reflecting each position.

[12] See para 17.1 page 17 of Book B

22. I must from the onset point out that generally both parties were c01Tect in their submission in the sense that each litigant is expected to discharge a duty. The question therefore lies on the nature of each party'·s duty and this borders on the c01Tect legal terminology to be employed.

23. No doubt, a litigant who initiates legal proceedings bears the duty to establish his case. In civil matters, the degree of discharge is one of preponderance of probabilities while in criminal matters, is beyond reasonable, and certainly not any, doubt. This duty re1nains fixed on the party who has put to motion the machinery of justice. It does not shift no matter the issues raised and despite any intervening interlocutory matters in the process of the hearing or trial as the case may be. In the legal language, this burden of proof is referred to as the *onus* - the duty encumbered on the applicant or plaintiff to establish his case.

24. Then there is the other duty or burden. This duty keeps on shifting from one party to the other, depending on the issues advanced. In law, this duty is referred to as the evidential burden of proof. This is the duty to advance material and relevant evidence to be put on the scales of justice. In other words, the courts do not expect a litigant to come to cotni and remain mum on the ground that its opponent bears the *onus* of proof in as much as it does, unless of course if the applicant's or plaintiffs case is so far-fetched or flimsy such that it is not worth the paper it is written on. Worse still, it does not anticipate a bare denial from the party's opponent under the same guise. Each party is expected to discharge the evidential burden of proof.

25. Summing up the above position of the law, **Cockburn *C J***[13] eloquently wrote with reference to the Corpus Juris:

> " *'Semper necessitas probandi incubit illi qui agit* (D.22.3.21)' ***If one person claims something from another in a Court of law, then he has to satisjj1 the Court that he is entitled to it."***

26. The learned Chief Justice wisely proceeded:

> ***"But there is a second principle which must always be read with it:*** *'Agere etiam is videtur, qui exceptione actor est' (D. 44.1.1. (Exception does not mean of course, an exception in the sense in which the term is now used in our practice).* ***Where the person against whom the claim is made is not content with mere denial of that claim, but sets up a special defence, then he is regarded quoad that for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it."*** (Bold, my emphasis.)

27. Any confusion therefore created by case authority on the question of *onus* remains to be settled by the above. Turning to the case at hand, the conclusion is therefore that the applicants bear the *onus* of establishing that it would be in the interest of justice to release them on bail. The respondent on the other hand bears the burden of establishing any of the grounds listed in section 96(4).

[13] See Campel v Spotsmoode (1863) Eng R 405, (1863) 3B & S 769 at 777

Respondent's grounds

28. The respondent has raised the following number of grounds arguing that they militate against granting the applicants bail:

a) The respondent contended that both applicants were a flight risk and that both applicants as deposed by them in their founding affidavits were men of greater means. They could easily dispose of their businesses and utilize the proceeds thereof to establish themselves outside this Court's jurisdiction. Respondent pointed out that 1st applicant had a biological brother residing in Pretoria where he could easily find new aboard. What exacerbates the applicants' position is that in as much as this Kingdom enjoys an extradition treaty with the Republic of South Africa, the processes of extradition has proven to be cumbersome. There are no extradition treaties with Mozambique who shares a border with the Kingdom, the respondent contended.

The respondent asse1ied further on this ground that it relies on the evidence of video recording and eye witnesses on the drawn indictment against the applicants. Then there is the other aspect of the heavy penalty awaiting the applicants in the event they are convicted. The accumulative effect of this is that the likelihood of applicants evading this court's jurisdiction is highly likely.

b) The respondent further raised that there is a likelihood that the applicants might endanger the safety of the public. The perception of the likelihood to endanger the safety of the public is fortified by the evidence that, *"Some*

public officials have already received threats as a result of (their) arrest." [14] The respondents added that the offences committed by both applicants had resulted in bodily injuries, loss of life and destruction of both private and public property. This is evidence that the likelihood of endangering public safety is not far-fetched. To add weight on this likelihood, the 1'[1] applicant mobilized many people to join him in his *"unlattful activities of revolting against the Government of Eswatini. "* [15]

c) The respondent attested also that releasing the applicants on bail would jeopardize public confidence in the justice system. The respondent drew such inference from their averment that as a result of their unlawful conduct which led to the indictment facing the applicants, there was loss of life, bodily injuries and destruction to public and private properties. It then contended, *"Society expects protectionfi'om the Courts. "*[16]

d) The Crown fmiher pointed out that there was a likelihood that the applicants once released on bail might interfere with the Crown's witnesses. It pointed out that some of the witnesses in the main charge were from their constituencies where they enjoyed power and influence owing to their positions and means in society. The pre-trial conference would be conducted while they are out of custody. At that stage, they will get to learn of the names and addresses of the witnesses. It would be easy for them to intimidate them following that the witnesses would be from their respective

[14] See page 20 para 10 of Book A and page 19 para 8 of Book B
[15] See page 20 para 9 of Book A
[16] See page 19 para 8 of Book Band page 20, para 10 of Book A

constituencies. Further, the Crown lacked the necessary means to police or monitor the applicants on their release.

e) The Crown raised the ground that the propensity of the applicants to commit further crimes while on bail was already demonstrated in the c01nmon cause evidence that they were both out on bail for other crimes before their incarceration for the present offences.

f) Lastly, as regards 1st applicant, is that during his arrest, *"Applicant took the warrant and locked himself into his car for one and half (J/2) hours with the space of time the warrant went viral on social media instigating his followers. "*[17] This demonstrates that applicant is not a law abiding citizen as he so deposed.

Deposition in rebuttal

29. In refuting the above grounds raised at the instance of the Crown, applicants, although filing different sets of replying affidavits, each averred in similar wording as follows:

"The pwported affidavit and the Answering Affidavit do not set out grounds for opposition as it merezv makes bold and/or bold allegations. Put d[fferently the bald and/or bold allegations have not been substantiated by any facts and they are denied.

To that extent I reiterate the averments made in my Founding Affidavit. "[18]

[17] See page 20, para 11 of Book A
[18] See page 26, paras 3 & 4 of Book A and page 24 paras 3 & 4 of Book B

Analysis of the evidence adduced

30. My task is simple. It is to put on the scales of justice the material and relevant evidence adduced. It is then to assess the direction upon which the scale of justice tilts. If it leans in favour of the applicants, then the interest of justice that the applicant be released on bail must be pronounced by this Court. If it tilts in favour of the respondents, then the applicants' application stands to be dismissed.

31. During *viva voce* hearing, it was strenuously contended on behalf of the applicants that the court should not consider a number of averments by the respondent. These were the strength of the Crown's case. The Court was referred to **Senzo Matsenjwa's**[19] case at page 12 para 18. The said paragraph reads:

> *"[] 8] 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.* "

32. Obvious from the above, nothing precludes the court from considering the gravity of the Crown's main charge. This is pa1iicularly so in assessing the likelihood of the accused to flee the jurisdiction of the Court. The rationale is that the stronger the evidence against the accused on the main charge, the court takes the view that the higher the likelihood that such might induce

[19] Senzo Matsenjwa v the King (30/2017) [2018] SZSC 45 (06/11/2018)

him to flee. At any rate, the legislature, in his wisdom, outlined the said factor in section 96(6)(f)[20] which reads:

> *"In considering whether the ground in subsection (4)(b)* (the likelihood that the accused, if released on bail, may attempt to evade the trh1l;) *has been established, the court may, where applicable, take into account the following factors, namely-*
>
> *(f) the nature and the gravity of the charge on -which the accused shall be tried;* "

33. The court was urged not to consider the attestation that the applicants were out on bail when they were charged with the offence they were presently facing. The Comi: was referred to **Maxwell Dlamini's** case[21] at page 11 which reads:

> *"The court a quo further sought to deny bail to the first appellant on the basis of a particular charge of sedition allegedly committed in 2013 and for which the criminal trial was pending. However, this does not constitute evidence of a propensity to commit crimes on the part of first appellant. Certainly a pending criminal charge cannot in itself constitute evidence of propensity to commit crimes.* "

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[20] The Criminal Procedure and Evidence Act (CP&E)

[21] Maxwell Mancoba Diamini & Another v Rex (46/2014) [2014] SZSC 09 (29/7/2015)

34. I must point at an obvious error. The learned Acting Chief Justice[22] as he then was, made reference to a pending charge. In the present case, the applicants are said to be out on bail on another charge. In other words, the Courts have already warned the applicants to respect the conditions of bail set. Section 96(8)(c)[23] reflects as a factor to be considered by court in assessing the question whether the applicants ought to be granted bail or not. The section reads:

> *"Any previous failure on the part of the accused to comp y with bail conditions or any indication that he or she will not comply with any bail conditions;"*

35. The above leads me to a second aspect of the matter. The respondent, no doubt, pleaded some of the grounds reflected in section 96(4)[24]· The question then is, "What evidence should this court put against the evidence of the respondent?" Put differently, what did the respondent say in reply to the aven11ent that they were a flight risk by reason of their affluence, the heavy penalty attended by a conviction if any, the strength of the Crown's criminal case and that 1st applicant has a biological brother in South Africa?

[22] M.C.B. Maphalala
[23] Of CP&E
[24] Of CP&E

What evidence by the applicants does this Court put on the scales of justice against the attestation that applicants' release might endanger the public safety as evidenced by that, *"Some public officials have already received threats as the result of (their) arrest"?*[25] What tilts the scales of justice against the respondent's deposition that in the process of the committal of the charge faced by the applicants, there was the resultant bodily injury, loss of life and destruction to both public and private property thereby there was the likelihood that their release might jeopardize public confidence in the criminal justice system as the public expects the courts to protect it.?

36. The answer to the above poser lies in the replying affidavit. The affidavit as highlighted above under the sub-heading ***"Deposition in rebuttaf'*** [26]reflects a bare denial of the respondent's answering affidavit. The position of the law on the procedure as regards bare denial was espoused in **Room Hire**[27] as follows:

> *"bare denial of applicants' material averment cannot be regarded as sufficient to defeat applicant's right to secure relief by motion*

[2525] See para 10 page 20 of Book A and para 8 page 19 of Book B
[26] See para 29 above
[27] Room Hire Co. (Pty) Ltd v Jeep Street Mansions (Ply) Ltd 1949 (3) SA 1155 at 1165

proceedings in appropriate cases. Enough must be stated by respondent to enable the court to conduct a preliminary examination
· *and ascertain whether the denials are not fictitious intended merely to delay the hearing."*

37. In brief, a bare denial in our law is not regarded as sufficient defence to defeat an allegation by an opponent. Counsel for the applicants, aware of this position of the law, sought to submit from the bar for instance that any alleged threats against public officials by the respondent happened while the applicants were incarcerated and therefore the court should not consider them. However, this was not in the reply. With regard to 1st Applicant remaining in his motor-vehicle for a ce1iain period despite service of a warrant upon him, his Counsel submitted that the police did not use force to remove him as if they did, they would have deposed so. Again this was submitted from the bar and it is not clear why such averments could not find their way into the replying affidavit in light of our trite principle of the law to the effect that a patiy is debarred from adducing evidence from the bar as it denies his opponent reasonable oppo1iunity to prepare for it. The end result of this position taken on behalf of the applicants is that there is nothing to put on the scales of justice against the evidence by the

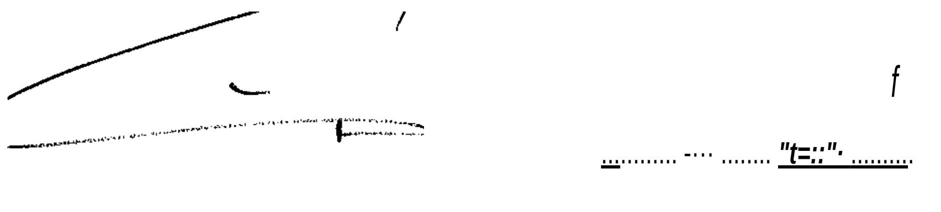
respondent. This has necessitated the scales of justice to tilt against the grant of their bail application.

Order

38. In the final analysis, I must enter as follows:

38.1 1st and 2nd applicants' application is hereby dismissed;

38.2 No order as to costs.



MDLAMINI J.

1st and 2nd Applicants: **Advocate M. Mabila instructed by S. Jele Attorneys**

Respondent **M. Nxumalo and T. Dlamini from the Director of Public Prosecutions' Chambers**