

IN THE HIGH COURT OF ESWATINI

CASE NO. 83/2024

HELD AT MBABANE

In the matter between:

SIFISO SONDO MSIZI MAMBA

1ST APPLICANT

SIPHELELE SAKHILE MNTSHALI

2ND APPLICANT

And

REX

RESPONDENT

NEUTRAL CITATION:

**SIFISO SONDO MSIZI MAMBA & ANOTHER
VS REX (83/2024) [2024] SZHC – 45
(14/03/2024)**

CORAM:

BW MAGAGULA J

HEARD:

29/02/2024

DELIVERED:

14/03/2024

SUMMARY:

*Criminal Law and Procedure - Bail application –
Point in limine taken by the Crown on the basis of*

failure to comply with Section 96 (12) (a) of the Criminal Procedure and Evidence Act 67/1938 – The requirements of the legislation considered – Points in limine upheld no need to consider the matter on the merits as the determination of the points in limine disposes of the matter.

HELD:

The Applicants application for bail is denied.

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

- [1] Serving before Court is an application for bail by two Applicants. Both of them were arrested by members of the Royal Eswatini Police service based at Hluthi Police Station on the 29th December 2023. This means they have been in custody for about two months or so.
- [2] The Applicants have approached this Court on a certificate of urgency seeking to be admitted to bail upon such conditions as the Court may deem fit.
- [3] The application is opposed by the Crown. A point in *limine* has been taken in the answering affidavit filed by the Crown. Although the Crown has gone

further to plead on the merits. During the arguments the parties addressed the Court extensively on the points of law and on the merits. The Court deems it prudent to first determine the point of law raised.

Points in *Limine*

- [4] The Crown argues that the Applicants have not complied with the provisions of **Section 96 (12a) of The Criminal Procedure and Evidence Act 67/1938** as amended, in that they have not adduced evidence that exceptional circumstances exists which in the interest of justice may permit their release.
- [5] The Crown further argue that in light of the fact that the Applicants are facing an offence of robbery, wherein a firearm was used amongst others, they also acted in furtherance of a common purpose. This offence is listed in the Fifth Schedule of the Act. The argument is that in terms **Section 96 (12a) of the CP&E Act** the Applicants in such circumstances, are required to adduce evidence to the satisfaction of the Court that exceptional circumstances exists which in the interest of justice permit their release. The Crown contends therefore that the Applicants have not complied with this requirement.
- [6] The Court will consider the affidavit that has been filed by the Applicant, to ascertain if evidence demonstrating that exceptional circumstances exists which in the interest of justice may permit the release of the Applicants' have been made.

The Applicants argument in opposition to the point of law raised

- [7] During the hearing Counsel for Applicants' R. Mwelase addressed the Court and argued that the Court must look at the application holistically. He conceded that both the affidavits of the Applicants' did not devote specific paragraphs where the exceptional circumstances requirement is addressed. But he submitted that he will take the Court to various portions of both affidavits of the Applicant, where the exceptional circumstances can be deduced when the Court reads the paragraph holistically and in context.
- [8] He commenced his arguments by bringing attention to the Court the contents of the paragraph 15 comply with the requirements of the aforesaid section.
- [9] The Court deems it necessary to reproduce the contents of paragraph 15 per verbatim for context. It is states as follows;

"I submit that at the time of my arrest I was employed as a kombi conductor and my continued incarceration will occasion myself with a job loss and by extension lose my only source of income. I am a father to two minor children who are 3 and 5 years old and my children depend on myself for their maintenance. My continued incarceration will be detrimental to the minor children as I would not be able to provide maintenance due to my incarceration and I am not even aware how they are surviving in my absence. Their mother is unemployed too."

[10] The crux of the above except underpins the Applicant's reasons for exceptional circumstances. In a nutshell, the exceptional circumstances comprises of the following;

10.1 At the time of the 1st Applicant's arrest, he was employed as a kombi driver and as such his continued incarceration will occasion him loss of employment.

10.2 He is a father of two minor children, who are three and five years old respectively. He is responsible for the maintenance of his minor children, as their mother is not employed.

10.3 This basically brings the exceptional advanced to two.

[11] In respect of the 2nd Applicant the Court was urged to consider what has been stated in paragraph 6 of the 2nd Applicant's founding affidavit which is basically that he is also employed in the taxi industry as a conductor, and he is a father of a minor child two years old, and the child depends on him for her maintenance as he separated from the mother. It is not at though that the 2nd Applicant did not stated that the mother is unemployed. So the Court will take it that she contributes at the maintenance and upbringing of the child as expected by law.

THE LAW

[12] **Section 96 (4) of the Criminal Procedure and Evidence Act 1938** (as amended) provides as follows;

“The refusal to grant bail and the detention of an Accused in custody shall be in the interest 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 2 of the First Schedule; or*
- b) Where there is a likelihood that the Accused, if released on bail, may attempt to evade trial; (bold my emphasis)*
- 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; (bold my emphasis)*
- d) Where there is a likelihood that the Accused, if released on bail, may undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system; or*
- e) Where in the exceptional circumstances there is a likelihood that the release of the Accused may disturb the public order or undermine the public peace or security.*

[13] In the **Director of Public Prosecutions v Bhekewako Meshack Dlamini & 2 Others** case (supra), at paragraph 14, line 8 it was further stated that;

“Where the Accused is charged with an offence listed in the Fifth Schedule of the Criminal Procedure and Evidence Act, the Accused should, in addition, adduce evidence which satisfies the Court that exceptional circumstances exist which in the interest of justice permit his release”.

- [14] It is the Respondent’s submission that Section 96 (12) of the Criminal Code provides that;

“Notwithstanding any provision of this Act, where an Accused is charged with an offence referred to-

“(a) in the Fifth Schedule the Court shall order that the Accused be detained in custody until he or she is dealt with in accordance with the law, unless the Accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the Court that exceptional circumstances exist which in the interest of justice permit his or her release;

(b).....

- [15] Exceptional circumstances as defined in the case of **Wonder Dlamini and Another v Rex Criminal Appeal Case No. 1/2003** where it was stated by Ramodibedi CJ as he then was that;

“In my judgment the word “exceptional” in relation to bail must mean something more than merely “unusual” but rather less than unique which means in effect “one of a kind”.

ANALYSIS AND CONCLUSION

[16] It is now imperative for the Court to apply the above stated principles of law to arguments by the parties. It is contended on behalf of the Applicants that the risk of the loss of their employment is an exceptional circumstances.

[17] In case of **Nyiko Titos Luis Cossa v The King (184/19) [2019] SZHC (142) 31st July 2019** per Mlangeni J. the Court held that;

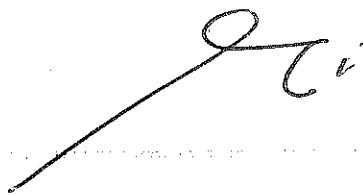
“[2] On the basis of the above, it is apparent that the murder is a Fifth Schedule offence. In terms of Section 96 (12) (a) an Accused who is charged with a Fifth Schedule offence and who desires to be released on bail is enjoined to adduce evidence to the satisfaction of the court ‘that exceptional circumstances exist which in the interest of justice permit his or her release’ It has been held that special circumstances are not the usual and normal hardships and inconvenience that are occasioned by incarceration. Inability to fend for one’s dependents or to look after one’s ill or infirm relative are a natural consequence of incarceration and do not fit the description of exceptional circumstances. In the absence of something out of the ordinary (“one of a kind”), bail cannot be granted. While paying every attention to the importance of the liberty of the individual” (underlining own emphasis).

- [18] I now discern to consider the reasons adduced in both affidavits, which is the imminent loss employment. The question that must be asked is whether the loss of employment through incarceration is an exceptional circumstance as envisaged by S96 (12). Is it unusual, is it one of a kind?
- [19] In the many cases that come before court, where the Accused persons are employed, all of them risk the loss of their employment if they continue to be incarcerated. It therefore follows that the loss of employment is a normal, foreseeable consequence of incarceration. In my view, there is nothing exceptional, unusual or special about a loss of employment pursuant to incarceration. Infact, one may conclude that it's a usual normal consequence of incarceration. That leads the Court to conclude that the Applicants' have fallen short of meeting the high standard as set out in the legislation of exceptional circumstances by hinging their exceptional circumstances on threat or loss of employment.
- [20] I will now proceed to consider the second ground which is that their continued incarceration will prejudice the sustenance of their dependants. In the matter **Nyiko Titos Luis Cossa v The King** (*supra*) Mlangeni J settled this question. His Lordship stated that inability to fend for one's dependants are a natural consequence of incarceration. Therefore, it cannot be said the inability of the Applicants' to fend for their dependants constitutes an unusual scenario or a scenario that is out of the ordinary. It therefore goes without saying that this ground as well, cannot be accepted as an exceptional circumstance, warranting the Applicants' to be admitted to bail.

[21] In the absence of any other exceptional circumstance which the Court can consider as per the requirements of **Section 96 (12) of the CP&E Act**, the Court arrives at the conclusion that both Applicants' have failed to adduce through evidence that exceptional circumstances exists to warrant that they be admitted to bail.

[22] The Court does not deem it necessary to consider the matter on the merits, because clearly the point of law has been appropriately taken by the Crown. It disposes of the matter in its entirety. The founding affidavits of the Applicants have dismally failed to set out the exceptional circumstances as required by Section 96 (12) (a) of the CP&E.

[23] The Court would therefore hold that the point of law must succeed. The Applicants application for bail is dismissed.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For The Applicant:

Mr R. Mwelase – (B.S Dlamini &
Associates)

For The Respondents:

Miss N. Mhlanga - (DPP's Chambers)