IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVIL CASE NO. 329/09**

IN THE MATTER BETWEEN:

KWANELE MNCINA **APPLICANT**

VS
THE COMMISSIONER OF POLICE **1st RESPONDENT**
THE DIRECTOR OF PUBLIC
PROSECUTIONS **2nd RESPONDENT**

CORAM MBC MAPHALALA, J
FOR Applicant Mr. N. Manana
FOR Respondents **Mr. Mathunjwa**

JUDGMENT

January 2010

[1] Applicant instituted a bail application before this Court on a Certificate of Urgency. The basis for the urgency are two-fold: First, that he is kept in custody with highly volatile people and that his safety is not guaranteed; Second, that the conditions in custody are not suitable and his health is deteriorating.

[2] The Respondents did not oppose the urgency; however, they opposed the release of the applicant on bail.

[3] THE APPLICANT WAS ARRESTED ON THE 16TH AUGUST 2009 BY POLICE OFFICERS BASED AT THE MBABANE POLICE STATION. HE IS CHARGED WITH THE MURDER OF DANIEL JABULANI MATSENJWA, A MEMBER OF THE POLICE SERVICE BASED AT THE MBABANE POLICE STATION.

[4] The application for bail is opposed and the Respondents submit that the applicant is facing a very serious charge of murder and that the sentence to be meted against him should he be found guilty can influence him to abscond trial.

[5] FURTHERMORE, THE RESPONDENTS SUBMIT THAT APPLICANT'S PARENTAL HOMESTEAD IS SITUATED AT MPULUZI AREA WHICH IS ADJACENT TO THE NATIONAL BOUNDARY SEPARATING THE KINGDOM OF SWAZILAND AND THE REPUBLIC OF SOUTH AFRICA; AND, THAT IT WOULD BE VERY EASY FOR APPLICANT TO ESCAPE FROM THE COUNTRY.

[6] It is also evident from the Respondent's Opposing Affidavit that when the police arrived at the applicant's homestead to arrest him for the commission of the offence, he ran away from the police officers. Applicant does not deny this in his Replying Affidavit.

[7] APPLICANT WAS EVENTUALLY ARRESTED BY A CERTAIN SECURITY PERSONNEL AT MHLABATSI FOREST WHO THEN ALERTED THE POLICE.

[8] The Respondents further submit that there is a likelihood that if released on bail, the applicant may influence or

intimidate witnesses; that one of the crown witnesses is a minor schooling at Nhlanganisweni High School who is an accomplice witness and has been released on bail.

[9] THE APPLICANT IS CHARGED WITH THE MURDER OF A LAW ENFORCEMENT OFFICER WHO WAS AT THE TIME PERFORMING HIS FUNCTIONS AS SUCH AND WAS KILLED BY VIRTUE OF HIS HOLDING SUCH POSITION. THE CRIME IS LISTED IN THE FIFTH SCHEDULE OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT NO. 67 OF 1938 AS AMENDED.

[10] Section 95 (5) of the Criminal Procedure and Evidence Act as amended stipulates that a person charged with an offence listed in the Fifth Schedule shall, if admitted to bail, pay a bail amount of not less than E50,000.00 (Fifty Thousand Emalangeni.)

[11] Accordingly, the law considers the offences listed in the Fifth Schedule to be very serious.

[12] During the hearing of the bail application, the court was referred to Section 96 (12) of the Criminal Procedure and Evidence Act as amended by learned Counsel for the Prosecution; it provides that:

> "NOTWITHSTANDING ANY PROVISION OF THIS ACT, WHERE THE ACCUSED IS CHARGED WITH AN OFFENCE REFERRED TO:
>
> > (a) In the Fifth Schedule the Court shall order 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."

[13] APPLICANT'S COUNSEL ARGUED THAT PARAGRAPHS 8, 10 AND 11 OF THE FOUNDING AFFIDAVIT DO CONSTITUTE EXCEPTIONAL CIRCUMSTANCES

AS REQUIRED BY LAW.

[14] Paragraph 8 states that:

> "I DID NOT TAKE PART IN THE PELTING OF THE DECEASED WITH STONES ALTHOUGH I WAS IN THE COMPANY OF MY CO-ACCUSED. WHEN ALL THAT HAPPENED AT THE SCENE OF THE CRIME TOOK PLACE, I WAS IN HIDING AND DID NOT PARTICIPATE IN SAME."

[15] Paragraph 10 provides that:

> "BEFORE MY ARREST, I WAS EMPLOYED AND THUS I WAS THE BREADWINNER IN MY FAMILY AS I HAVE TWO CHILDREN WHO ARE FULLY DEPENDENT ON ME AND ALSO MY PARENTS ARE UNEMPLOYED THEY ARE FULLY DEPENDENT ON ME."

[16] Paragraph 11 provides that:

> "THE MATTER IS URGENT BY VIRTUE OF THE FACT THAT, WERE IT TO TAKE ITS NORMAL COURSE, I STAND TO SUFFER IRREPARABLE HARM IN THAT I AM KEPT WITH HIGHLY VOLATILE PEOPLE IN CUSTODY SUCH THAT MY SAFETY AND WELFARE IS NOT GUARANTEED. THE HEALTH CONDITIONS IN CUSTODY ARE ALSO NOT SUITABLE FOR ME SUCH THAT ON EACH DAY THAT PASSES, MY HEALTH STATUS IS DETERIORATING AND NEGATIVELY AFFECTED."

[17] It is apparent from paragraph 8 of the Founding Affidavit that the applicant does admit that he was in the company of the co-accused when the crime was committed, but says that he did not participate in the commission of the offence because he was hiding. He doesn't explain why he was in the company of the co-accused or why he was hiding; to me, this is a contradiction and a bare denial which cannot constitute an Exceptional Circumstance.

[18] In paragraph 10, the applicant states that before his arrest,

he was employed and was the sole breadwinner supporting his two minor children and his parents. He does not say where he was employed or what kind of work he was doing. Being the sole breadwinner alone without other factors cannot constitute an Exceptional Circumstance.

[19] The deteriorating health status of an accused does constitute an Exceptional Circumstance provided that this is proved to the satisfaction of the court with the requisite medical report. The age of the accused particularly where he is under the age of sixteen years does constitute an Exceptional Circumstance. Similarly, the period for which the accused has spent in custody since his arrest does constitute an Exceptional Circumstance particularly where it is not certain when the trial will be concluded.

[20] IT IS COMMON CAUSE THAT THE APPLICANT DID NOT ANNEX ANY MEDICAL PROOF FOR THE ALLEGATION IN PARAGRAPH 11 OF HIS FOUNDING AFFIDAVIT THAT HIS HEALTH HAS DETERIORATED; HENCE, THIS CANNOT AMOUNT TO AN EXCEPTIONAL CIRCUMSTANCE.

[21] The Supreme Court of Swaziland has dealt with a similar application for bail where the applicant was charged with an offence in the Fifth Schedule.

[22] **Beck J.A. in the appeal of Bheki Shongwe v. Rex Criminal Appeal No. 11/2005** (unreported), at page 2 stated:

> "The offence with which the appellant is charged is one that falls under Schedule 5 of the Criminal Procedure and Evidence Act as amended by Act 4 of 2004. The circumstances under which bail may be granted to persons in custody awaiting trial on a charge that falls under Schedule 5 are set out in Section 96 (12) (a) of the abovementioned Act."

[23] HIS LORDSHIP THEN QUOTED THE ABOVE SECTION AS I HAVE DONE IN

PARAGRAPH 12 ABOVE.

[24] His Lordship proceeded to deal with the question of the onus of proof quoting the South African case of **S. v. Vermaas** which also dealt with a similar matter. At page 2 His Lordship had this to say:

> "IN THE CASE OF **S. v. VERMAAS 1996 (1) S.A.C.R. 528 (T) VAN DIJKHORST J** HAD THIS TO SAY ABOUT SECTION 60 (11) (A) OF THE SOUTH AFRICAN CRIMINAL PROCEDURE AND EVIDENCE ACT WHICH SECTION IS IN SIMILAR TERMS TO SECTION 96 (12) (A) OF THE SWAZILAND ACT:
>
> It is expressly worded as an exception by the use of 'notwithstanding any provision of this Act'. It is limited to only a number of crimes stated in Schedule 5 .... It is imperative "the court shall order the accused to be detained". The accused is called upon to satisfy the court that the interests of justice do not require his detention in custody. Clearer wording cannot be sought for an onus on the accused.... The applicant therefore bears the onus to satisfy me on a balance of probabilities that the interests of justice do not require his detention."

[25] HIS LORDSHIP WENT ON TO STATE THAT HE IS "IN COMPLETE AGREEMENT WITH THAT EXPOSITION OF THE MEANING AND EFFECT OF THE SECTION AS ESPOUSED IN THE VERMAAS CASE ABOVE"

[26] At page 3, His Lordship also quoted with approval the South African Constitutional Court case of **S.V. Dlamini ; S.V. Mdladla and Others; S. V. Joubert ; S. Schietekat 1999 (2) S.A.C.R. 51** at page 90, paragraph 78 where **Kriegler J** said:

> "THEN THERE IS THE QUESTION OF THE ONUS .... IT WAS NOT SUGGESTED THAT THE IMPOSITION OF AN ONUS ON AN APPLICANT FOR BAIL IS IN ITSELF CONSTITUTIONALLY OBJECTIONABLE, NOR COULD SUCH A SUBMISSION HAVE BEEN SUSTAINED. THIS COURT HAS IN THE PAST UNHESITATINGLY STRUCK DOWN PROVISIONS THAT CREATED A REVERSE ONUS CARRYING THE RISK OF CONVICTION DESPITE THE EXISTENCE OF A REASONABLE DOUBT; BUT WHAT

WE HAVE HERE IS NOT A REVERSE ONUS OF THAT KIND. HERE THERE IS NO RISK OF A WRONG CONVICTION, THE OBJECTION THAT LIES AT THE ROOT OF THE UNACCEPTABILITY OF REVERSE ONUSES. ALL THAT THE SECTION DOES IN THIS REGARD IS TO PLACE ON AN ACCUSED, IN WHOSE KNOWLEDGE THE RELEVANT FACTORS LIE, AN ONUS TO ESTABLISH THEM IN A SPECIAL KIND OF INTERLOCUTORY PROCEEDING NOT GEARED TO ARRIVING AT FACTUAL CONCLUSIONS BUT DESIGNED TO MAKE INFORMED PROGNOSES."

[27] As stated in the preceding paragraphs, the applicant has failed to adduce evidence to satisfy the court that Exceptional Circumstances exist which in the interests of justice permit his release; the relevant factors lie within the knowledge of the applicant and he bears the onus to adduce evidence of those factors.

[28] NO ORAL EVIDENCE WAS GIVEN BY THE APPLICANT DURING THE HEARING; THE ONLY EVIDENCE AT THE DISPOSAL OF THE COURT ARE THE AFFIDAVITS FILED BY THE APPLICANT AND THE INVESTIGATING OFFICER.

[29] I have not had assistance on the authorities on the meaning of 'Exceptional Circumstances'; however, this phrase refers to a fact or condition which is unusual but relevant to a particular action. Examples could include a deteriorating health condition of the accused and/or his young and tender age.

29.1 IN THE CASE OF **S. v JONAS 1998 (2) SA SACR 667 (SOUTH EASTERN CAPE LOCAL DIVISION) AND 678, HIS LORDSHIP HORN JA** DEALING WITH THE SOUTH AFRICAN SECTION 60 (11) WHICH IS SIMILAR TO OUR SECTION 96 (12) (A) HAD THIS TO SAY:

> "From the aforesaid provisions it is clear that a court is obliged to order an accused's detention where he stands charged of a

schedule 6 offence and a court will only be empowered to grant bail in those instances provided the accused can advance exceptional circumstances why he should be released. The

effect of this provision is to shift the onus to the accused to convince the court on a balance of probabilities that such circumstances exist. The schedule 6 offences are serious offences such as murder, rape and robbery where there were aggravating circumstances present when they were committed.

The term 'exceptional circumstances' is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a schedule 6 offence when everything

> points to the fact that he could not have committed the offence because, e.g. he has a cast-iron *alibi,* this would likewise constitute an exceptional circumstance."

29.2 From the above authorities, it is evident that it is within the discretion of the court to decide in each case, guided by the evidence submitted, whether or not exceptional circumstances exist; there is no closed list.

[30] FURTHERMORE, SECTION 96 (12) (A) REQUIRES THAT THE "ACCUSED MUST SHOW THAT EXCEPTIONAL CIRCUMSTANCES EXIST WHICH IN THE INTEREST OF JUSTICE PERMIT HIS OR HER RELEASE".

[31] **Section 96 (4) of the Criminal Procedure and Evidence Act** as amended provides that:

"THE REFUSAL TO GRANT BAIL AND THE DETENTION OF AN ACCUSED IN CUSTODY SHALL BE IN THE INTERESTS OF JUSTICE WHERE ONE OR MORE OF THE FOLLOWING GROUNDS ARE ESTABLISHED:

....(b) where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;

(C) WHERE THERE IS A LIKELIHOOD THAT THE ACCUSED, IF RELEASED ON BAIL, MAY ATTEMPT TO INFLUENCE OR INTIMIDATE WITNESSES OR CONCEAL OR DESTROY EVIDENCE...."

[32] The applicant ran away from the police when they wanted to arrest him; hence, there is a likelihood that if released on bail he may evade trial. Furthermore, one of the crown witnesses is an accomplice witness who is young and still schooling, and there is a likelihood that the applicant if released on bail may attempt to influence or intimidate the witness.

[33] SIMILARLY, HIS HOMESTEAD IS SITUATED ALONG THE BORDER WITH SOUTH AFRICA COUPLED WITH THE FACT THAT HE IS FACING A SERIOUS CRIME, IT IS LIKELY THAT HE MAY ESCAPE TO ANOTHER COUNTRY.

[34] In the circumstances, I find that the applicant has not established on a balance of probabilities that 'Exceptional Circumstances' exist which in the interest of justice permit his release. The application for bail is therefore refused.

[35] THE REGISTRAR OF THE HIGH COURT IS ACCORDINGLY DIRECTED IN TERMS OF SECTION 95 (7) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT AS AMENDED TO EXPEDITE THE PROCEDURE UNDER SECTION 88 BIS FOR PURPOSES OF AN EARLIER TRIAL DATE.

M.B.C. MAPHALALA
JUDGE OF THE HIGH COURT OF SWAZILAND