IN THE HIGH COURT OF SWAZILAND

Criminal case No: 165/10

In the matter between:

ZONKE THOKOZANI DLAMINI	**First Applicant**
BHEKUMUSA DLAMINI	**Second Applicant**
AND	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**First Respondent**
THE REGISTRAR OF THE HIGH COURT	**Second Respondent**
THE ATTORNEY GENERAL	**Third Respondent**
Coram:	**MAPHALALA M.C.B., J**

For First Applicant	Attorney Mary Da Silva
For Second Applicant	Attorney Bhekisisa Zwane
For Third Respondent	Crown Counsel Stanley Dlamini

Summary

Criminal Law – application for release from custody in terms of section 136 (2) of the Criminal Procedure and Evidence Act – application refused partly because the Registrar has issued Notice of Trial in terms of Rule 54 and partly because their bail application was refused.

JUDGMENT

21.12.2011

[1] The applicants brought an application in terms of section 136 (2) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended for their release from custody. They were arrested in June 2010 and charged with various counts under the Suppression of Terrorism Act No. 3 of 2008. Their application for bail had been made in July 2010, but it was refused by the Court. They were indicted in October 2010 for trial before this court. The application was heard on the 21st December 2011.

[2] They alleged that they were remanded in custody on various occasions before they were indicted; and, that they expected to be brought for trial during the next court session beginning January 2011 to April 2011. They also argued that their matter was not placed on the roll for the following session beginning June 2011, and, even on the session beginning in October 2011. They argued that they were entitled to be released in terms of section 136 (2) of the Criminal Procedure and Evidence Act of 1938 as amended.

[3] The applicants argued that the first respondent had a responsibility to ensure that the second respondent enrolled the matter timeously; they accused both the first and second respondents of being in total disregard of their obligations of setting their trial date.

[4] The application is opposed by the respondents on the basis that a trial date was granted for the 14th December 2011; and, that trial notices have also been served upon the applicants. They further argued that the applicants have failed to annex documents as proof that they applied for bail and it was refused or the document relating to their committal to the High Court; they argued that in the absence of these documents, it was difficult to verify the allegation that they were refused bail or to compute the necessary time limits for their indictment to the High Court. They denied that the applicants were entitled to be released in terms of section 136 (2) of Criminal Procedure and Evidence Act; similarly, they denied that they have acted in total disregard of their duties as alleged in the absence of the documents which ought to have been annexed to the applications.

[5] A copy of a Notice of Trial in terms of Rule 54 (1) is annexed to the Opposing Affidavit advising both applicants of the trial date before the High Court at 8.30 am on the 14th December 2011; the Notice was issued on the 5th December 2011.

[6] Section 136 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides the following:

"136 (1) Subject to the provisions of this Act as to the adjournment of a court, every person committed for trial or sentence whom the Attorney General has decided to prosecute before the High Court shall be brought to trial at the first session of such court for the trial of criminal cases held after the date of his commitment, or else shall be admitted to bail, if thirty-one days have elapsed between such date of commitment and the time of holding such session, unless –

(a) The court is satisfied that, in consequences of the absence of material evidence or for some other sufficient cause, such trial cannot then be proceeded with without defeating the ends of justice; or

(b) before the close of such first session an order has been obtained from the court under section 137 for his removal for trial elsewhere.

(2) If such person is not brought to trial at the first session of such court held after the expiry of six months from the date of his commitment, and has not previously been removed for trial elsewhere, he shall be discharged from his imprisonment for the offence in respect of which he has been committed."

[7] It is apparent from the evidence adduced that the applicants were committed for trial before this court in October 2010. Similarly, it is not in dispute that the applicants were not brought to trial at the first session of the court after their committal. It is not in dispute as well that a period of six months has elapsed since the applicants were committed for trial before this court.

[8] The Director of Public Prosecutions is empowered by section 162 of the Constitution to institute and undertake criminal proceedings against any person before any court in Swaziland in respect of any offence alleged to have been committed by that person against the laws of Swaziland; when executing his functions, he acts independently and is not subject to the direction or control of any other person or authority. It is only in respect of matters relating to National Security that he is required by the Constitution to consult the Attorney General. The Constitution makes the Director of Public Prosecutions the "*dominis litis*" in criminal matters save in instances where he has issued a "*nolle prosequi*". It is therefore his responsibility to bring accused persons to trial, the fact that the allocation of trial dates is done by the Registrar of the High Court in terms of Rule 54 (1) after consultation with the Chief Justice as head of the judiciary does not divest the DPP of his powers to bring accused persons to court in terms of section 136 of the Criminal Procedure and Evidence Act as well as section 162 of the Constitution.

[9] The effect of section 136 (2) of the Criminal Procedure and Evidence Act, if the application succeeds, is to release the accused from custody while he awaits trial for the offence for which he has been charged; he is not absolved from further prosecution. Furthermore, an accused is said to have been brought to trial when the Director of Public Prosecutions is ready to

proceed with the trial, the accused is arraigned before court ready for trial, and, the court is ready to proceed with the matter. A mere appearance by the accused for remand does not suffice. Once the matter is brought to court, it takes over the matter from the Director of Public Prosecutions and directs the next course of action; it may proceed with the trial forthwith or it may postpone the matter to a suitable date and within a reasonable time.

[10] *Justice Didcott in S. v. Lulane and Others* 1976 (2) SA 204 (NPD) at 208 H- 209 A states the following:

> **"Until the case gets to court, the power in question rests with the state as "*dominis litis*". But as soon as the accused person comes before court for any purpose, whatever, the power passes decisively and exclusively to it. If a postponement is then sought, one of the factors which the court will take into account when it deals with the application is that delay would protract the duration of the pre-trial detention and that this consequence ought if possible to be avoided or kept within bounds. The court may grant the application, but insists upon postponing the trial to an early date so that the period of custody is not unduly prolonged. Or the court may refuse the application altogether with the result that, when the prosecutor had asked for the remand, he is compelled either to proceed immediately with his case or to withdraw the charge at once and to let the accused person go free. If on the other hand the adjournment is wanted by the defence, the court will not act different to, but obviously less concerned with the prejudice to the accused person ensuing from a course which he has deliberately chosen."**

[11] The importance of section 136 of the Act cannot be over-emphasised; it accords with the Right to a Fair Hearing in Section 21 of the Constitution which calls for a fair and speedy public hearing in the determination of civil rights and obligations or any criminal proceedings. *Justice Didcott in S. v. Lulane* (supra) at page 208F states the object of section 150 (1) (b) of the South African Criminal Procedure and Evidence Act No. 56 of 1955 which is analogous to section 136 (2) of our Criminal Procedure and Evidence Act in the following respect:

> **"The object of the sub-section is plain. It is devised to meet the situation in which an accused person is detained while he awaits trial and unable to get bail in the ordinary way; and its aim is to limit the period during which someone in that situation must remain in custody. But for its provisions his captivity would inevitably have lasted until his trial began, whenever that happened to be."**

[12] The applicants have gone to great lengths, criticizing not only the first respondent but the second respondent for being in total disregard of their obligations in the setting of their trial date. This criticism is not misdirected when reading Rule 54 which provides as follows:

> **"54. (1) When an accused has been committed for trial or when the Chief Justice has directed that an accused shall be tried summarily, and an indictment has been lodged with the Registrar, the Registrar shall issue a notice of trial substantially in**

accordance with Form 24 of the first schedule and shall cause such notice to be served upon the Director of Public Prosecutions or other prosecutor or his attorney and the accused.

(2) The Director of Public Prosecutions or other prosecutor or his attorney shall deliver to the Registrar the original and two copies of the indictment and, if there is more than one accused, as many additional copies as there are accused persons.

(3) The Registrar shall cause a copy of the indictment to be served upon the accused.

(4) When any person is committed for sentence to the court by a Magistrate's court under the provision of section 292 (1) of the Criminal Procedure and Evidence Act, 1938, the Registrar shall set the matter down for hearing as soon as may be possible and shall cause the notice of hearing to be served upon the Director of Public Prosecutions and the person committed and his attorney, if known to the Registrar, at least ten days before the date for hearing."

[13] It is against this background that the Supreme Court in the case *of Rex v. Celani Maponi Ngubane* appeal case No. 5 of 2004 at page 8 stated the following after reading Rule 54:

"These provisions clearly confer obligations on the Registrar which that office must perform and over which the Director of Public Prosecutions' office has no control.

In order to enable a court that has to deal with a section 136 application to do so in an informed and meaningful way, it would in our view, be necessary to join the Registrar as a respondent in such an application. The court will then be able to determine whether the Registrar has carried out the obligations conferred by Rule 54 (3). That office would also be able to give an account of what other steps have been taken to render the process efficacious. Doing so would also have an impact, albeit it only indirectly, on the speed with which matters are allocated, *inter alia,* by highlighting the extent and impact of the delays. Backlogs could be quantified and such information could then be used to justify a request for resources, both human and financial. The real reasons for unjustified delays could then also be more readily identified."

[14] The supreme court made an order confirming the decision of the court a quo that the Director of Public Prosecutions was correctly cited as a respondent in the section 136 proceedings; the court further ordered that in all future proceedings for relief in terms of section 136 of the Act the Registrar shall be cited as a co-respondent with the Director of Public Prosecutions. However, this decision does not change the Constitutional duty of the Director of Public Prosecutions to bring accused persons before this court for trial after their committal. It is the duty of the Director of Public Prosecutions to cause the committal of the accused whom he has decided to prosecute in terms of section 86 of the Act; in terms of this section, the Director of Public Prosecutions has to appear before a

magistrate in the presence of the accused and apply for his committal to the High Court.

[15] The Director of Public Prosecutions may also lodge an *ex parte* application before the Chief Justice in chambers in terms of section 88 bis of the Act for a Summary Trial. Before he grants the application, the Chief Justice has to satisfy himself that it is in the interests of justice to grant the Summary Trial. When granting the application, he would direct that the accused should be tried summarily in the High Court without the need to hold a preparatory examination. The Director of Public Prosecutions would then be required to lodge with the Registrar an indictment; and the Registrar would in turn issue a Notice of Trial in terms of Rule 54 to the Director of Public Prosecutions, the accused and his attorney. Thereafter, the Director of Public Prosecutions would serve copies of the indictment to the accused with a brief Summary of the Evidence to be led as well as the list of witnesses to give evidence on behalf of the Crown.

[16] It is common cause that the Director of Public Prosecutions in this matter proceeded by way of section 88 bis of the Act and the application was duly granted by the Chief Justice in October 2010. The Registrar merely issued the Notice of Trial in terms of Rule 54 (1) advising that the matter will be heard on the 14th December 2011.

[17] It is common cause that on the 14th December 2011, the matter appeared before the Trial Judge but could not proceed because one day was not sufficient to conclude the matter; hence, it was set down for three days to the 2nd, 3rd and 4th February 2012.

[18] Notwithstanding the Notice of Trial, the applicants proceeded in terms of section 136 (2) of the Act on the 21st December 2011, and, full arguments were made by the two defence attorneys representing the applicants as well as the Director of Public Prosecutions representing the Crown; the court dismissed the application and advised that a written judgment would be made available in due course. It is common cause that the trial proceeded on the dates allocated.

[19] The reasons for dismissing the application are two-fold: first, when the application in terms of section 136 (2) of the Act, was made, the second respondent had already issued a Notice of Trial in terms of Rule 54 (1). In addition, the first respondent had already brought the applicants to trial on the 14th December 2011; and, the trial court was now seized with the matter, and, the Director of Public Prosecutions had no control over the matter. The court, exercising its discretion, postponed the matter after realizing that the one day allocated for trial was not sufficient to finalize the trial.

[20] The second reason for the dismissal of the application is that the applicants did exercise their rights and applied for bail but it was refused by the court. It is trite law that an accused who has been refused bail cannot benefit under the provisions of section 136 (2) of the Act because the court cannot refuse bail unless doing so would be in the interests of justice; hence, a literal interpretation of section 136 (2) of the Act would defeat the ends of justice.

[21] Before a court could refuse bail, it investigates all the circumstances of the case with a view to determine whether the refusal to grant bail would be in the interests of justice.

[22] Section 96 (4) of the Act provides the following:

> **"(4) 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:**
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> **(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 II of the first schedule; or**
> **(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 to conceal or destroy evidence;

(d) where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or

(e) where in exceptional circumstances, there is a likelihood that the release of the accused may disturb the public peace or security."

[23] *Harcourt J* delivering a decision of the full bench *in S. v. Smith and Another* 1969 (4) SA 175 (N) at 177 E –F and 177 H -178 A confirmed the principles relating to the granting of bail:

> **"The general principles governing the grant of bail are that, in exercising the statutory discretion conferred upon it, the court must be governed by the foundational principle, which is to uphold the interests of justice; the court will always grant bail where possible, and will lean in favour of, and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby….**
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> **In dealing with an application of this nature, it is necessary to strike a balance, as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice…. The presumption of innocence operates in favour of the applicant, even where it is said that there is a strong prima-facie case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be**

defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing to allow him bail."

[24] I agree wholeheartedly with the reasoning of the court in *Celani Maponi Ngubane v. The Director of Public Prosecutions* High Court Criminal Trial No. 11/04 where *Masuku J* at page 7 stated the following:

"I am also of the firm view that in such cases, bail applications must first be determined and that if refused, the bail applicant cannot thereafter approach the court for relief in terms of the provisions of section 136 because the court would have investigated all the important variables and would have found that it is not in the interest of justice to admit the applicant to bail. He cannot therefore, …be discharged if his bail application has been unsuccessful."

[25] In the circumstances, the application is dismissed.

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