IN THE HIGH COURT OF SWAZILAND

Criminal case No: 383/2012

In the matter between:

SELBY MUSA TFWALA **APPLICANT**

VS

REX **RESPONDENT**

Neutral citation: *Selby Musa Tfwala v. Rex (383/2012 [2013] SZHC146 (2013) 8th August 2013*

Coram: **M.C.B. MAPHALALA, J**

Summary

Criminal Procedure –application for bail – initial bail application was dismissed by the Court on the grounds that the applicant has not complied with the provisions of section 96 (12) (a) of the Act which requires the applicant to adduce evidence proving that exceptional circumstances exist which in the interest of justice permit his release – the present application is based on fresh evidence found complying with section 96 (12) (a) of the Act – application opposed by the Crown on two grounds, firstly, that the matter is *res judicata*, secondly that the new evidence is still short of complying with the mandatory provisions of sections 96 (12) (a) of the Act - Court finds that a terminal illness constitutes an extenuating circumstances for purposes of section 96 (12) (a) of the Act – further held that the *exceptio rei vindicatae* is not absolute but subject to specific exceptions – bail accordingly granted.

JUDGMENT
8 AUGUST 2013

[1] The applicant instituted a bail application on the 3rd January 2013 which was subsequently dismissed by this Court on the basis that the applicant had failed to adduce evidence showing the existence of exceptional circumstances which in the interest of justice permit his release.

[2] The applicant is charged with offences listed in the Fifth Schedule of the Criminal Procedure and Evidence Act as amended. In order for the applicant to succeed in his bail application, he has to comply with section 96 (12) (a) of the Act which provides the following:

> **"96. (12) Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to-**
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> **(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."**

[3] In his bail application the applicant contends that in 2010, and, whilst still employed in the Republic of South Africa, he tested positive to HIV and Aids; he started taking anti-retroviral medication on the 6th June 2011. He argues that his continued incarceration has worsened his health condition since the living conditions at the Remand Centre are not conducive to his health. He contends that he sleeps on a mat on the floor and cannot be protected from

attracting further illnesses since his immune system is not strong. He further argues that his trial date has not yet been determined since that is a process. He has attached a medical report in this regard.

[4] He further states that in his first bail application, he had advised his attorney that he was a sickly person who is HIV positive and that the living conditions in prison are not conducive for his health. His attorney advised him that it would not be possible to mention his sickness in his bail application in the absence of his medical record which was at his former place of employment in South Africa.

[5] The application is opposed by the Crown. In *limine* the Crown argues that the application should be dismissed on two grounds. Firstly, that the matter is *res judicata* having been dismissed by this Court on the 6th March 2013. Secondly, that the new evidence provided by the applicant falls short of meeting the mandatory requirements of section 96 (12) (a) of the Act. On the merits the respondent contends that the applicant is not the only inmate who is on ARV treatment at the Remand Centre; and, that the Remand Centre has qualified medical staff as well as a clinic which refers very sick inmates to the Mbabane Government Hospital. In addition the Crown argues that the applicant had sufficient time to secure his medical report from South Africa but he failed to do so; and, that he could have secured the medical report through his Attorney or relatives.

[6] It is apparent from the evidence that the Crown does not dispute or challenge the medical report or the fact that the applicant suffers from a terminal illness. Furthermore, the Crown does not dispute the evidence of the applicant's living conditions at the Remand Centre as not being suitable for a person suffering from such an illness; and, that such living conditions are likely to worsen the health condition of the applicant.

[7] It is well-settled that the "*exceptio rei judicatae*" is subject to specific exceptions and that it is not absolute. See the case of *Custom Credit Corporation (PTY) Ltd v. Shembe* 1972 (3) SA 462 as well as *Johannes Nkwanyane v. The Accountant General* Civil Appeal No. 14/2005 at para 14. One of these exceptions is where new evidence has been found which was in advertently omitted and not considered in the previous hearing. There is no doubt that the medical report constitutes new evidence which was not presented to the Court when the matter was first heard. The *exceptio rei judicatae* cannot operate in a matter where subsequent to the first judgment new circumstances have arisen which have a bearing to a just and fair determination of the matter.

[8] In the Supreme Court case of *Wonder Dlamini and Lucky Sandile Dlamini* Criminal Appeal No. 1/2013, I had this to say at para 7, 8 and 9:

> **"[7] In defining exceptional circumstances *Magid AJA,* in *Senzo Menzi Motsa v. Rex* appeal case No. 15/2009 stated as follows at para 11:**

"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".

[8] Section 96 (12) (a) makes it clear that an applicant for bail in respect of a Schedule Five offence bears a formal onus to satisfy the Court that exceptional circumstances exist which in the interest of justice permit his release; the applicant discharges the onus by adducing the requisite evidence failing which his detention in custody continues pending finalization of the trial. Admittedly, the onus has to be discharged on a balance of probabilities.

[9] The offences listed in the Fifth Schedule consist of serious and violent offences, and, which upon conviction are accompanied by severe penalties. It is apparent that when Parliament enacted this law, the purpose was to render the granting of bail in respect of these offences most stringent and difficult to obtain by placing the onus on the accused to adduce evidence showing the existence of exceptional circumstances. The legislation seeks to protect law-abiding citizens against the upsurge in violent criminal activity. The legislation does not deprive the Courts of their discretion in determining bail applications in respect of the Fifth Schedule offences but it requires evidence to be adduced showing the existence of exceptional circumstances. It further places the onus of proof upon the applicant. Parliament enacted section 96 (12) (a) in order to deter and control serious and violent crimes as well as to limit the right of an accused person to bail in the interest of justice."

[9] At paragraph 12 of the *Wonder Dlamini* case, I quoted with approval the South African Constitutional case of *S. v. Dlamini; S. v. Dladla and Other; S. v. Jourbert; S. v. Schietekat* 1999 (2) SACR 51; 1999 (4) SA 623 (CC) at para 64. This case dealt with section 60 (11) (a) of the South African Criminal

Procedure Act No. 51 of 1977; and its wording is substantially the same as our section 96 (12) (a) of the Criminal Procedure and Evidence Act No. 67 of 1938.

> "64. **However, s 60 (11) (a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a Schedule 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise … in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60 (11) (a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail will be resolved in favour of the denial of bail, unless 'exceptional circumstances' are shown by the accused to exist. This exercise is one which departs from the constitutional standard set by section 35 (1) (f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary Constitutional test of the 'interests of justice' were to be applied."**

[10] Admittedly section 96 (12) (a) of the Act renders the granting of bail in respect of offences listed in the Fifth Schedule most stringent and difficult to obtain by placing the onus on the accused to adduce evidence showing the existence of exceptional circumstances. However, the Court retains a discretion to consider the circumstances of each case whether or not the applicant has discharged the onus required by the Act. The retention of the Court's discretion in this regard affords flexibility that diminishes the overall impact of the harsh and stringent nature of the requisite onus.

[11] The Criminal Procedure and Evidence Act No. 67 of 1938 as amended does not define what constitutes "exceptional circumstances". The definition of *Magid AJA* in *Senzo Menzi Motsa v. Rex* (supra) at para 11 means "something more than merely unusual but rather less than unique which means in effect one of a kind". In *the Wonder Dlamini* case (supra) in para 15, the Supreme Court adopted a definition made by *Horn JA* in *S. v. Jonas* 1998 (12) SA SACR 667 where the learned judge said:

> "15. ...**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."**

[12] At para 18 of the *Wonder Dlamini* case the Supreme Court stated the following:

> **"18. Section 16 (7) of the Constitution endorses the general principle that bail is a discretionary remedy. For a person charged with an offence under the Fifth Schedule, section 96 (12) (a) of the Act requires that the Court has to be satisfied that the applicant for bail has adduced evidence showing that exceptional circumstances**

exist which in the interest of justice permit his release. If the Court is not satisfied bail is refused. However, section 96 (12) (a) of the Act does not take away the Court's discretion to grant bail. It is the duty of the Court in every bail application to determine if the facts and averments made constitute exceptional circumstances. The first appellant has adduced evidence that he suffers from pneumonia and frequent bouts of sinus both of which requires high levels of ventilation and protection from colds. He further argued that his continued incarceration would worsen his condition because at the Remand Centre they sleep on a mat."

[13] In the *Wonder Dlamini* case the Supreme Court concluded that suffering from pneumonia with frequent bouts of sinus is a condition which is "more than unusual but rather less than unique, and that it is a condition that is one of a kind" as defined by *Magid AJA* in *Senzo Motsa v. Rex* (supra). In view of the authorities considered, it is apparent that suffering from a terminal illness constitutes an exceptional circumstances as contemplated by section 96 (12) (a) of the Criminal Procedure and Evidence Act.

[17] Accordingly, the following orders are made:

(a) Bail is granted at E50 000.00 (fifty thousand emalangeni) in accordance with section 95 (5) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended. The applicant will pay cash of E10 000.00 (ten thousand emalangeni) and provide surety worth E40 000.00 (forty thousand emalangeni).

(b) The applicant should attend trial.

(c) The applicant should not interfere with Crown witnesses.

(d) The applicant should surrender all his passports and travelling documents and not apply for new ones pending the finalization of the trial.

(e) The applicant should report at the Manzini Police Station fortnightly on Friday between the hours of 8 am and 4 pm.

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M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT

For Applicant	Attorney Noncedo Ndlangamandla
For Respondent	Senior Crown Counsel Absalom Mkhanya