IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 12/13

In the matter between

LEO NDVUNA DLAMINI **APPLICANT**

And

THE KING **RESPONDENT**

Neutral citation: *Leo Ndvuna Dlamini v The King (12/13*) [2013] SZHC 247 (5 November 2013)

Coram: **OTA J**

Heard: **1 November 2013**

Delivered: **5 November 2013**

Summary: **Criminal procedure: post-conviction bail application; exceptional circumstances requisite to warrant bail; no exceptional circumstances shown; application lacking in merits and accordingly dismissed.**

OTA J

Judgment

[1] The Applicant Leo Ndvuna Dlamini as Accused, was convicted on two counts of offences namely, count one: contravening Section 33(1) (b) read with Section 33(2)(b) (i) of the Prevention of Corruption Act 30 of 2006 and count two: Attempting to defeat or obstruct the course of justice. On the 22nd of October 2013, I sentenced him to five (5) years imprisonment in count one and two (2) years imprisonment in count two. I ordered the sentence to run concurrently and backdated it to the date of Applicant's arrest and incarceration.

[2] The proved facts of this case briefly stated are as follows: The Applicant who was a Magistrate stationed at the Pigg's Peak Magistrates' Court attended a party at a Da Silva homestead at Luhlangotsini, on the 24th of September 2011. The Applicant met the complainant at the party. The complainant who was then very drunk made certain utterances to the Applicant. After the party, the Applicant lodged a complaint of assault common against the complainant at the Pigg's Peak police station in consequence of his utterances.

[3] As a result of the complaint lodged by the Applicant and on the 24th of November 2011, about two months after the incident, the complainant in the company of his father together with the chief of the community went to tender an apology to the Applicant in terms of Swazi Law and Custom. The Applicant refused the chief audience saying he'll see only the complainant and his father at 2pm. At 2pm when the complainant and his father again approached the Applicant in his chambers, the Applicant also sent the complaint's father away saying he'll deal with the complainant alone. The Applicant then imposed a fine of E5,000 on the complainant for the assault common charge and demanded for a deposit of E1,000. Since the complainant had only E900 on him which amount was meant for his children's school fees, he approached his father who was then waiting outside for the balance of E100 to make up the sum of E1,000 deposit which the Applicant had asked for. The complainant gave the sum of E1,000 to the Applicant who ordered him to pay the balance of E4,000 on or before the 31st of December 2011.

[4] Thereafter, the investigating police officer Constable Mlangeni approached the Applicant to withdraw the assault common charge on the understanding that it had been amicably settled by the parties. The Applicant however told Mlangeni to wait until the 31st of December 2011.

[5] The complainant did not pay the balance of E4,000 by the 31st of December 2011, he rather reported the matter to the Anti-Corruption Commission who launched an investigation into same. In the wake of the aforegoing events, and on the 12th of February 2012, the Applicant ordered Mlangeni to proceed with the laying of the assault common charge. Thereafter, on the 16th of February 2012 the Applicant also ordered PW3 Sipho Dlamini a clerk of Court based at the Pigg's Peak Magistrates Court to register the

docket. This was in affront of the laid down procedure at the Pigg's Peak Magistrates Court, which is that before criminal dockets are registered they are first perused by the prosecutors based at the Court, who first ascertain whether there is sufficient evidence to prosecute. After registering the docket, PW3 returned the criminal docket to the Applicant as he had been instructed. Subsequently, Mlangeni instructed PW3 to issue out summons which he did.

[6] It was based on the totality of the evidence led that I found that the Applicant being a judicial officer used his position as such to manipulate the system at the Pigg's Peak Magistrates Court. He thus unlawfully demanded, agreed to accept and accepted an advantage of E5,000 from the complainant, which advantage induced him not to proceed with laying criminal charges against the complainant. I found the Applicant guilty of the offences as charged and convicted him accordingly.

[7] In sentencing the Applicant, I considered his personal circumstances, especially the mitigating factors which include the following: the fact that Applicant is 54 years old approaching retirement age; the fact that his conviction automatically makes him liable to lose his job as a judicial officer; the fact that the conviction will hang over his head for the rest of his life disabling his chances of ever practicing as an attorney, as well as, impeding his chances of obtaining other gainful employments; the fact that the loss of his job will curtail his wherewithal to provide for his family especially his two children who are still in school; the fact that this will certainly affect his ability to pay the children's school fees; the fact that Applicant is a first offender and that this factor should save him from being condemned to the maximum sentence prescribed for this offence; the fact that out of the E5000 he solicited he only received E1,000; the fact that the

offence in count 2 is inchoate; the fact that the Applicant showed some remorse especially by offering to pay back the complainant the E1,000 which he already received from him. I also considered the fact that the Applicant was contending for the option of a fine preferably in the amount of E5,000 which he solicited and not a custodial sentence and the fact that the offences arose from the same transaction thus commanding a concurrent sentence.

[8] Thereafter, I proceeded to consider the interest of the society and the peculiar circumstances of the offence. I observed that the offence the Applicant committed is not only serious but is one that naturally elicits public indignation I then considered the seriousness of the offence of corruption in general whether it is the soliciting of a mere E5,000 by a judicial officer *in casu* or the looting of billions from Government coffers, based on the devastating effect this offence has on the society. I identified this effect to include that corruption frustrates national development plans and budgets of countries; arrests development; results in large scale pauperization and dehumanization of the citizens of the country; break down of governance; law; order; security and collapse of state structures. Therefore, it must be eradicated in the interest of the sanctity, stability and progress of the Kingdom. I noted that it was in appreciation of this fact and the upsurge of this offence in the Kingdom, that parliament passed the Prevention of Corruption Act in a bid to investigate and punish the offence. I acknowledged the mood of the society which is evident in the punitive sentence prescribed for this offence via Section 35(2) of the Act. I then considered the fact that the gravity of the offence, therefore, does not lie in the mere E5,000 solicited by the Applicant as contended by his Counsel, which gravity is compounded by the fact that as a judicial officer the Applicant bears the flagstaff of justice to uphold the rule of law and

maintain public confidence in the administration of justice, which legal duty he breached by his unethical conduct. In his bid to undo the complainant for the utterances at the party he became high handed, arbitrary and vengeful. Unfortunately, some of the actions the Applicant took had criminal connotations he therefore shot himself squarely in the foot. Thereafter, I considered that judicial office is not an ego trip because it is a sacred office. That the wrongful exercise of judicial power leads to weak governance, anarchy and a total breakdown of the rule of law. I recognized that the conduct of the Applicant left much to be desired in the circumstances, and ought to be seriously inveighed with a sentence that will accord with legitimate public expectation of law enforcement. Thereafter, I imposed the sentence, as I have hereinbefore demonstrated in para [1] above, as a deterrent to others.

[9] The Applicant has appealed against only his sentence, upon grounds encapsulated in the Notice of appeal as follows:-

> **"(1) That the sentence imposed by the Court a quo induces a sense of shock in that the Appellant was a first offender.**
>
> **(2) That the Court a quo misdirected itself in not considering sentencing the Appellant with an option of a fine despite that the Act provides for a fine as the first option in sentencing a person found guilty of committing an offence under Section 33 of the Prevention of Corruption Act 30/2006.**
>
> **(3) That the Court a quo misdirected itself in imposing a custodial sentence against the Appellant without having given reasons why the Appellant should not be afforded the option of a fine."**

[10] In consequence of the aforegoing appeal, the Applicant moved an application under a certificate of urgency contending for bail pending the

prosecution of the appeal. This application is founded on a 19 paragraph affidavit sworn to by the Applicant himself.

[11] The Respondents who are opposed to the application filed a 19 paragraph opposing affidavit sworn to by Ayanda Matsenjwa described in that process as a Crown Counsel stationed in the office of the Director of Public Prosecutions and Junior Counsel to Advocate N. Kades SC who was the lead prosecutor in the matter.

[12] The parties also filed heads of argument and proffered oral arguments which exhorted the grounds advanced in their respective affidavits.

[13] In the Applicant's heads of argument which was embellished in oral submissions, learned Counsel for the Applicant Advocate L. Maziya, submitted, that in an application such as the instant, the Courts attention is usually focused on indications that the Applicant might be a flight risk and/or the likelihood that he might interfere with Crown witnesses. Counsel referred to **S V Nichas and Another 1977 (1) SA 257 (C) and Rex Vs Mtatsala and Another 1948 (2) SA 585 (E).**

[14] Advocate Maziya further contended that in such instances, the Court is expected to do its best in striking a balance between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice. For this proposition he referred to **R vs Essack 1965 (2) SA 161 D** and **S V Mhlawli and Others 1963 (3) SA 795 (C)**. He then contended that since this matter relates to bail pending an appeal, the question of tampering with Crown witnesses is now irrelevant since they have already testified. What is of importance at this stage is whether the Applicant is likely to abscond before the hearing and determination of the pending

appeal. It was further Counsel's contention that it is common cause that the Applicant is not a flight risk in that the Crown conceded this fact.

[15] Advocate Maziya then took on the issue of the prospects of success of the appeal. He contended that the Applicant has more than reasonable prospects of success in the pending appeal. This, he says is because this Court made an error of law in meting out a custodial sentence when this is not provided for in Section 35(2) of the Prevention of Corruption Act No. 3 of 2006. The clear language of the Section, so goes the argument, presupposes a term of imprisonment only in the event of a failure by the Applicant to pay a fine. Therefore, the option of a fine must be considered first before the imposition of a custodial sentence. Had the intention of the legislature been to exclude the option of a fine, it would have said so in express and unequivocal terms. As it stands, further argued the learned Advocate, the Judge's judgment amounts to an amendment of the section yet that is the exclusive domain of parliament. The sentence would have been permissible only if there was no prescribed penalty in the statute. For this proposition Counsel referred to **R vs Forlee 1917 TPD 52 at pg 55**.

[16] Further, Counsel contended that the Judge erred by not considering the triad since there is nothing in the sentencing regime to show that it was in fact considered. The Court ought to have demonstrated in the treatment of the evidence that in fact the triad was considered. For instance the Court failed to give reasons why the Applicant was not entitled to a fine. There was nothing to show what weight was placed, if any, on the undisputed fact that the Applicant had been provoked by the complainant to such an extent that the latter even went to apologize to the Applicant. Surely, the utterances by the complainant constitute a factor bearing upon the Applicant's subsequent conduct and ought to have been held as having had the effect of reducing

his moral blameworthiness and thus qualifying as extenuating circumstances. The offence was not premeditated. If the utterance had not been made the Applicant would not have acted as he did, so contended Advocate Maziya.

[17] Furthermore, the Judge erred by placing undue emphasis on the gravity of the Applicant's conduct as a judicial officer as well as the gravity of the offence. This is because the offence is already tailor made for judicial officers. Counsel in his heads of argument cited a passage from an article entitled **Judges and The Law Maker (1976) 39 Mordern Law Review 1 at 3** where it is stated:- *"The social services that he renders to the community is the removal of the sense of injustice"* and then submitted, that with this passage in mind another sentencer may have come to the conclusion that it would be the height of injustice to the community to treat an offender who had been provoked the same way as someone who is motivated by the selfish desire for personal enrichment to **"loot billions from government coffers."**

[18] However, in oral submissions Advocate Maziya conceded that corruption is a serious crime and it is definitely the same, whether it is the soliciting of E5,000 by a judicial officer or the looting of billions.

[19] It is pertinent that I also observe here, even though Counsel tendered no argument in this respect, that in his founding affidavit the Applicant addressed other factors such as, he has two children who are in school in South Africa; he is a sickly person who suffers from asthma as well and pneumonia; the fact that having been a Magistrate, he may be attacked by prisoners whom he had convicted and sentenced during his tenure as such if he is not released on bail.

[20] Counsel then prayed the Court to grant the Applicant bail in the peculiar circumstances of this matter.

[21] For his part Advocate Kades SC who appeared for the Respondents referred the Court to the case of **S V Rabie 1975 (4) SA 855 and S V Narker and Another 1975 (1) SA 853**, and contended, that punishment is pre-eminently a matter for the discretion of the trial Court and sentence can only be altered if the discretion has not been judicially or judiciously exercised and thus vitiated by irregularities and misdirection or is disturbingly disappropriate. Advocate Kades SC drew the Court's attention to the fact that there is no contention by Applicant's Counsel that the sentence is disturbingly disappropriate or irregular. He further contended, that the sentencing discretion was properly exercised in that the Court properly considered the triad before the imposition of the sentence. The Court considered all it was supposed to consider in the peculiar facts and circumstances of this case. Senior Counsel further contended, that the sentence erred on the side of leniency. The conduct of the Applicant, contended Advocate Kades SC, is the high water behavior that gives rise of the offence under The Prevention of Corruption Act. The Court therefore correctly laid emphasis on the fact the he abused his authority as a judicial officer and breached his legal duty to uphold the rule of law and maintain public confidence in the administration of justice.

[22] Counsel further contended that the Applicant took the useless utterance of a drunken man to heart. The complainant and his father and chief came to apologize, the Applicant decided not to accept the apology. He sent the elders away, so that they will not be witnesses to what he wanted to do. Therefore, so contended Advocate Kades SC, the offence is premeditated.

The Applicant then proceeded to extort the money from the complainant and demanded a deposit of E1,000. When E900 is produced he told the complainant to go out and find the balance of E100. Thereafter, the Applicant sees to it that the docket does not get to be prosecuted to further his scheme to extort the money from the complainant. The Applicant further manipulated the system when the balance of E4,000 does not materialize, when he set the machinery in motion for registering the docket by ordering the clerk of Court to do so. Learned Counsel then posed a pertinent question to wit: *"How much worse can the conduct of a judicial officer get?"* He then submitted, that the Supreme Court will not intervene. There is no provocation with regards to the soliciting of the bribe. Maybe what happened at the party was provocation, however, the amount was solicited way after that incident and the offence continued over a period of months with the Applicant manipulating both the police investigation procedure and also the Court procedure at the Pigg's Peak Magistrates Court of which he was well aware, further argued Advocate Kades SC.

[23] Furthermore, Advocate Kades SC zeroed in on the correct interpretation to be given to Section 35(2) of the Prevention of Corruption Act which is the section under which the Applicant was punished. Senior Counsel drew the Court's attention to the legislation which states that a person convicted under section 33 thereof, shall be liable to **"a fine not exceeding Two Hundred Thousand Emalangeni or imprisonment not exceeding twenty years or to both"** and contended, that he fails to read that legislation the way it has been read by Advocate Maziya. This, Counsel contends is because the language of the legislation is clear. It does not say that a person convicted of an offence under that section shall be liable to a fine. It gives the Court the discretion to impose a fine or custodial sentence or both. Therefore, further argued Senior Counsel, for the Applicant to sway

the Court into granting the bail application he must convince the Court that the Supreme Court will set aside the custodial sentence. However, he does not see the Supreme Court doing this. The best that the Supreme Court can do if it were minded to interfere with the sentence, is to reduce it and not to set it aside, so contended Advocate Kades SC.

[24] Counsel further drew the Court's attention to the fact that even though in its sentencing regime, the Court had found a measure of remorse by the Applicant in that he offered to pay back the complainant the sum of E1,000 he had already received, however, the Applicant has failed to tender the said amount. Furthermore, the gravity of the offence is compounded by the fact that the Applicant pleaded not guilty to the offence. Counsel therefore submitted that there is no prospect of success of the appeal and prayed the Court to dismiss the application.

[25] In reply on points of law, Advocate Maziya contended that the sentencing regime of the Court is irregular in that the question of a discretion is not a factor in terms of the punishment section. He further submitted that the contention of Advocate Kades SC that the least the Supreme Court can do even if it were minded to interfere with the sentence, is to reduce it and not to set it aside, itself amounts to interference by the Court.

[26] Advocate Maziya further contended that he would agree with Advocate Kades SC that this Court erred on the side of leniency in the sentence imposed, only if the sentence itself was provided for, however, we are dealing with a situation where the sentence is not provided for by the relevant statute.

[27] Now, having carefully considered the totality of the record of these proceedings, as well as the oral submissions urged by both sides, it is imperative for me at this early stage to state the position of the law on post-conviction bail applications. The law the way I understand it is that, inasmuch as this Court has the power to grant bail at any stage of the proceedings, a clear distinction must however be drawn between the principles applicable to bail pending trial and bail pending appeal. The learning is that in a post-conviction bail application, the Applicant must show the existence of exceptional circumstances in order to be granted bail, otherwise, he is expected to serve his sentence. Speaking about this principle in the Botswana Case of **Salvado V The State (2001) 2BLR 411 at 413, Nganunu CJ,** declared as follows:-

> **"The presumption of innocence on the side of the accused falls by the way side when he is convicted at his trial. It becomes a fact that the law considers him a criminal, until perhaps he succeeds to upset the conviction in any appeal he may make. With the disappearance of innocence, also disappears the tilt of the Courts towards the liberty of that person in any bail application. The law expects the convict to serve any term of imprisonment decreed by the Court. To me this constitutes the fundamental divide between the approach of our Courts in pre-trial bail applications and those after a conviction and sentence of imprisonment. In my view, the principle followed by our Courts in post-conviction bail applications is that the applicant must show the existence of some exceptional circumstances in order to be granted bail, otherwise, he is expected to serve his sentence instead of being on the street as a free man."**

[28] What will constitute such exceptional circumstances warranting post-conviction bail were espoused by **Hannah J** in the case of **State V Sephiri and Kgoroba 1982 IBLR 211,** as follows:-

> **"The approach of the Court of Appeal in England when dealing with application for bail pending appeal is now clearly set out in R V Walton (supra). In that case the Court held that exceptional circumstances are the test and the two questions to be considered in determining whether exceptional circumstances exist are (1) whether it appears prima facie that the appeal is likely to be successful or (2) whether there is a risk that the sentence will have been served by the time the appeal is heard."**

[29] Similarly, in **R V Mthembu 1960 (3) SA 463 at 471 A-B**, the Court declared as follows:-

> **"As I see it, the effect of Section 368 is such that the grant of bail is in the discretion of the Court. I think that the law is that, if justice is not endangered, the Court favours liberty more particularly where there is a reasonable prospect of success"**

[30] What can be extrapolated from the aforegoing authorities is that such exceptional circumstances are:

(1) whether there is *prima facie* prospects of success of the appeal.

(2) whether there is a risk that the sentence will have been served by the time the appeal is heard.

[31] I am persuaded by the aforegoing decisions. I have no wish or inclination to depart from them, save to add that the Court is still entitled in the judicial and judicious exercise of its discretion to consider other factors such as the likelihood of the Applicant absconding from the jurisdiction, the Applicant's health situation if any, etc, if the circumstances of the case warrant such a consideration and especially where there are prospects of success of the appeal.

[32] Adumbrating upon this discretion in the case of **S V Williams 1981 SA 1170**, the Court said the following:

> **"Different considerations do of course arise in the granting of bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that is putting it too high to say that before bail can be granted to an Applicant on appeal against conviction, there must always be reasonable prospects of success on appeal. Such cases as Meline and Erleigh (4) 1950 SA 601 (W) and R V Mthembu 1947 (B) SA 468 (I) stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. It is necessary to put in the balance both the likelihood of Applicant absconding and the prospects of success. Clearly the two factors are inter-connected because the less likely the prospects of success are the more inducement there is on an Applicant to abscond. In every case where bail after conviction is sought the onus is on the Applicant to show why justice requires that he should be granted bail."**

[33] The question here, is, has the Applicant demonstrated exceptional circumstances that warrant his admittance to bail?.

[34] Let me proceed to consider the factors urged *ad seriatim*.

(1) Prospects of success of the appeal

The challenge in dealing with this factor, is, that the inquiry I am expected to embark upon at this stage is to determine whether the grounds of appeal disclose substantial issues of law and fact. Substantial because they are triable, they are not merely frivolous. This exercise will ordinarily involve a weighing of the grounds of appeal, against the impugned decision *vis a vis* the established facts of the case. This is a challenge. I say this because, it invites the Court to pre-determine issues which are pending before the

Supreme Court in the substantive appeal which is clearly undesirable at this stage of the proceedings. Speaking about this self same issue in my decision in the case of **Thembela Simelane V Rex Case No 234/2002, para [35],** I stated as follows:-

> **"---The challenge in dealing with this requirement, is that the Court may find itself in a situation whereby it will be considered to be determining an appeal pending before a higher Court. The problem that arises then is how does the Court draw the line, when dealing with this question, in order to avoid determining the substantive appeal? It is difficult to know where to draw the line, as the Court at this stage is expected to come to a conclusion that the grounds of appeal disclose triable issues, or that there is a prospect of success in the appeal, before it can grant such an application. There is no doubt that this exercise will require a proper and considered view of the grounds of appeal vis a vis the impugned judgment. This Court will somehow in embarking on this exercise, pronounce on the merits of the appeal. This is the problem. This problem is further compounded by the way and manner, the application has been argued by both sides, as if the substantive appeal is being determined at this stage."**

[35] I have thus accordingly warned myself not to fall into the danger of pre-determining the appeal pending before the Supreme Court. Suffice it to say that, I have carefully scrutinized the grounds of appeal juxtaposed with the assailed sentence and the established facts of the case, and I am convinced that the grounds of appeal disclose no triable issues to warrant the bail sought. Without the necessity of canvassing each ground of appeal in detail, I am inclined to agree with Advocate Kades SC, that the sentencing process and the factors considered therein *vis a vis* the established facts of this case, show that the grounds of appeal do not disclose any triable issue, or any prospects of success that would move my hand to grant the application in favour of the Applicant. The Applicant has thus failed to disclose *prima facie* prospects of success of his appeal.

[36] (2). Likelihood that the Applicant will serve his sentence before the appeal is prosecuted.

This factor is of paramountcy and goes hand in hand with the prospects of success of the appeal. This is because, if the Applicant has prospects of success in his appeal and the sentence imposed is such that he would have served it before the appeal is heard, his access to justice would have been frustrated if bail is not granted. The indicators of the likelihood that the sentence would have been served before the appeal is heard, are factors such as:

(1) the time it takes to compile the record by the Court registry;
(2) the diligence of the Court in dealing with proceedings in the Supreme Court;
(3) whether the Respondents are contributing to the delay in the appeal process;
(4) whether the Supreme Court has too may cases and cannot enroll the appeal;
(5) the length of the sentence imposed on the Applicant; the shorter the sentence the more likelihood to grant the bail in light of the above factors.

[37] This is not such a case. I say this because, the Applicant has not elicited any factor to show the Court that if he is not granted bail he will be foisted with a fait accompli, in the sense that he would have served his sentence before the appeal is concluded, thereby rendering his appeal nugatory. He did not even so allege. The established facts are that the sentence of the Applicant, having been ordered to run concurrently, he is liable to serve 5 years out of the total sentence imposed. I do not see any likelihood of the

Applicant having served this sentence before the next Supreme Court session, which I take judicial notice of, is statutorily slated for May 2014. This is (6) months away. The Applicant has not alleged any facts to the contrary. The Applicant has therefore failed to demonstrate any likelihood whatsoever that he would have served his sentence before his appeal is determined.

[38] (3) Likelihood of the Applicant absconding from the jurisdiction.

[39] In this regard, the Applicant urged the following facts in his founding affidavit:-

> **11**
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> **"------I aver that I have six (6) children two (2) of whom are attending school in South Africa and therefore still need my support. One attends school at a college at Limpompo where he is studying to become a teacher while the other one is doing Matric at Cefups Academy.**
>
> **12**
>
> **I point out that I have no relatives outside Swaziland and have two (2) homesteads with one being at Ngonini area in the Hhohho District and the other at Luve area in the Manzini District and would therefore not evade the country pending my appeal.**
>
> **13**
>
> **I point out that all my relatives live in Swaziland and I have a wife who is employed by the Ministry of Agriculture at Ntfonjeni RDA the Hhohho District which I aver indicates that I (sic) rooted in the country and would not evade the country pending my appeal."**

[40] Based on the aforegoing allegations of fact, Advocate Maziya contended, that since the Respondents did not controvert these facts, it is thus common cause that the Applicant is not a flight risk. There is no doubt that this is a

consideration. However, speaking for myself, in an application for bail pending appeal after conviction and sentence, this factor cannot standing alone justify bail. This is because the fact of the conviction and sentence by itself, inherently makes the convict a flight risk. Since the Applicant has already been convicted and sentenced to 5 years imprisonment, this in itself makes him a flight risk, more so as he has not appealed against his conviction. He is thus not entitled to bail solely on the grounds he has advanced to show that he is not a flight risk. The Court may be minded to grant him bail on this ground if he shows other exceptional circumstances, such as the prospects of success of the appeal as well as the likelihood that he will have served his sentence before the appeal is heard. See **S V Williams (supra).** These factor are inter-connected and the Applicant has the duty to establish them convincingly. As I have already abundantly shown above, the Applicant has failed to do so.

[41] (4) Applicant's health conditions

On this ground the Applicant contended that he suffers from asthmatic attacks and has in the past been sick with pneumonia, which may be worsened by low temperatures in the prison. Therefore, his continued stay in detention will greatly affect his health condition.

[42] It is incontrovertible that every person, whether on trial or a convict, is entitled to medical care. There is also no doubt that a person can be admitted to bail on grounds of ill health. However, for a medical condition to be such as to ground bail, it must be exceptional, in the sense that it is contagious or it is of such a nature that it cannot be handled within the prison prescints or it is adversely affected by very dire and established circumstances within the prison, which cannot be contained by the Correctional Services.

[43] Speaking about this issue in the case of **Abacha v The State 2002 5NWLR (pt761) 638 per Uwaifor JSC**, the Nigerian Supreme Court made the following apposite remarks which I find highly persuasive:-

> **"It must be made quite clear that everyone is entitled to be offered access to good medical care whether he is being tried for a crime or had been convicted or simply in detention. When in detention or custody, the responsibility of affording him access to proper medical facility rests with those in whose custody he is, invariably the authorities. But it ought to be understood that the mere fact that a person in custody is ill does not entitle him to be released from custody or allowed on bail unless there are really compelling grounds for doing so. See Chinemelu V COP 1995 4 NWLR (pt 390) 467, An obvious ground upon which bail will be granted for ill health is when the continued stay of the detainee, poses a possibility of a real health hazard to others and there are no quarantine facilities of the authorities for the type of illness. A person being tried or who has been convicted of a serious offence will normally be kept or maintained in custody while he receives available medical treatment."**

[44] Furthermore, **Ayoola JSC** in the same case **Abacha (supra),** said:-

> **"Were it the law that an Accused person remanded in custody to await trial is entitled to be granted bail pursuant to a right to have access to a medical practitioner or medical facility of his choice, then, hardly will any accused person remain in custody to await trial. There is no general principle of law affording that right to an accused person remanded in custody. The duty of the state to ensure that the medical needs of persons in custody are met does not create such extravagant right as claimed, that a person in custody is entitled to be treated by a doctor of his own choice. The special medical need of an accused person or convict whose proven state of health needs special medical attention which the authorities may not be able to provide, is then a factor that may be put before the Court for consideration in the exercise of discretion to grant bail. Such need is not brought before the**

Court by mere assertions of the accused or his Counsel but on satisfactory and convincing evidence."

[45] Then, bringing the matter home to this jurisdiction is the case of **Wonder Dlamini and Another V Rex Criminal Appeal Case No. 01/2013.** In that case the Appellants had averred that they suffer from pneumonia and frequent bouts of sinus and that they require high levels of ventilation and protection from colds; they averred that their continuous incarceration is likely to worsen their condition since they cannot receive the required levels of ventilation whilst in custody. They also contended, that their condition may be worsened by the living conditions at the Remand Centre, where they sleep on a mat on the cold floor which cannot protect them from attracting further illnesses. These averments were not challenged by the Respondents who had failed to file an answering affidavit. They were therefore deemed admitted and established. The Supreme Court held that the combined effect of the factors advanced by the Appellants constitute exceptional circumstances warranting bail. Their appeal was upheld. It is important that I note, that this was a bail application pending trial. I refer to it solely to show the factors that may constitute exceptional circumstances under this head. Each case must invariably be treated according to its own peculiar facts and circumstances.

[46] *In casu,* I see no exceptional circumstances in the medical grounds advanced by the Applicant to warrant the bail sought. Asthma is a common disease, and so is pnuemonia. It is a notorious fact that they are not infectious diseases. I take judicial notice of that. Nothing has been put before me to show that the prison authorities cannot take care of these medical needs by providing the Applicant adequate medical assistance. The Respondents in paragraph 12 of their opposing affidavit averred that

the state will take care of the Applicant's medical needs. I take judicial notice of the fact that His Majesty's Correctional Services is now well equipped to take care of the medical needs of its inmates. There is also nothing to show that the Correctional Services is not equipped to take care of the alleged low temperatures. This factor must therefore fail.

[47] Finally, the contention in paragraph 17 of the founding affidavit to the effect that the Applicant is a Magistrate who has served in several Magisterial Districts and thus fears that if he is kept in custody he would be attacked by prisoners whom he had convicted and sentenced during his tenure as a Magistrate, most of whom are incarcerated in the Correctional Institutions, is clearly unsustainable as a factor warranting bail. In response to this proposition, the Respondents contended as follows in paragraph 17 of their opposing affidavit:-

> **"The security of Appellant is a matter which will be dealt with by the prison authorities and in any event the logical conclusion to what is stated herein by Appellant is that a person in the position (sic) Appellant having been convicted of a crime may never be sentenced to a custodial sentence. This is untenable."**

[48] I respectfully align myself with the aforegoing exposition. It is commonsensical.

[49] <u>CONCLUSION</u>

On the whole, the Applicant has failed to advance the requisite exceptional circumstances to warrant his release on bail pending his appeal. This application is unmeritorious. It fails.

[50] ORDER

I hereby order as follows:-

That the Applicant's application for bail pending his appeal to the Supreme Court be and is hereby dismissed.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

……DAY OF ……..….2013

OTA J

JUDGE OF THE HIGH COURT

For the Applicant: Advocate L. Maziya
(Instructed by Attorney S. Bhembe)

For the Respondent: Advocate N. Kades S.C
(Instructed by DPP Chambers)
Assisted by A. Matsenjwa