



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 383/12 (b)

In the matter between:

SELBY MUSA TFWALA

FIRST APPLICANT

EDWARD THEMBA NDWANDWE

SECOND APPLICANT

VS

REX

RESPONDENT

Neutral citation:

Selby Musa Tfwala And Another v. Rex NO (383/12(b))
[2013] SZHC34 (2013)

Coram:

M.C.B. MAPHALALA, J

For Applicant
For Respondent

Attorney M. Dlamini
Senior Crown Counsel M. Mathunjwa

Summary

Criminal Law and Procedure – Bail application – accused charged with offences listed in the Fifth Schedule using a firearm – section 96 (12) (a) of the Act requires the accused to adduce evidence showing that exceptional circumstances exist which in the interests of justice permit his release – section 16 (7) of the Constitution discussed – bail application dismissed.

JUDGMENT
6th MARCH 2013

- [1] This bail application was brought on a certificate of urgency. During the hearing, the Crown advised the court that it was no longer opposing the bail application for the second applicant, and, a Recognisance Form signed by the Crown and its attorney was presented in court; the bail was fixed at E15 000.00 (fifteen thousand emalangeni), with a cash payment of E3 000.00 (three thousand emalangeni) and a surety for E12 000.00 (twelve thousand emalangeni).
- [2] The second applicant was further ordered to report fortnightly on Fridays upon his release to the Manzini Police Station between the hours of 0800 and 1600 hours, surrender his passport to the investigating officer at the Manzini Police Station and not apply for a new passport as well as not interfere with Crown witnesses.
- [3] In his bail application the first applicant submitted that he was arrested by the police on the 24th December 2012 and taken to the Manzini Police Station; he was made to appear in Court on the 27th December 2012.
- [4] He further alleged that at the time of arrest; he was employed in South Africa. He conceded that he has a South African Residence Permit which he lawfully obtained since he had been working there for sometime. He had arrived in Swaziland on the 19th December 2012 for purposes of spending Christmas holidays at home with his family.

- [5] He alleged that he is a Swazi male adult of Bethany area in the Manzini region under Chief Mlobokazana and Indvuna Khalalempi Mndzebele. He has a home at Bethany area where he stays with his wife and four minor children; this house is built on the same piece of land as his parental homestead where his extended family resides. He has a motor vehicle registered in Swaziland. All his assets and life is in Swaziland.
- [6] He argued that he would plead not guilty to the indictment because he never committed the offences for which he has been indicted. He argued that some of the offences were alleged to have been committed when he had already been arrested.
- [7] He undertook to abide by all the terms and conditions imposed if granted bail and he further undertook to attend trial. He argued that he is the only breadwinner in the family and needed to go back to his workplace since that is his only source of income. He further argued that the matter is urgent because undue delay would cost him his job; he further urged the court, in granting his bail, to be considerate with his bail conditions and allow him to continue working in South Africa.
- [8] He also contended that he cannot evade his trial if granted bail and hide in South Africa because the two countries have an extradition treaty; he averred that he has a fixed and stable physical address in South Africa. He argued that

these factors on their own constitute exceptional circumstances as required by section 96 (12) (a) of the Criminal Procedure and Evidence Act. He concluded by stating that the interests of justice favour his release on bail because he would stand trial and will not abscond.

[9] The respondent opposes the granting of bail to the first applicant. In its Opposing Affidavit the respondent has raised a Point of Law that the applicant has failed to comply with the provisions of section 96 (12) (a) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended; in essence the Crown argued that the applicant has not adduced evidence showing that exceptional circumstances exist which in the interests of justice permit his release.

[10] The respondent further argued that the applicant is charged with serious offences using a firearm, and that he also attempted to kill his victims by shooting at them. The crown also argued that the offences for which the applicant is charged are listed in the Fifth Schedule of the Act and require compliance with section 96 (12) (a) of the Act.

[11] On the merits the respondent argued that the applicant is a South African citizen, and that he holds a South African passport No. 483330089 under the name of Sibusiso Twala instead of Selby Musa Tfwala; and, that his place of birth in the passport appears as the Republic of South Africa.

[12] The respondent conceded that the first applicant was arrested at Bethany area in Swaziland but denied that he has a South African resident permit. It was further denied that the first applicant is employed in South Africa and that he lost his job in 2011. The respondent further argued that the applicant's passport shows that he frequents the country regularly which is very strange for a person who is employed; and that it was doubtful that the first applicant is employed at all since he doesn't disclose his place of employment and the nature of his job.

[13] The respondent also argued that it would not be in the interests of justice to admit the first applicant to bail because he is charged with serious offences that carry stiff custodial sentences; he contended that there is overwhelming evidence against him including the use of a firearm in committing the offences which he freely and voluntarily pointed out. It was argued by the respondent that in view of the possibility that he may be convicted; this may induce him to evade trial if released on bail.

[14] The respondent argued that since the first applicant knows the identity of the complainants and the nature of the evidence they will adduce against him, there is a likelihood that he may endanger their safety if released on bail.

[15] It is common cause that the first applicant is charged with two counts of armed Robbery, one count of theft, four counts related to a contravention of the Arms

and Ammunition Act No. 24 of 1964 as amended by Act No. 5 of 1990, six counts of Attempted Murder and one count of Attempted Robbery.

[16] The first applicant filed a replying affidavit arguing that the fact that he is charged with serious offences does not deprive him of his constitutional right to be presumed innocent until proven otherwise. He further argued that he is a Swazi citizen and he annexed a National Identity Card, a church membership card, Swaziland Medical Aid Card, Marriage Certificate of his parents showing they were born in Swaziland and their chiefdom, birth certificates of his father and mother showing that they were born in Swaziland and their National Identity Card of his wife Simangele Phindile Xaba showing that she is a Swazi citizen as well as a confirmatory affidavit of his wife confirming that her husband is a Swazi and that they have four minor children and a home at Bethany area; she further stated that her husband works in South Africa but visits the country regularly.

[17] The first applicant clarified that by virtue of residing in South Africa for a long time he was entitled to a South African passport. I agree that having the passport is not evidence that he is a South African citizen because of the existence in South Africa of the status of permanent residence afforded to those foreigners who have resided there for a specific period.

[18] The first applicant disclosed that at the time of his arrest, he was employed by Dodge Motors in Johannesburg as a contracted employee but was dismissed after his arrest. He denied being found in possession of the firearms and ammunition and insisted that they were seized by the police at a certain homestead and that the owner is on the run from the police; he further denied the pointing out. Similarly, he denied committing the offences listed in the indictment and argued that chances of his acquittal are high; and that nothing would induce him to evade trial.

[19] During the hearing, Counsel argued the Point of Law raised by the respondent together with the merits. The issue for the court to decide is whether the first applicant is entitled to bail in light of section 96 (12) (a) of the Criminal Procedure and Evidence Act No. 67 of 1938 as read with section 16 (7) of the Constitution. Section 96 (12) provides as follows:

“96. (12) Notwithstanding any provisions 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.”

[20] It is common cause that the first applicant is charged with offences some of which are listed in the Fifth Schedule, and, this court has to determine whether exceptional circumstances exist which in the interests of justice permit his release. *His Lordship Magid AJA*, in the case of *Senzo Menzi Motsa v. Rex* Criminal Appeal case No. 15/09 stated the following:

“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”

[21] In the case of *Wonder Dlamini and Another v. Rex* criminal appeal No. 01/2013 at paragraphs 8 and 9, the Supreme Court stated the following which is equally binding in this matter:

“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.”

[22] The amendment to the Criminal Procedure and Evidence Act No. 4 of 2004 brought about a sharp distinction in the law relating to bail in sections 95 and 96 of the Act between the most serious violent offences listed in the Fifth Schedule, the other offences listed in the Fourth Schedule as well as offences mentioned under section 95 (6) of the Act.

[23] Section 95 (6) of the Act deals with offences not covered in the Fourth and Fifth Schedules, and the amount of bail fixed should not be less than half the value of the property. It provides as follows:

“95. (6) Where an accused person is charged with any offence, other than the offences covered by the provisions of this section but not excluding an offence under the Theft of Motor Vehicles Act, 1991, the amount of bail to be fixed by the Court shall not be less than half the value of the property or thing upon which the charge relates or is based upon and where the value cannot be ascertained without any form of speculation the Court may, for purposes of this subsection, without or with the assistance of any person the

Court deems could be of assistance to it, also fix an amount to be the value of the property or such thing.”

23.1 Section 103 of the Act fortifies sections 95 and 96 of the Act and provides the following:

“103. Subject to section 102A, the amount of bail to be taken in any case shall be in the discretion of the court or judicial officer to whom the application to be admitted to bail is made:

Provided that no person shall be required to give excessive bail and the amounts specified under section 95 shall not be construed as excessive”.

23.2 Section 102A of the Act referred to in section 103 of the Act provides, inter alia, that the amount of bail to be given by a magistrate in respect of theft or any kindred offence shall be E500.00 (five hundred emalangeni) if the value of the property in respect of which the offence is committed is E2 000.00 (two thousand emalangeni) or one half of the value of the property in respect of which the offence is committed if the value exceeds E2 000.00 (two thousand emalangeni).

23.3 It should be noted that section 102A of the Act provides that in respect of theft and kindred offences the amount of bail shall be made in cash only; this excludes payment of bail by means of a surety.

[24] Section 95 (1) of the Act provides that the High Court shall be the only court of first instance to consider bail applications where the accused is charged with any of the offences specified in the Fourth and Fifth Schedules or under subsection 95 (6) of the Act. Where the High Court admits the accused to bail in respect of an offence listed in the Fourth Schedule, it shall fix bail in an amount not less than E15 000.00 (fifteen thousand emalangeni) as contemplated by section 95 (3) of the Act. However, where the court is satisfied that substantial and compelling circumstances exist which justify a lesser bail amount, the court will fix bail in an amount less than E15 000.00 (fifteen thousand emalangeni) as reflected in section 95 (4) of the Act.

[25] Notwithstanding the provisions of section 95 (3) and (4) of the Act, an accused person charged with an offence listed in the Fourth Schedule with aggravating circumstances is treated in the same manner as an accused who is charged with an offence listed in the Fifth Schedule. Section 95 (5) of the Act provides that the amount of bail in those instances should not be less than E50 000.00 (fifty thousand emalangeni).

[26] Where an accused person is charged with an offence listed in the Fourth Schedule as well as in section 95 (6) of the Act, the accused has to adduce evidence which satisfies the court that the interests of justice permit his release. Section 95 (8) of the Act provides the following:

“95. (8) 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 grounds under the provisions of section 96 (4) are established.”

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

“96. (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 grounds under the provisions of section 96 (4) 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 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 disrupt the public order or undermine public peace or security.”**

[28] Section 96 (12) (b) also deals with bail applications in respect of offences listed in the Fourth Schedule, and, it provides the following:

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

....

(b) In the Fourth Schedule but not 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 the interests of justice permit his or her release.”

[29] However, the granting of bail in respect of offences listed in the Fifth Schedule is very stringent. Proof of the factors listed in section 96 (4) of the Act is not sufficient. In addition the accused has to adduce evidence showing the existence of exceptional circumstances which in the interests of justice permit his release in accordance with section 96 (12) (a) of the Act.

[30] In South Africa the serious and violent offences are listed in the Sixth Schedule as opposed to this country where they are listed in the Fifth Schedule. Bail in respect of these offences is dealt with by section 60 (11) (a) of the Criminal Procedure Act 51 of 1977, and, it is worded substantially the same as our section 96 (12) (a) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended

[31] The Constitutional Court in South Africa has dealt with “exceptional circumstances” in respect of section 60 (11) (a) of the Act in the 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. The Supreme Court of Swaziland in the case of *Wonder Dlamini and Another v. Rex* Criminal Appeal No. 01/2013 approved and applied the South African Constitutional case as reflecting the law in this country.

[32] At para 12 of the judgment of *Wonder Dlamini and Another v. Rex* (supra), the Supreme Court of Swaziland quoted with approval the South African Constitutional case referred to above:

“12. His Lordship at paragraphs [63] and [64] of the judgment analysed the change to bail applications which has been introduced by the amendment in section 60 (11) (a) of the Act. He stated the following:

‘[63] Section 60 (11) (a) applies only when an accused is charged with one of the serious offences listed in Schedule 6. It is true that the seriousness of the offence, and with it the heightened temptation to flee because of the severity of the possible penalty, have always been important factors relevant to deciding whether bail should be granted. So, too, have been the possibility of interference with the course of the case, and the accused’s propensity to interfere in the light of his or her criminal record. Indeed, those are factors that are expressly mentioned in the list of ‘ordinary’ circumstances contained earlier in section 60.

[64] These are factors, therefore, which in the past would have been considered in determining whether bail should be granted. 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.’ ”

[33] It is apparent from the provisions of sections 95 and 96 of the Act that bail is a discretionary remedy. With regard to bail applications in respect of offences listed in the Fourth Schedule as well as those listed in section 95 (6) of the Act, the accused has to adduce evidence which satisfies the court that the interests of justice permit his release. In respect of offences listed in the Fifth Schedule, the accused has to adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release.

[34] At para 13 of the case of *Wonder Dlamini and Another v. Rex* (supra) the Supreme Court stated the following:

“13. The court has a discretion in each case, to determine whether exceptional circumstances exist. *Kriegler J* put it more succinctly at paragraph 74 as follows:

‘[74] Section 60 (11) (a) does not contain an outright ban on bail in relation to certain offences, but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provisions. What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.’ ”

[35] The argument by the first applicant’s attorney that the court does not have a discretion to refuse bail in light of section 16 (7) of the Constitution of 2005 is therefore misconceived. Section 16 (7) of the Constitution provides the following:

“16. (7) If a person is arrested or detained as mentioned in subsection (3) (b) then, without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that that

person appears at a later date for trial or for proceedings preliminary to trial.”

[36] In paragraph 18 of the judgment of *Wonder Dlamini and Another v. Rex* (supra), 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 interests 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...”

[37] Having considered the evidence before me, I have no doubt in my mind that the first applicant is a citizen of this country by birth and that he has a family as well as a home at Bethany area. It is also apparent from the evidence that the first applicant is no longer employed in South Africa; however, it is not clear when his employment was terminated.

[38] The first applicant has argued that this country and South Africa have an extradition treaty; and that he has a fixed and stable physical address in South Africa. Furthermore, he has undertaken to abide by the bail conditions if granted bail. However, there is nothing in the evidence adduced by the first

applicant which may be said to constitute exceptional circumstances as defined by *Magid AJA in Senzo Menzi Motsa v. Rex* (supra).

[39] *His Lordship Horn JA in S. v. Jonas* 1988 (2) SA SACR 667 (S.E.C.L.D.) at p. 678 stated the following:

“...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...”

[40] In the present case the first applicant has failed to adduce evidence showing the existence of exceptional circumstances which in the interests of justice would permit his release.

[41] Accordingly, the application for bail is dismissed in respect of the first applicant.

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