IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 181/2014

In the matter between:

MLUNGISI MAKHANYA	**1st**	**Applicant**
BONGANI HLANGABEZA GAMA	**2nd**	**Applicant**
NTOBEKO GIDEON MASEKO	**3rd**	**Applicant**
SIZA JABULANI TSABEDZE	**4th**	**Applicant**
BRIAN CLIVE NTSHANGASE	**5th**	**Applicant**
MANGALISO MENZI KHUMALO	**6th**	**Applicant**
BAFANA MABANDLA KHUMALO	**7th**	**Applicant**

And

THE KING **Respondent**

Neutral citation: **Mlungisi Makhanya & 6 Others** ***v The King (181/2014) [2014] SZHC 100(5th May 2014)***

Coram: **M. Dlamini J.**

Heard: **3rd May,2014**

Delivered: **5th May 2014**

Bail application – charge under Fourth Schedule depending on circumstances of case, court may consider in favour of applicants where continued detention of applicants might result in lose of employment or business.

Summary: Seven applicants seek to be released on bail following charges of contravening the Suppression of Terrorism Act No.3 of 2008. The respondent is opposed to their release on the basis mainly that they are facing a serious offence and therefore the likelihood that there might be a flight risk is high.

Brief background

[1] It turned out during the hearing and this appears to be common cause between the parties that the applicants were arrested on the 23rd April 2014 while at the main entrance of this High Court. They were charged under both the Suppression of the Terrorism Act and the Sedition and Subversive Activities Act No. 46 of 1938.

Charges

[2] For purposes of the present application, it is apposite to cite *verbatim* the charges preferred against the applicants which are:

> "*Count 1:*
>
> *The accused 1, 2, 3, 4, 5 6 and 7 are guilty of* ***Contravening Section 11 (1) (a) of The Suppression of Terrorism Act No.3 of 2008.***
>
> > *In that upon or about the 22nd and 23rd April 2014 and at or near Mbabane (High Court main gate, Mbabane Bus Rank and along Mahlokohla Street next to kaZondle) in the Hhohho Region, the accused each or all of them acting individually and / or jointly in furtherance of a common purpose did unlawfully solicit support for and or give support to a terrorist entity, to wit, the Peoples United Democratic Movement (proscribed entity) in the commission of terrorist acts, to wit, chanting*

terrorist slogans, wearing white T-shirts written PUDEMO and reflecting terrorist demands at the back, and also wearing red and black PUDEMO berets and did thereby contravene the said Act.

Count 2:

The accused 1, 2, 3, 4, 5, 6 and 7 are guilty of ***Contravening Section 11 (1) (b) of The Suppression of Terrorism Act No.3 of 2008.***

In that upon or about the 22nd and 23rd April 2014 and at or near Mbabane (High Court main gate, Mbabane Bus Rank and along Mahlokohla Street next to kaZondle) in the Hhohho Region, the accused each or all of them acting individually and / or jointly in furtherance of a common purpose did unlawfully solicit support for and or give support to a terrorist entity, to wit, PUDEMO to the commission of terrorist acts by the said PUDEMO (proscribed entity), to wit, chanting terrorist slogans, wearing white T-shirts written PUDEMO and reflecting terrorists demands at the back, and also wearing red and black PUDEMO berets and did thereby contravene the said Act

Count 3

The accused 1, 2, 3, 4, 5, 6 and 7 are guilty of ***Contravening Section 4 (a) (b) (c) and (e) read together with Section 3 (c) and (e) of the Sedition and Subversive Activities Act NO. 46 of 1938 as amended.***

In that *upon or about the 22nd and 23rd April 2014 and at or near Mbabane (High Court main gate, Mbabane Bus Rank and along Mahlokohla Street next to kaZondle) in the Hhohho Region, the said accused acting individually and or jointly and in furtherance of a common purpose did unlawfully do or attempt to do, or make preparation to do or conspire with other people to do an act with seditious intention, to wit, bringing into hatred or contempt or to excite disaffection against the administration of justice in Swaziland and promote feelings of ill-will and hostility between different classes of the population in Swaziland, by chanting terrorist slogans, wearing white T-shirts written PUDEMO and reflecting terrorist demands at the back,*

and also wearing red and black PUDEMO berets and did thereby contravene the said Act.

Count 4

The accused 1, 2, 3, 4, 5, 6, 7 are guilty of ***Contravening Section 5 (1) read together with Section 5 (2) (a) (i) (ii) and (iii) (b) (c) (d) (e) and (f) of the Sedition and Subversive Activities Act NO. 46 of 1938 as amended.***

In that *upon or about the 22nd and 23rd April 2014 and at or near Mbabane (High Court main gate, Mbabane Bus Rank and along Mahlokohla Street next to kaZondle) in the Hhohho Region, the said accused acting individually and or jointly and in furtherance of a common purpose did unlawfully support, propagate or advocate an act or thing prejudicial to public order, the security of Swaziland or the administration of justice, inciting to violence or other disorder or crime, or counseling defiance of or disobedience to any law of lawful authority, intended or likely to support or assist or benefit, in or in relation to acts or intended acts to prejudice public order or the administration of justice, indicating expressly or by implication any connection, association or affiliation with or support for an unlawful society, intended or likely to bring into hatred or contempt or to excite disaffection against a public officer or any class or public officers in the execution of their duties by chanting terrorist slogans, wearing white T-shirts written PUDEMO and reflecting terrorist demands at the back, and also wearing red and black PUDEMO berets and did thereby contravene the said Act."*

Parties' averments

Applicants

[3] The applicants all describe themselves as Swazi males residing in various places within Swaziland. They undertake to abide by the conditions of bail to be imposed. The first applicant informs court that he is the breadwinner of his extended families. He further avers as an exceptional circumstance warranting his release on bail that he is a director of two companies*viz.*Ntsikelelo Logistics (Pty) Ltd and Mathandis (Pty) Ltd with about ten permanent employees.

[4] The second applicant pleads that he is suffering from chronic ailment and therefore on special treatment. He is also employed as a welfare officer with the S.O.S. Village and is the sole financial supporter of his family.

[5] The third applicant pleads similar exceptional circumstances as the second applicant in relation to his chronic condition. He is in the same employ as second applicant and a sole breadwinner of his own family and extended family.

[6] The fourth applicant attests that he is self employed. He runs agricultural businesses by farming vegetables and chickens. His perpetual incarceration would destroy his business and in turn his livelihood.

[7] The fifth applicant submits on oath that he runs a construction business to support not only himself but his family. He is also on strict diet following his medical condition. He, however, does not divulge his ailment. He attests that he was informed by Correctional Services that they do not provide his diet.

[8] The sixth applicant informs this court that he is under the employ of the Swaziland Government as a nurse. His continued incarceration might result

in his employment being terminated. He has a family which depends upon him for a living and is on special medication which was divulged to the police during his arrest.

[9] The seventh applicant is in the same boat as sixth applicant in that he is in the employ of the Government of the Kingdom of Swaziland although under the Ministry of Agriculture. His health condition demandsdialyses now and again. Such facility is not available in the place of his custody and he is the sole breadwinner of his family.

Respondent's

[10] The respondent articulates its opposition in the following manner:

> *"AD PARAGRAPH 13-15*
>
> *7.*
>
> *May I state that the applicants are not law abiding citizens because they committed the offence well knowing that it was against the law to give support to a terrorist group. Due to the conduct and attitude of the Applicants towards the present government, their release will endanger the public as per their song "Phambilengemzabalazophambile."*
>
> *8.*
>
> *May I state that the state witnesses are police officers who is [sic] always at the High Court gate on daily basis while the Contempt of Court proceedings are going on. If the Applicants are released on bail they will go to the High Court and intimidate those witnesses and also cause confusion.*
>
> *9.*
>
> *AD PARAGRAPH 18-19*
>
> *I admit that the Applicants are facing very serious offences but I deny that there is no evidence against them. The Applicants were given statements of witnesses together with the indictment before filing this application but they have failed to show the Court why they say there is no evidence or in what manner such evidence does not carry value. May I further state that Applicants are not charged with for being terrorists but for giving support or soliciting support to or from a terrorist group being PUDEMO.*
>
> *13.*
>
> *AD PARAGRAPH 22*

May I state that the prospects that Applicants will be convicted are high due to the nature of the available evidence and the sentence to be imposed will be severe and as such will induce Applicants to evade trial. The Applicants are therefore a flight risk. May I further state that Applicants are lawfully kept in custody because they committed offences and they do not meet the requirements to be released on bail as per the Criminal Procedure and Evidence Act No. 67 of 1938 as amended. May I further state that the presumption of innocence does not mean that an offender will be released on bail even when it is not in the best interest of justice to do so.

14.

AD PARAGRAPH 23-26

May I state that the state relies on the police to enforce the law including bail conditions. The conduct of Applicants towards the police has shown that they do not respect the police as they were among the people who caused a blockade at the High Court entrance despite several requests by the police that Applicants refrain from blocking the way to the High Court. It surprises me then if the Applicants allege that there will be means to enforce the bail conditions as bail is granted after due consideration of an applicant's previous conduct. Further, may I state that there is no way to prevent communication between the police and the Applicants because Applicants will go to the High Court gate where the state witnesses are currently based once they are released on bail.

19.

AD PARAGRAPH 5-5.2

May I stat that the Applicant's sickness[sic] not of a unique nature because there are other inmates suffering from the same disease at the Correctional Services and they are being taken care of by the Correctional Services. The mere fact that the Applicant is employed does not entitle him to bail as there are other compelling reasons to keep him in custody.

23.

AD 6TH APPLICANT'S AFFIDAVIT MANGALISO KHUMALO AD PARA 1-6

May I state that I am surprised to hear that the 6th Applicant is a nurse and I wonder why he decided to abandon his patients to give support to a terrorist group being PUDEMO. The 6th Applicant left his work place and participated in the terrorist action well aware that this might have serious implications on his work or employment, he cannot therefore complain about losing his job when this is his own making.

25.

AD PARA 6

May I state that the Mbabane Government Hospital has a dialysis unit and inmates are always taken to this hospital of [sic] the Correctional facility does not have such services."

The respondent end as follows:

"*26.*

May I humbly state that it will not be in the interest of justice to release the Applicants on bail for reasons mentioned above."

Legal Principles

[11] Section 96 (1) (a) of the Criminal Procedure and Evidence Act No.67 of 1938 as amended (CP&E) reads:

"*In any court:-*

(a) *An accused person who is in custody in respect of an offence shall, subject to the provisions of section 95 and the Fourth and Fifth Schedule, be entitled to be released on bail at any stage preceding the accused's conviction in respect of such offence, unless the court finds that it is in the interests of justice that the accused be detained in custody.*"

[12] From the above reading of section 96 (1) (a) it is settled that a court faced with the bail application starts from the premise that bail ought to be granted to the applicant. It is only once it is established that granting of bail might jeopardize the interest of justice that the court should refuse bail. Expanding on this principle of our law, his **Lordship Van Blerk JA** in **Magano and Another v District Magistrate Johannesburg and Other 1994 (4) S.A. 169** at 171 hit the nail on the head when he stated:

> "*The language of the section does not merely give to an accused person the right to apply for bail which he has under the Criminal Procedure Act…but the right to be released from detention with or without bail. That right may only be denied an accused person where the interest of justice require otherwise. … For these reasons I am of the view that accused person does not bear the onus of proving that he should be released from detention, but that the State is required to show that he should be refused such bail because the interest of justice require it.*"

[13] However, section 96 (12) (b) is an exception to this general principle of our law as it reads:

> "*Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to –*
>
> *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 interest of justice permit his or her release.*"

[14] In other words, there is a paradigm shift from the perception that applicants should be released to one to be kept in custody pending his trial unless applicant "*adduces evidence which satisfies the court that the interest of justice permit his or her release*"

[15] Adjudicating on a similar application of the same charge i.e. (Fourth Schedule) **Ota J.** as she then was, in **MfanawenkhosiMbhunuMntshali and Another v The Director of Public Prosecutions (180/13) July 2013 SZHC 154** concluded at page 3:

> "*The onus lies on the applicants to adduce evidence which on a balance of probabilities justify their release on bail in the interest of justice*."

[16] As already highlighted, the respondent strenuously argued that the charges faced by the applicants were of a serious nature. I agree with the respondent in that regard. Generally speaking all criminal charges are serious in their nature although one must add that it is not from the mere reading of a charge that one may infer its seriousness. One has to go further and read the act, commission or omission said to have been committed.

Issue

[17] The issue at hand is whether applicants have discharged the onus on the balance of probabilities.

Adjudication

[18] The respondent as already demonstrated strenuously argued that the applicants are a flight risk. I must add that the respondent also alluded to other grounds such as that the applicants might commit the same offence if released and that they might interfere with the Crown witnesses.

[19] In determining whether the applicants should flee, **Masuku J** in **BrianMduduziQwabe v Rex Criminal Case No. 43/04** articulated at page 3:

> "*Regarding the risk that he might not stand his trial issues that require consideration are the following:*
>
> *(i) how deep his emotional, occupational and family roots with this country are;*
> *(ii) his assets in the country;*
> *(iii) means he has to flee;*

> *(iv) his ability to forfeit his bail deposit;*
>
> *(v) travel documents at his disposal to enable him to flee;*
>
> *(vi) extradition arrangements in case he flees;*
>
> *(vii) inherent seriousness of the offence with which he is charged;*
>
> *(viii) strength of case against him and the inducement offered thereby for him to abscond;*
>
> *(ix) severity of sentence likely to be visited on him; - see S vs ACHESON 1991 (2) SA 805 (NmHC)"*

[20] *In casu*, it is not in issue that all the applicants have their families in the country.This includes the first applicant who, although is said to have both his businesses in South Africa, as supported by his travelling documents, he comes to the country to be with his wife and children almost every weekend.

[21] I note that it is stated of the fifth applicant:

> "*6. May I further state that upon my further investigations in respect of the 5th Respondent (Applicant) I discovered that he is residing in South Africa on the border line at Mkhwakhweni area where the Ntshangase clan is found. 5th Applicant uses informal entry and exit points to Swaziland*."

The fifth applicant then deposed:

> "*7.* ***AD PARAGRAPH 8***
>
> *The allegations thereof are denied and the deponent is put to strict proof thereof. The police themselves have charged Brian Ntshangase as a Swazi. In the indictment he is charged as a Swazi and not a South African. The police are playing double standards."*

[22] It is a notorious fact that the Ntshangaseclan occupy mainly Mkhwakhweni, an area adjacent to the South African border, in the south of Swaziland. I am inclined to accept that the investigator correctly described the fifth applicant as a Swazi.

[23] The factor that all the applicants have their families or emotional ties, as we often say, on its own fortifies the ground that the applicants are rooted in the country and this mitigates the likelihood of evading trial.

[24] The respondent disputed that the second applicant was employed at S.O.S. while second applicant insisted. This court, guided by section 96 (2) (c) which reads:

> "*In bail proceedings the court-*
> *may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced*."

[25] I ordered that the respondent calls the Principal of S.O.S. where second applicant was said to be employed to verify whether he was employed. On the return date, it was confirmed that second applicant is employed by S.O.S.

[26] On behalf of third applicant, Mr. MaswatiDludlu on oath informed the court that third applicant was a member of Arterial Network of Swaziland an umbrella body for Artist in Swaziland and that third applicant actually participated by producing artistic work. I accept this evidence demonstrating that third applicant is in gainful business.

[27] The averments by fourth and fifth applicants that they are businessmen were not disputed by respondent and therefore stand to be admitted.Respondent did not controvert the assertion by sixth and seventh applicants that they are servants of the Crown.

[28] On the above aspect, the applicants deposed on a similar fashion:

> "*My continued incarceration has a potential of causing me to lose my employment*."

[29] Her Ladyship, **Ota J** in **BhekiMadzinane v The King, Case No. 224/2013** paragraph 5 articulates on the ground of employment:

> "*5. It is very imperative that the court does not shut its eyes to the crucial factor of Applicant's job and the likelihood of his losing same by reason of his continued incarceration. We must always bear in mind that an Accused person is presumed innocent until he pleads or is proven guilty. Therefore, for him to suffer loss of employment prior to his conviction, if that were to be the result of his trial, will not serve the course of justice. As this court observed in the case of **SiphoGumedze and five others v Director of Public Prosecutions, Civil Case No. 135/2004, para [13]**, with reference to the text **Criminal Procedure, Handbook, 5th Edition para 137,** by**Bekkeretal**, where the learned editors made the following commentary on Section 60 (4) of the South African Penal Code which is in parimateria with our Section 96 CP&E, as amended:-*
>
> > *"The accused who … is presumed to be innocent is subject to the punitive aspect of detention. The effect of remaining incarcerated will probably result in the loss of his job, of his respect in the community …even if (later) acquitted …And if detention has resulted in the loss of the (accused's) job, he may not be able to even retain an attorney. The (accused) who is denied the right to bail will feel that effect at the most important level of Criminal Procedure … at the trial level…"*

[30] I see no reason why this ratio should not extend to accused person who is self employed as first, fourth and fifth applicants. On the basis of her Ladyship **Ota J's***dictum*, it would not serve the interest of justice to continue detaining the applicants as correctly observed that continued detention may result in the accused "*not able to even retain an attorney*."

[31] A further factor that requires attention is the ability of the applicants to flee. Against this ground is the strength of the Crown's case, the stringent penalty or seriousness of the charge.

[32] A perusal of the four counts reflects that the mischief alleged against applicants is that they unlawfully solicited or gave support to a terrorist entity i.e. PUDEMO by wearing T-shirts with inscription "*PUDEMO*". Nothing turns on enchanting of terrorist slogans because there are no specific words mentioned in the indictment indicating the same. Further, although they face four counts, two under the Suppression of Terrorism Act and two under the Sedition and Subversive Activities Act, only one act is reflected on all four counts and that is of wearing T-shirts and berets belonging to the proscribe entity PUDEMO. Counsel on behalf of respondent during the hearing submitted that the applicants are charged with an offence of violence. When pressed by this court to demonstrate the same from the charges, Counsel informed the court that he was withdrawing such submission. On this, nothing much was left to be said on the seriousness of the charge or penalty.

[33] The respondent has asserted that the applicants are inclined to interfere with witnesses. It is common cause that all the witnesses in the criminal offence are police officers. The likelihood that they might interfere with the Crown's witnesses is therefore remote.

[34] I juxtapose the present case with that of **MfanawenkhosiMbhunuMntshali and Another***supra*. In **Mfanawenkhosi's** case, the applicants were facing a similar charge as applicants *in casu* for contravening the Sedition and Subversive Act. They were alleged to have carried a banner with inscription calling upon everyone not to go and cast their votes. This offence was said to have been committed during the election period, a critical time in the country. The learned Judge considered the ground, *viz*. that the two applicants (just like in the present applicants) were in gainful employment and that their continued detention might result in them loosing their employment.*In casu*, as already shown, the applicants are said to have worn T-shirts and berets belonging to a PUDEMO. If the applicants in **Mfanawenkhosi's** case were granted bail, owing to the circumstance of their case, I see no reason why in the circumstances of this case, the seven applicants should be denied bail.

[35] In fixing the bail amount, I am guided by **Mfanawenkhosi's**case and the personal circumstances of the present applicants.

[36] In the premises the following orders are entered:

1. Applicants are granted bail with the following conditions:

   (i) Bail amount is fixed at E15,000 each;
   (ii) Each applicant is to deposit with the Treasury Department a cash sum of E5,000.00 and provide surety for the balance;

   (iii) All applicants are ordered to submit all their travelling documents or passports to the head of investigation team and not apply for any. However first applicant is granted leave to

retain one of his travelling documents for purposes of attending only to his employment in South Africa;

(iv) Applicants are ordered to report to Mbabane Police station, Lukhozi Department once every last Saturday of each month-end between the hours of 9.00 a.m. to 3.00 p.m. commencing end of May, 2014;

(v) Second to seventh applicants are ordered to remain within Swaziland until finalization of their trial;

(vi) All applicants are ordered to submit their residential addresses to the head of investigating team;

(vii) All applicants are ordered to appear in court upon service of court process;

(viii) Should any applicant be found to have violated any of the above conditions, his bail shall be cancelled forthwith and bail amount forfeited to the Crown.

M. DLAMINI
JUDGE

For Applicants : S. Gumedze

For Respondent : M. D. Nxumalo