IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.132/15

In the matter between:

MIKE THEMBA NDLOVU 1st Applicant

JUSTICE MANGOSUTHU MZIZI 2nd Applicant

And

THE COMMISSIONER OF POLICE 1st Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS 2nd Respondent

Neutral citation: *Mike Themba Ndlovu & Another vs The Commissioner of Police & Another (132/2015) [2015] SZHC 105 (Extempore 24/03/15, Written 19/06/15)*

Coram: Hlophe J

For the Applicants: Mr. M. S. Dlamini

For the Respondents: Miss. N. Masuku

Date Heard: 24 March 2015

Date Delivered: Extempore on 24/03/15. Written reasons on 19/06/15

Summary

Bail application – Applicants arrested in execution of a warrant of arrest and charged with two counts of contravening certain Sections of the Prevention of Corruption Act No. 3 of 2006, theft as a continuing offence as well as an alleged contravention of certain Sections of the Legal Practitioners Act – Applicants applied for bail on an urgent basis contending that they were innocent of the crimes and prayed that they be released on bail undertaking to abide all the terms this court would attach to such release – Applicants contend money deposited into their trust account was deposited in the cause of business and it was privileged under attorney – Client privilege – Respondents opposed application and claimed that their investigations are still incomplete but failed to divulge what it is they were still investigating particularly in light of a comprehensive charge sheet having been served on the accused – Applicants having been arrested pursuant to a warrant of arrest, upon the court being satisfied of a prima facie case against them – Respondents eventually concede per counsel during argument that there was no basis for not releasing the Applicants on bail – Whether an accused who has been arrested can be released before the lapse of 48 hours – Whether an arrested accused person can be released on bail before he makes a court appearance – Whether a case is made for bail in this matter – Whether state entitled to arrest, keep people in custody and then investigate – Under what circumstances can it be proper to

investigate after an arrest – Whether a blanket rule allowing arrest before investigation is tenable or not – Court of the view Applicants have made a case for the reliefs sought – Bail granted.

JUDGMENT

[1] The Applicants are partners in a Law firm practising under the style Masina Ndlovu Mzizi Attorneys with offices in Manzini. The Applicants are also admitted attorneys of this court. On the 24th March 2015 the Applicants instituted the current proceedings under a certificate of urgency, mainly praying for an order of this court admitting them to bail and awarding them costs in the event of an unsuccessful opposition to their application.

[2] The matter served before me as Duty Judge of that week. When it was called in court, the Applicants' counsel insisted on the matter being heard there and then as he contended investigations were complete given that the Applicants had already been given a detailed charge sheet which they annexed to their application. The Applicants' counsel further contended that they were, as at that stage of the proceedings, presumed innocent.

Furthermore their right to liberty as guaranteed in the constitution, was unjustifiably being compromised, they alleged.

[3] It was agreed between the parties that in view of the apparent urgency, the answering affidavit be filed by 1700 hours that day with the replying papers being filed by 1800 hours later so that the matter could be argued that same day. These time frames were adhered to with regards the filing of the papers and the matter was proceeded with in terms of this arrangement.

[4] I must say I find it imperative to state that while Applicants' counsel was arguing that the matter be proceeded with there and then, despite the Respondent having not yet filed its opposing papers, I had *melo mutu* enquired whether or not the police were not entitled to 48 hours of investigation after arrest before bail could be applied for as I recalled a mention of such number of hours in one or more statute Books or the constitution, without then being sure of its *ipsisima verba* or its legal effect. As indicated this was a question calling for a closer look at the relevant law and was by no means conclusive on the issue whether bail could or could not be entertained and perhaps even be granted before the lapse of the said period. I must admit as well that I had to look up at the law closely in that regard, which is why I allowed the filing of further

papers and the fixing of time limits as agreed between the parties and as referred to above. The fixing of these time limits had the effect of acknowledging the urgency of the matter while at the same time affording both parties an opportunity of placing their cases before court.

[5] As shall be seen later on in this judgment, the Respondent's case as pleaded and argued had as its essence this contention about Respondent's entitlement to 48 hours for investigation after arrest before the matter could be taken to court and bail to be applied for, with the averment being made that this court had no power to entertain and grant a bail application before the lapse of the said period after the applicant's arrest.

[6] The Applicants' application was founded on the founding affidavit of Mike Themba Ndlovu; with his co-applicant, Mr. Justice Mzizi filing another one as well. I must say this is irregular. In my understanding there should not be two founding affidavits in a matter. The proper position is for there to be filed only one founding affidavit by the main deponent, with the other Applicant or Applicants as the case may be filing a confirmatory or a supporting affidavit, depending on what such other Applicant wishes to say in his own affidavit; that is whether he merely wants to confirm what has been said by his co-applicant, in which case he files a confirmatory affidavit or he wants to go further and

support the case presented by the other Applicant in terms of the founding affidavit in which case he would file a supporting affidavit in which he would elaborate and say much more than merely confirm.

[7] The case made by the Applicants in their papers was essentially that they were arrested earlier on that day, around 10 o'clock, and taken to the Matsapha Police Station where they were kept in custody. At the time of their arrest the Applicants averred that they were given the charge sheet annexed to their application which they both described as detailed and indicative of completed investigations. They contended to have been charged with four counts, which can be described as the alleged violation of Section 41 (1) and Section 12 (1) and (2) as read with Subsection (3) (a) of the prevention of Corruption Act No.3 of 2006; Theft as a continuing offence as well as the alleged violation of section 24 Bis (1) or alternatively Section 24 Bis (2) of the Legal Practitioner's Act which are both to be read with Section 24 sext of the same Act.

[8] At the heart of all these charges is said to be a sum of E190 000.00 which was allegedly deposited into the Trust Account of the Applicants aforesaid Firm of Attorneys on behalf of a certain client of the Firm. It turned out that the said sum of money was part of money stolen or diverted from the funds of the Swaziland Broadcasting And Information

Services hence the charges of violating the sections of the prevention of Corruption Act referred to above; as well as that of Theft of the same amount of money given that the said amount was alleged to have been stolen yet theft was in law a continuing offence. The Applicants were also accused of failing to disclose the information required by the Anti-Corruption Commission with regards the depositing of the same amount of money into their Trust Account when asked to do so by the Commission as well as with regards the same amount in failing to keep their Books of Accounts in accord with the requirements of the Legal Practitioners Act.

[9] In their application, the Applicants inter alia asked for an order admitting them to bail and for a costs order in the event of an unsuccessful opposition to their application. In support of their application, the Applicants denied having committed the said offences, averred their innocence and disclosed that they were going to plead not guilty during their trial. They alleged the type of prejudice they, and their clients were going to suffer if not released on bail, was immense and that such prejudice could be obviated through their being admitted to bail. In short they contended it was going to be in the interests of justice to have them released on bail.

[10] They contended further that the state had had sufficient time to investigate their matter considering the letters exchanged between the parties which were annexed to the application and indicated months of engagement between the parties before their eventual arrest. They contended that in law, the crown was not allowed to keep accused persons in custody and then investigate afterwards. Instead they contended, the opposite was true.

[11] It merits mention at this point that it is not in dispute that the arrest of the Applicants came about in execution of a warrant of arrest issued by the Chief Justice following an application for the issuance of same made by the Anti-Corruption Commission. It can never be disputed that in such instances, particularly where the arrest is a culmination of an apparent lengthy period of investigation, the court would issue such a warrant after having satisfied itself of a prima facie case against the person being arrested. Otherwise the entire process would end up being opened to abuse if people would be arrested in execution of a warrant issued under such circumstances and still be kept in custody because some undisclosed investigations were still being conducted. It could be that there are instances where investigations would be justified after arrest on a warrant, but these instances would no doubt have to be few and far apart and where they occur, it ought to be fully explained, why that is the case

and the crown ought to be willing to disclose what is being investigated and why it could only be investigated after the accused person has already been arrested. I do not think that the 48 hours period was in a way meant to be some period of keeping accused persons in custody every time after arrest. It seems to me that to allow it to happen like that would be tantamount to, in a way, imposing some pre court appearance punishment of an accused person. I have no doubt such an approach would have a chilling effect on the constitutionally guaranteed right to liberty.

[12] The Applicants' application was opposed by the Respondents. The opposition to the application was contained or expressed in a brief answering affidavit filed by the investigating officer. The essence of the said opposition was that the Respondents were still investigating and that they were entitled to keep the Applicants in custody for at least some 48 hours which they alleged they were afforded by the constitution to an accused person in custody before producing him in court or before such a person could apply for bail. It was contended that the giving of the charge sheet to the Applicants was merely for their information of the reasons for their arrest as required in terms of Section 16 (2) of the Constitution of Swaziland and not an indicator that those were the charges they were to face. In other words giving the Applicants the charge sheet did not mean that the investigations were now complete, it

was contended. As regards the alleged entitlement to keep the Applicants at least for 48 hours, the import in the Respondents assertion was that no bail application can be brought before the lapse of the said period. In this regard reference was made to Section 16 (4) of the constitution of Swaziland, which according to the Applicants was authority or was a basis for their assertion. I deal at length and in depth with the correctness or otherwise of this assertion, further down in this judgment.

[13] It is worthy of note that other than a bare assertion that investigations are ongoing; the Respondent does not take the court into its confidence on what aspect of the matter the investigations are still ongoing including why these investigations could not be concluded prior to the arrest of the Applicants as they were arrested in execution of a warrant of arrest issued after the specific offences they were alleged to have committed were already prima facie investigated, given the detailed nature of the charge sheet and the time the investigations had taken as gleaned from the correspondence exchanged between the parties on the issue, prior to their arrest.

[14] In their replying affidavit the Applicants denied that there was in law any requirement that no bail application can be moved before the lapse of 48 hours subsequent to an arrest. The Applicants contended that not only had the respondents sought and obtained all information they needed from them but they had even obtained files allegedly containing privileged attorney – client information as well over and above their having taken all bank statements, cheque books and returned cheques relating to the files belonging to the Applicant's alleged client. It was contended as well that there was no provision not even an indirect suggestion by both the Constitution and the Criminal Procedure And Evidence Act directing that bail cannot be applied for and be granted within 48 hours. Instead, it was contended, Section 16 (7) of the Constitution and Section 96 (1) and (2) of the Criminal Procedure And Evidence Act of 1938 as amended, provided that an accused person held in custody was entitled to be released on bail at any stage prior to his conviction.

[15] The parties initially maintained their foregoing positions during the argument or hearing of the matter. I must however bring it to the fore that later on in her submissions, counsel for the Respondent conceded that they, as the crown, had no basis for their opposition to the grant of bail to the Applicants and that the fact that 48 hours had not lapsed was not a bar

to bail being granted in an appropriate matter, which this one was. In fact she sought to explain that they had meant to produce the accused persons before the Magistrates court in Manzini that very day where they would have been at liberty to apply for and possibly obtain bail but could however not do so because the Applicants instituted the present proceedings which meant that they should then concentrate on the said proceedings and be derailed from producing them in court where they could have applied for bail. The only value in this assertion was, from the court's point of view, the realization that the fact that 48 hours had not elapsed was not on its own a basis in law to keep the Applicants in custody unless there were other sound and valid reasons for doing so.

[16] From these assertions, it can only mean that the opposition of the Applicants' bail application was based on a mistaken belief in the meaning and effect of Section 16 (4) of the constitution or an outright abuse of power. I was, however not interested in determining what the real motive was given the clear concession by Miss Masuku referred to above. As she is an officer of this court, who I have no reason to assume otherwise, I will deal with the matter on the basis that the opposition of the bail application was a result of the initial misunderstanding of the meaning and effect of Section 16 (4) of the constitution with regards the entitlement or otherwise of the crown or police to keep accused persons

in custody at will before the lapse of 48 hours of their arrest. I otherwise deal at length with this aspect of the matter later on in this judgment.

[17] I must otherwise indicate that after listening to the argument made before me including having read the papers filed of record and having considered the applicable law as well as taking into account the fact that the application was about a matter of the deprivation of the accused's liberty and the concession made by the Respondent's counsel, I there and then granted the Applicants' application attaching thereto the conditions set out below in the executive part of this judgment. As I did so I clarified that I was to avail my reasons for my decision or order in due course. This text should therefore be understood in that light.

[18] In A. V. Lansdown and J. Campbell's book titled, **The South African Criminal Law and Procedure, Volume V 1982, Juta and Company**, at page 311, the purpose of bail is described in the following words, which is what guided this court in the determination of this matter:-

> *"The function (of bail) is the safe guarding of personal liberty by enabling a person held on a criminal charge to regain his freedom pending the determination of the allegations against him".*

Further on, on the same page the said writers are recorded as having said the following, still emphasizing the need to have an accused person allowed his liberty:-

> *"It is of some significance that bail is …[a] machinery for the protection of the liberty of the subject against <u>unnecessary</u> or <u>avoidable</u> pretrial detention…"(underlining mine)*

[19] The significance of these excerpts is, in my view, the fact that an unnecessary or avoidable pretrial detention or incarceration should be avoided where the accused's attendance in court can be secured by other means such as a release on bail without it having an adverse effect on the interests of justice.

[20] ***In R v Mark M. Shongwe 1982-86 (1) SLR 193***, there was emphasized a general principle of our law with regards the grant of bail in the following words:-

> *"If there is no likelihood that the accused will not stand trial if released on bail or that he will interfere with witnesses or otherwise hamper or hinder the proper course of justice, he will normally be granted bail".*

In the present matter I considered these aspects and concluded that there was no likelihood of any of them occurring which meant that the application of the general rule in their favour as stated in the foregoing excerpt had to follow. The ground initially relied upon was that the investigations were not complete. I have already indicated that other than this bare assertion, there was no disclosure in what way the investigations in a matter of accused persons charged with contravening the Prevention of Corruption Act of 2006 such that they were arrested after the issuance of a warrant of arrest by this court, were in complete, just as there was also no disclosure on what it is that was being investigated. Or in what way the investigations were said to be incomplete.

[21] An arrest in matters of this nature ought not only follow the issuance of a Warrant of Arrest as a result of which the court issuing same should be satisfied of the case against such accused person, but the Act itself specifically provides per Section 13 (1), (2) and (3) that an officer authorized to arrest a person under this Section, shall not be entitled to do so unless he first obtains a Warrant of Arrest signed by a Judge upon him being satisfied that a prima facie case has been made or established. Further in terms of Subsection (5) of the same Section, once arrested, a person should be taken to court within a reasonable time.

[22] What I have stated in the foregoing paragraph is a direct paraphrase of Section 13 (1) (a) as read with Section 13 (2) and Section 13 (3) (c) as well as Section 13 (5) of the Prevention of Corruption Act of 2006. In my understanding the only import to conclude from the said section is that it can never, in a matter commenced in the manner stated above, be said that the person arrested would, after having been so arrested as a result of a Warrant of Arrest issued after a court was satisfied with the existence of a prima facie case, be said that the accused person is then to be kept in custody because some undisclosed investigations are still being conducted. I am sure this is not what the Legislature intended.

[23] I am convinced that for an accused person arrested on the basis of a warrant of arrest, investigations after his arrest and incarceration would have to be disclosed where a challenge to the continued incarceration of the accused person is made so that the court can look at it and determine whether or not that is indeed the case. It would in my view be even more onerous on the part of the crown where a fully-fledged charge sheet has already been given to the Applicants and the intended investigations are not disclosed yet the arrest of the accused followed the satisfaction of a court of law that there was a prima facie case as confirmed in a warrant of arrest of the accused person.

[24] In ***S v Maharaj and Another 1976 (3) SA 205 (D) at 207 F-H***, the court had the following to say on an accused person's liberty vis-à-vis the entitlement of the state to take away same:-

> *"It is a fundamental requirement of the proper administration of justice that an accused person stands trial and if there is any cognizable indication that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence… <u>But if there are no indications that the accused will not stand trial if released on bail or that he will interfere with witnesses or otherwise hamper or hinder the proper course of justice, he is prima facie entitled to and will normally be granted bail"</u>. (Underlining is mine)*

[25] There was, as observed above, not even a suggestion that the Applicants in this matter were unlikely to stand trial if released on bail just as there was none they were going to interfere with investigations or that they were going to in any way hamper or hinder the course of justice. From this point, and as stated above I was not convinced there was a sound reason not to accede to the Applicants' request to be admitted to bail.

[26] According to Section 16 (1) (d) and (e) of the Constitution of Swaziland, an accused person can be deprived of his liberty in instances where that deprivation of liberty is in execution of an order of a court to secure his attendance in court or where he is suspected of having committed a crime or is suspect of being about to commit a crime in Swaziland. There is no doubt that the Applicants were arrested because an order of court (warrant of arrest) had issued directing that they be arrested and produced in court or because they were suspected of having committed a crime.

[27] Such an arrest is however not an end in itself. According to Section 16 (3) of the Constitution; a person who is arrested or detained for the purpose of bringing him to court in execution of an order of court or because he is suspected of having committed an offence, should be brought before a court of law without undue delay. This is expressed as follows in the said sections:-

> *" 16 (3) A person who is arrested or detained:-*
>
> *(a) For the purpose of bringing that person before a court in execution of the order of a court; or*
>
> *(b) upon reasonable suspicion of the person having committed, or being about to commit, a criminal offence*

shall, unless sooner released, be brought <u>without undue delay</u> before a court" (underlining is mine)

[28] Arguing that there was no undue delay in bringing the Applicants before court, Respondents counsel initially submitted that 48 hours had not yet elapsed. She argued that the crown was entitled to 48 hours of investigations and that the Applicants were not entitled to move a bail application before the lapse of that period. Asked what the basis of that argument was, Miss Masuku cited Section 16 (4) of the Constitution. The said Section reads as follows:-

"Where a person arrested or detained pursuant to the provisions of Subsection (3), is not brought before a court <u>within forty-eight (48) hours of the arrest or detention</u>, the burden of proving that the provisions of Subsection (3) have been complied with shall rest upon any person alleging that compliance. (Underlining is mine)

[29] I cannot agree with Miss Masuku in this regard. The wording of Subsection (4) does not; in my reading of it prohibit the granting of bail to an accused before the lapse of 48 hours where he can show it was in the interest of justice to release him before the lapse of that period. It in fact specifically provides that he should be produced in court within 48 hours and not after the lapse of that period. In fact if he is not brought

before court within that period, the crown has a duty to justify such incarceration. In other words the onus to release an accused person before the lapse of 48 hours is on the Applicant but after 48 hours it shifts to the person contending for his continued incarceration, often the crown or the state. The Subsection therefore does nothing to limit the requirement of Section 16 (3) which is that people arrested pursuant to the execution of an order of court, or those reasonably suspected of having committed an offence ought to be produced in court without undue delay.

[30] I therefore agreed with the submissions by Mr. Dlamini for the Applicants that there is no provision of any law to the effect that an accused person cannot apply for bail within 48 hours. I agree that if anything Section 95 (2) empowers this court to release an accused person on bail at any stage of proceedings even before the lapse of 48 hours in a befitting case. In this regard, the section concerned provides as follows:-

> *"95 (2) Notwithstanding any other law the High Court may subject to this section and Section 96 of this Act, at any stage of any proceedings taken in any court or before any magistrate in respect of any offence, admit the accused to bail".*

[31] The Respondents opposed bail on the ground that investigations were not complete. I have pronounced myself on what ought to be alleged and proved to sustain such an assertion. A bare assertion cannot in my view suffice. It should always be borne in mind that the General Rule is that expressed in the following words in ***S v Bennet 1976 (3) SA 652 (c)***:-

> *"The state cannot merely arrest in order to complete its investigations. There must be a reasonable possibility that the accused will, not may, interfere with investigation"*.

In as much as no rule of thumb can be legislated to the effect that no arrest can be made where investigations are not complete; no such rule can be legislated that no accused can be released where investigations are not complete. It all depends on the circumstances of each matter. It is imperative to allege and prove how the accused person is going to hinder or temper with the said investigations including what the said investigations relate to.

[32] It was for the foregoing reasons that I came to the conclusion that the Applicants' application ought to succeed. For certainty's sake, I recorded the following order on the file, which I hereby repeat:

32.1 The Applicants be and are hereby granted bail subject to the following terms:-

32.1.1 The Applicants are to each pay a cash deposit in the sum of E3000.00 each.

32.1.2 The Applicants are to each provide a surety or sureties to the amount of E12 000.00.

32.1.3 The Applicants are to report to the Manzini Police Station once a month on the first Friday of each such month beginning on the first Friday of their release from custody so that they may be given further orders about appearing in court if they would not have been given such orders or directives through the usual court processes by then;

32.1.4 The Applicants are to appear in court whenever they are required to do so through the usual court processes.

32.1.5 The Applicants are not to interfere with crown witnesses nor are they to do anything that hinders the course of justice.

32.2 Given the peculiar circumstances of the matter, particularly the lateness of the hour, which made the payment of the bail deposits and the determination of the suitability of the sureties for the Applicants in the normal manner impossible, this court made the following order:-

32.2.1 The bail deposits to secure the Applicant's bail are forthwith to be paid at the Matsapha Police Station for onward transmission to the Swaziland Revenue office.

32.2.2 This court has determined that the Attorneys who are otherwise the officers of this court, presented as sureties for the Applicants, whose names are listed herein below, are suitable for the task:-

32.2.2.1 Mr. N. E. Ginindza (Attorney) for the first Applicant.

32.2.2.2 Mr. Loyd Mzizi (Attorney) for the second Applicant.

N. J. HLOPHE
JUDGE - HIGH COURT