IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.133/2018

In the matter between:

SIBUSISO NELISA HLATSHWAKO **APPLICANT**

and

THE KING **RESPONDENT**

Neutral citation: ***Sibusiso Nelisa Hlatshwako v The King*** **(133/18) [2018] SZHC 99 (18th May, 2018)**

Coram: **M. Dlamini J.**

Heard **:** **17th May, 2018**

Delivered **:** **18th May 2018**

Civil - ***bail – exceptional circumstances – what is ordinary in one case may turn out to be exceptional in another – each case could be considered on its own merit***

- ***Applicant to first satisfy the requirements of section 96(12)(b) before establishing exception circumstances under section 96(12)(a)***

- ***before I could embark on the question of exceptional circumstances is to assess the evidence before me with the view as to ascertain whether it is reasonably probable. For no court of law is to accept evidence which is palpably improbable.***

Summary: Is it in the interest of justice to have the applicant detained in custody pending finalisation of his trial? This is the toll order facing this court following the application by the applicant for his release from custody which is strenuously opposed on behalf of the respondent.

Exceptional circumstances

[1] It suffices to point out that following a stand-off, the Legislature[1] in its wisdom introduced sections 95 and 96 to regulate matters of bail in this country. Serious offences were categorised as falling under the Fourth and Fifth Schedules by this amendment to the Criminal Procedure and Evidence Act, No. 67 of 1938 (the Act). An inroad to the common law principle governing bail was evident by a new concept "exceptional circumstances" where the offence fell under the Fifth Schedule. The concept "exceptional circumstances" in the amendment of the Act, was described by **MCB Maphalala CJ** [2] as introducing "*a more stringent and rigorous test*" in bail matters. Although the Legislature cautiously and conclusively enumerated in details variables to be considered in the determination

[1] was not a party to this stand-off
[2] In the DPP v Bhekwako Meshack Dlamini and Others Crim Appeal 31/2015 at para 23

of bail, it fell short in defining or identifying factors conceptualising "exceptional circumstances". Noble jurists, both in this jurisdiction and South Africa[3] have attempted to define and identify "exceptional circumstances".

[2] **Magid AJA**[4] defined "exceptional" as follows:

> "*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*".

[3] **Ramodibedi CJ**[5] with reference to **Horn JA**[6] pointed out:

> "*The term "exceptional circumstances" is not defined. <u>There can be as many circumstances which are exceptional as the term in essence implies</u>. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness must be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, <u>to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance.</u> Where a man is charged with a commission of a Schedule 6 (Schedule 5 in our jurisdiction) offence when everything points to the fact that he could not have committed the offence because e.g. he has a cast-iron alibi, this would likewise constitute an exceptional circumstance.*

[4] **A.J. Rall AJ**[7] considered a number of cases where the term "exceptional circumstances was defined. The learned judge started by pointing out the section

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[3] Following that our sections on bail are *pari materia* to that of South Africa
[4] In Senzo Menzi Motsa v Rex Appeal Case No.15/2009 at para 11
[5] In Wonder Dlamini and Another, Crim. Appeal No. 01/2013 at para 15
[6] In S v Jona 1998 (2) Sa SACR 667 at 678
[7] In Mazibuko and Another v jS 2010 (1) SACR 433 (KZP) (19th November, 2009)

listing the variables to be considered and cited **Hugo J**[8] who opined that where a number of the factors therein are in favour of the applicant, that on its own would consists of exceptional circumstances. For instance if the court where to consider whether the accused would not interfere with witnesses, stand his trial, or had cooperated with the police upon arrest, the learned judge considered that such would be exceptional circumstances.[9] **Rall AJ**, finding support from **S v Yanta** [10] alluded as an exceptional circumstance where there is "*the lack of existing evidence implicating the accused in the charge"*. The learned judge was however quick to point out that the list alluded to was not conclusive of exceptional circumstances. Each case ought to be considered on its own merits. In other words, it does not mean for instance that where the prosecutions' case is weak, or where there is no evidence implicating the accused, it is a certain case of exceptional circumstances. **Rall AJ** then pointed out:[11]

> "*It was held by Comrie J in Mohammed's case, that "exceptional" has two shades or degrees of meaning. It can either mean unusual or different, or markedly unusual or specially different. Although Comrie J held that it was not necessary to plump for one or the other of the two shades of meaning, he appeared to place the emphasis <u>on the degree of deviation from the usual.</u>"*

[5] The learned judge then quoted Comrie J at page 515 as follows:

> "*So the true enquiry, it seems to me, <u>is whether the proven circumstances are sufficiently unusual or different in any particular case</u> as to warrant the applicant's release. And "sufficiently" will vary from case to case.'*

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[8] S v Khan 7200/1998
[9] See para 8 N8
[10] 2000 (1) SA CR 237 at 243H-244a
[11] At pare 15

[6] He then wisely propounds on the word "exception[12]:

> *"For the circumstance to qualify as sufficiently exceptional to justify the accused's release on bail, it must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong or compelling. The case to be made out must be stronger than that required by subsection (11)(b) (*i.e. 12(b) in our instance*), but precisely how strong, it is impossible to say. More precise than that one cannot be. Applying this approach, the process of deciding a bail application would be the same as in the case governed by subsection 11(b), save that the additional requirement of exceptional circumstances must be satisfied. <u>This means that if an accused does not satisfy the subsection 11(b) test, it is not even necessary to consider whether the additional requirement imposed by subsection 11(a) has been met.</u>"(*my own explanation)

[7] The learned judge proceeded to eloquently sum up the above position as he pointed out that ordinary circumstances may be described as exceptional because they are in an exceptional degree. Prior he had given a simple example of a musician and pointed out that if he held characteristics in his music which were exceptional, it could be said that even though musicians are ordinary, the particular one held exceptional qualities. I understand the learned judge to be saying that what may be ordinary in one circumstance, may turn out to be exceptional in another context. It is therefore undesirable that one must identify a particular instance and conclude that it is exceptional or that it is not exceptional.

<u>Case at hand</u>

[12] At para19

[8] Turning to the present case, I must point out from the onset that the applicant having deposed in his founding affidavit that the charge of murder was one falling under the Fourth Schedule, the responded contended in its answering affidavit that it was a Fifth Schedule offence. Much argument was put on this issue. The Director of Public Prosecutions later filed a written confirmation in terms of section 96 (13) (c). In order to trade on safe waters, the applicant applied for leave of court to file a supplementary affidavit alleging exceptional circumstances. I granted the application for leave following that the applicant had pointed out in the founding affidavit that it viewed the charge as one under the Fourth Schedule. This ought to have prompted the Director of Public Prosecution to file the written confirmation. However, it did not do so until when the matter was argued before me and the applicant pointed out that if it was indeed falling under the Fifth Schedule, the DPP would have filed the written confirmation as per section 96 (13) (c) rather than for respondent to rely on the answering affidavit of the investigator. It is then that the respondent jumped up to apply that it be granted leave to file the said confirmation. The dictates of natural justice therefore were that the applicant must too be given that equal chance to supplement his papers.

Issue

[9] Has the applicant discharged the onus of establishing exceptional circumstances as per the provision of section 96 (12)(a)? This is the question for determination.

Applicant's case

[10] In establishing his defence in the bail application as per the requirement of both the Act and common law, the applicant averred that in the early hours of the

morning, while leaving a "*popular hangout spots at Msunduza area*"[13] he met up with the deceased who was assaulting Menzi Gama. Menzi Gama was a suspect in a rape case. The victim of the rape was deceased's niece. Gama called upon the applicant to come to his rescue. Following that the deceased was his acquaintance, he pleaded with the deceased to leave Gama alone. He reasoned with the deceased that he should stop assaulting Gama as Gama had not yet been convicted of the offence of rape. At that juncture, deceased turned on him by assaulting him with fist over his face. He attempted to run away but deceased chased him around the car park. He then ran towards the homesteads at Corporation. Deceased followed him and assaulted him. He eventually took a stone and threw at the deceased. Applicant then deposed:

> "[*U]unfortunately it him (sic) on the head*."[14]

[11] Applicant proceeded to aver that after the stone had hit the deceased on the head, he used that opportunity to run to the Mbabane police station. He reported the matter, telling the police that he "*had been involved in a fight*"[15] and requested to be attended by a medical practitioner as he was of the view that his nose had been injured. The police gave him a police medical examination form. He proceeded to the hospital. Unfortunately because it was still too early in the morning he was advised he could not be attended. He later received a call from a friend who was present during the assault who advised him that the investigator was looking for him. He enquired on the investigator's number and having received it, he called him. The investigator advised him to report at the Mbabane police station. He immediately complied. Upon arrival, he was arrested for the crime of murder. Applicant asserted that when he left the deceased at the scene, he was still alive. He further deposed:

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[13] At page 8 para 8.1 of book of pleadings
[14] Para 8..4 page 9
[15] Para 8.5 of page 9

> "*I must bring it to the attention of the above Honourable Court that at all material times, I was acting in self defence and I did not foresee that the deceased could die from my actions and I [*sic] *greatly remorseful for this unfortunate incident*."[16]

[12] The applicant then alluded to his personal circumstances. He pointed out that he was employed by the government in the Ministry of Public Works and Transport as a Senior Architectural Assistance. He had three minor children who are all depended on him. He has not fully recovered from the injuries sustained and that owing to his incarceration, he has not received any medical attention.

[13] The applicant, in his supplementary affidavit attested as an exceptional circumstance as follows:

> "*At all material times, I was acting in self-defence as I was in danger of losing my life after I had tried unsuccessfully to avoid the assault on myself. I must state that I was no match for the deceased and I failed to reiterate [*sic*] his blows and I could do was block them and run away but the deceased kept on chasing me. Consequently, I am innocent of the charge of murder that I am currently facing and I am advised and verily believe that the above Honourable Court should consider my defence."*[17]

[14] The applicant reiterate that he suffered injuries on his face and attached a photograph which reflected blood shots on his both his eyes' area. He also deposed:

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[16] Para 8.7 page 9
[17] Para 7.1 of sup aff.

"…but I must state that I have reasonable fear that my nose was broken during the assault and I am in so much pain and require medical assistance. I am aware that there is a nurse at the Correctional Centre but to date, I have not been assisted."[18]

Respondent's contra

[15] The respondent took a point *in limine* pointing out that the applicant had failed to establish exceptional circumstance as the charge of murder fell under the Fifth Schedule. In support of this submission, from the bar, respondent pointed out that applicant ought to have inferred that it was a Fifth Schedule offence on the basis that applicant pointed out that he was acquainted to the deceased. The deceased was a Senior Prosecutor, a fact known by the applicant following their acquaintances.

[16] The Fifth Schedule in this regard reads:

"*Murder, when-*
(a) It was planned or premeditated
(b) the victim was-
(i) a law enforcement officer or judicial officer performing his or her functions as such, whether on duty or not, or a law enforcement officer or judicial officer who was killed by virtue of his or her holding such a position;"

[17] I do not intend to get into the long and winding debate as to whether the deceased was in the performance of his duties when he met his death for the reason that I might find myself entangled with matters which are best left for trial. I shall

[18] Para 7.3 of sup aff

assume that the offence falls under the Fifth Schedule and treat the confirmation by the DPP as *prima facie* evidence without making a definite finding on it.

[18] On the events that led to the death of the deceased, the investigator Detective Assistance Superintendent S. Mavuso contended that witnesses who were present at Solani's recorded statements to the effect that the applicant was the instigator of the fight. He constantly pursued the deceased. At all material times the deceased ran away from the applicant. However, the applicant was adamant in dealing with the deceased. Applicant "*in a barbaric and cowardly manner assaulted the deceased with half concrete brick, a stone, kicks and fists several times on the body whilst the deceased laid motionless on the ground".*[19] Before the applicant charged towards the deceased, he was seen whispering to Menzi Gama and Gama pointed at the deceased. It is then that applicant swiftly moved to the deceased who was cool and collected drinking his alcohol. He pounced on the deceased with fist. Deceased always evaded the blows from applicant. The deceased, "*did not assault anyone, he merely attempted to evade as attack by the applicant who was uncontrollable*," went the deposition.

[19] Once the applicant had severely assaulted the deceased who sustained multiple injuries as evident from a post mortem report attached to the answering affidavit, he devised a plan to report to the police in order to conceal his offence. This led the police to give applicant a medical examination form. The investigator then stated, *"This was an act of desperation calculated to compromise the investigation of the case and obstruction of justice."*[20]

[20] On applicant's undertaking that he will not evade bail, the investigator deposed that the applicant, having attended his tertiary education in the Republic of South

[19] Para 7.1.2 at page 19
[20] Para 7.1.5 page 19

Africa, was likely to evade bail and join his former university colleagues. He could use informal crossings. Further most of the potential witnesses are known to applicant therefore they might "*succumb to influence or intimidation by the applicant.*"[21] Further the community is shocked as it is outraged by the killing of the deceased and "*is seeking revenge*"[22]. In its supplementary answer, the respondent regurgitated its main answer.

Adjudication

[21] My first port of call before I could embark on the question of exceptional circumstances is to assess the evidence before me with the view as to ascertain whether it is reasonably probable. For no court of law is to accept evidence which is palpably improbable. This is in line with the ratio by **Rall AJ**[23] that before a court can determine exceptional circumstances, the applicant must first establish that the interest of justice weighs against his incarceration in terms of section 96 (12) (b). In so doing, the first question to ascertain is whether the evidence adduce either for or against the grant of bail is probable.

[22] The applicant's version is that the deceased was assaulting Gama. He then intervened to stop the assault upon Gama by the deceased. However, deceased turned to pounce on him. He then picked up a stone and threw it against the deceased which struck him on his head. He ran to the police to report the "*fight*" he had with the deceased. As he sustained injuries, he requested that he be given a medical form in order to access medical attention. He was duly given. Although he proceeded to the hospital, he could not be attended because it was early in the morning. Applicant later submitted a photograph of his face showing injuries of significant degree.

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[21] Para 10.3 page 22
[22] Para 11.1 page 22
[23] See para 6 above

[23] On the other hand, the respondent's evidence is that at all material times, the deceased never raised a finger against the deceased. He avoided the deceased at all times. The applicant, without any reason decided to pounce on the deceased. In answering to the applicant's photograph showing his facial injuries, the respondent deposed that it "*does not show the specific injuries sustained*".

[24] I must point out that the analysis by the respondent of the events of the 28th April 2018 is highly improbable for the following reasons:

- applicant having pointed out from the onset (as per his founding affidavit) that he was engaged in a fight with the deceased, having started by intervening in a fight between deceased and Gama, the respondent totally refuted that the deceased ever assaulted the applicant. Respondent's version is simple that not once did the decease raise any finger against the applicant. However, this version fails to consider that when applicant went to the police station, he was given a medical examination form by another police officer identified as Mkhwanazi. One wonders as to how Mkhwanazi would have given applicant the form to be attended by a doctor if there were no visible injuries.

- Applicant having deposed that the deceased did not raise any finger against the deceased, later deposed"

> "*The contents are denied, the Applicant only had a minor laceration and after the remand he was referred to the Correctional Center for further detention where also medical assistance is offered for any form of ailment"*[24]

[24] Para 13 page 22

- The above deposition speaks volumes. It first explains that Mkhwanazi (the first police officer who attended to the applicant) gave applicant the medical examination form upon noticing the injuries on applicant. He was therefore justified in so doing.

- The version of the applicant finds support from this averment, viz. there was a fight. It is not clear therefore why respondent is attesting that applicant, by going to the police to report the fight, conjured a plan to defeat the ends of justice. At any rate, these words coming from the mouth of the investigator and there being no charge on defeating the ends of justice, goes to show its improbability. This improbability is evident by lack of a charge to this effect.

- Paragraph 13 of respondent's answer flies at the very face of the investigator who says that the deceased at all material times did nothing to defend himself from the endless blows coming from the applicant except by running away. There is no suggestion that the applicant was engaged in a fight with any other person other than the deceased on that day in order for him to sustain the "*laceration*" admitted by the respondent after refuting any fight with the deceased. Our law does not permit a litigant to blow hot and cold at the same time as respondent does by refuting any fight between the parties and at the same time admit that the applicant sustained injuries.

- Respondent disputes that the photograph attached by applicant reflects injuries on his face. This goes to show the desperation by respondent in order to ensure that applicant is denied his liberty. The photograph is clear on the injuries by the applicant. One does not need a magnifying glass to see the injuries. It is therefore not clear why respondent is disputing the obvious.

[25] The holding charge presumably preferred by the investigator at this stage, reads:

> **"***The said accused person is charged with the offence of MURDER.*
>
> *In that upon (or about) the 28th April 2018 and at (or near) Msunduza area in the Hhohho Region, the said accused person did wrongfully, unlawfully and intentionally assault one Stanley Dlamini with fists, a half concrete block and with a stone* ***several times on the face*** *inflicting fatal wounds from which the said Stanley Dlamini dies of and thus commit the said offence.:* (my emphases)

[26] It is safe to assume that the charges were drawn following statements by the number of witnesses the investigator attests to and as corroborated by the injuries evident on the body of the deceased. However, there is a mystery in this case when one considers the nature of the injuries as reflected on the post mortem report. This is more so as the applicant stands charged alone in this matter after the investigator attesting that there are many eye witnesses in this matter. The post mortem report shows not just a number of abrasion and laceration on the body of the deceased but ruptures of vital internal organs. The Pathologist identified the following internal organs as having ruptured: Mediastinum and thymus; heart and pericardial sac; liver; spleen. These ruptured organs are found in the chest and the abdomen yet the applicant stands charged for inflicting head injuries only. Surely the investigator's eye witnesses must have explained these injuries, if his version that he has may witnesses to the assault by applicant is anything to go by. However, the court does have a plausible version by the applicant on this and it is that he found the applicant already engaged in a fight before he intervened. This is however denied by the investigator. This denial leaves a lacuna on how then the deceased sustained the internal injuries away from his head as applicant stands

charged for inflicting fatal injuries on the head only. This lacuna is closed by the applicant's version who attest that there was a fight which was not only between him and the deceased but between the deceased and another as well.

[27] From the above therefore, it would be safe to conclude that the plausible, highly probable version by the applicant weighed against the version of the respondent which exposes inconsistencies and gaps, passes muster on the *onus* by the applicant to raise exceptional circumstances. In the result, I enter the following order:

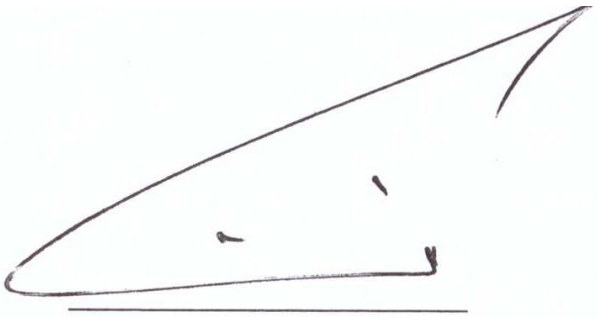
1. Applicant's application for bail hereby succeeds and applicant is granted bail in the following terms:

    1.1 Applicant's bail is set at E50 000

2. Applicant is ordered to:
    2.1 deposit the sum of E15 000 to the Treasury Department
    2.2 provide sureties to the Registrar of this Court for the balance of E35 000
    2.3 surrender all his travelling documents and passport to the Mbabane Police and interdicted from applying for any new ones pending finalization of his trial
    2.4 report every last Friday of each month, commencing this month of May, 2017 at the Mbabane police station between 8:00a.m. and 8:00p.m., commencing this month of May, 2018.
    2.5 advise the investigator in this matter of his residential address
    2.6 interdicted from interfering with the Crown's witnesses
    2.7 remain within this jurisdiction pending finalisation of this trial
    2.8 attend court whenever so directed by the court

2.9 not to commit any similar offence while on this bail

2.10 comply with all the above bail conditions failing which this bail shall be cancelled forthwith and the sum of E50 000 shall be forfeited by the Crown and his incarceration might be ordered.



M. DLAMINI J

For the applicant : N. Ndlangamandla of Mabila Attorneys & Association

For the respondent : S.B. Matsebula of the Director of Public Prosecutions