IN THE HIGH COURT OF SWAZILAND

JUDGMENT

In the matter between: Case No. **389/2017**

SOLOMON MSONGELWA MABILA **First Appellant**

DUMISA PHILEMON MNISI **Second Appellant**

vs

REX **Respondent**

Neutral citation: ***Solomon Msongelwa Mabila & Another v Rex***

[389/2017] [2018] SZHC 53 (26th March 2018)

Coram: **M. Dlamini J**

Heard: **14th February, 2018**

Delivered: **14th February, 2018**

EX TEMPORE JUDGMENT

Civil procedure*:** ***bail – failure to allude to defence – investigator's averments not controverted – court left with no other evidence other than that of the investigator - cardinal rule that applicant must allude to his defence – the averment, "I shall plead not guilty during the trial," is as good as a bare denial - bail application declined.

Summary: The Applicants applied for bail before this honourable Court on a charge of murder. I considered the application and dismissed it for reasons mentioned in this judgment.

Brief background

[1] It is common cause that the applicants were arrested at Mlilwane Nature Reserve. There was opening of gun fires between applicants and the Game Rangers of Mlilwane. In the process of the use of licensed firearms, one of applicants' accomplices died through a gun shot. The two differing and contending factions were both carrying firearms *albeit* licensed.

[2] It is also undisputed that the police subsequently attended to the scene and arrested the applicants before court. The police preferred charges relating to the contravention of the Game Act. The applicants were thereafter arraigned before the Magistrate Court sitting at Simunye where they were granted bail.

[3] On 11th December 2017, a further charge of murder was added to applicants holding charges of contravention of the Game Act. The additional charge of murder was as a result of the death of one of applicants' accomplices.

The deceased was a Game Ranger who is alleged to have joined the applicants in violation of the Game Act.

Applicants' contentions

[4] The applicants, in their founding affidavit, merely narrated scantily on how they were arrested, thereafter granted bail and while attending their remand, were then charged with the offence of murder. It was then deposed on the latter:

> *8.1* "*What is odd with this charge is that we were arrested in 2015 and the deceased died in 2015* [sic] *it therefore remains a mystery why the charges were not joined earlier."*

[5] The applicants then undertook to comply with bail conditions, mentioning some of them. They also attested that the matter was urgent by virtue of section 16 of the constitution which according to applicants, guaranteed and protected their liberty.

[6] The founding affidavit concludes by stating:

> *"11. This matter is urgent due to the fact that matters of a person's liberty are inherently urgent, as it* [sic] *protected and guaranteed under section 16 of the Constitution of the Kingdom of Swaziland. And* [sic] *the fact that I am gainfully employed as a Cordon Guard between the Swaziland-Mozambique Border a job I have been doing since 1995."*

11.1 I have a wife, eight children and a grandchild who are wholly dependent on me for livelihood. What is more is that I am deeply rooted in this country and my community as I am an elderly man nearing his sixties.

12. I reiterate and submit that the interests of justice clearly favour that we be afforded the relief sought in the Notice of Motion because there is no prejudice to be suffered by anyone as I am advised and verily believe that police have also completed their investigations pertaining [sic] *the matter."*

[7] **Respondent's *au contraire***

The respondent strenuously opposed the application under the hand of 3540 Detective Sergeant Bheki Shabangu. He deposed that the applicants failed to honour their bail terms in that although the court *a quo*, following the charges of contravention of the Game Act warned them to report at the Police Station. Applicants never did so. They only appeared at the Simunye Magistrate Court upon service of summons.

[8] He profusely disputed the applicants' argument that they were attending to their remand when the charge of murder was preferred against them. He asserted that on that day, applicants were in court upon service of summons for a trial of their case.

[9] The Honourable Investigator then attested:

"8. It is the perversion of the truth that on the 11th December 2017 Applicants herein were due for their routinely remand at Simunye Magistrate's Court, applicants had on that day come for trial on the charges then preferred against them and were without any legal representation after having told the Court that they would conduct self representation due to financial constraints when the matter was set. However, the matter could not proceed because the prosecuting Counsel applied to hand an amended charge sheet whereby a murder charge had been added automatically ousting the jurisdiction of the Magistrate's Court to hear the matter and necessitating the withdrawal or cancellation of their bail as it is this Honourable Court that has the power to determine or consider a bail application as the charge of murder falls in the forth schedule. I had already notified and charged the applicants on that day on the advice of the Director of Public Prosecutions and informed them of the possible incarceration being necessitated by the nature and gravity of the charge of murder".

"I am advised and I verily believe so that Applicants herein should have foreseen the possibility of death arising and withdrew from proceeding to poach. They were well aware that in the event they were to be caught poaching as they were themselves carrying firearms there would be the use of same with those of the Game Rangers and or the Royal Swaziland Police and the likelihood of death arising could not be excluded but applicants proceeded to enter Mlawula

Nature Reserve for poaching. These are facts to be proved during trial of the matter. Under the doctrine of ***dolus eventualis*** *applicants are to answer for causation of death of Sikhumbuzo Dlamini who died driving their car within Mlawula Nature Reserve. I am further advised that the prosecution can add further charges any time before accused persons are called upon to plead to the charges".*

Irregularities

[10] I must point out from the onset that firstly, there are two applicants in this case as it appears from the citation herein. The founding affidavit to this bail application is deposed by the 1st applicant. The argument in support of the bail application are in plural. However, on the grounds why the applicants are to be granted bail, the attestation is in the singular form as it is so quoted at paragraph 6 of this judgement.

[11] What aggravates the irregularity following the manner in which the founding affidavit is framed, is the absence of a confirmatory affidavit by the 2nd Applicant. I guess he could not sign a confirmatory affidavit in view of the averments at paragraphs 11-12 of the founding affidavit. Worse still, the founding affidavit reflects: *"Wherefore, I pray for an order in terms of the Notice of Application".*

[12] In the final analysis of the above, I consider that the only application for bail serving before me is one by the 1st Applicant who is the only deponent to the founding affidavit in support of the bail application. The 2nd

Applicant cannot in law be granted bail on the basis of a proxy bail application.

[13] Before I address the merits of the present bail application, it is apposite to mention some observations concerning bail matters. I have demonstrated above why I have found that there is no application serving before me in respect of 2nd applicant. It is not clear why as both applicants from the onset of this matter were represented by Counsel. I guess, judging from the nature of the founding affidavit, the applicants' application for bail was hastily drafted. The reason for such is not very far as it has become a norm in this Court to grant bail application willy-nilly. A bail application has been for the taking, as it were. The result of this practice is evident in the sharp rise of crime in this country. The incident that transpired at the Corner Plaza filling station where a business man was short during broad day light, few minutes after the masses had dispersed from a national soccer match and, worse still, if the newspaper reports are anything to go by, at a close range, in full view of not only petrol attendants but members of the public, must be a wakeup call to those called upon to discharge criminal justice in our tiny Kingdom. I need not elaborate further on this as the honourable Chief Justice in his opening address of this year's judicial calendar eloquently expounded on the duty of the bench concerning bail matters.

[14] So much of the digress! I now turn to the merits of this application. Out of abundance of caution, I shall consider the 2nd Applicant despite that he has dismally failed to serve before me an application for bail except by proxy.

Principles on bail applications

[15] An observation by ***John Van der Berg*** is apposite in the bail application serving before me. The learned author writes:

> *"Bail applications, on the other hand, are akin to trials in that they are adversarial proceedings culminating in a finding and discretionary order by the Court, which affects the right of the accused."* [1] (Underlined, my emphasis)

[16] The statement by the learned author applies where bail is opposed. It therefore means that where bail is contested, each party must adduce evidence either in affidavit form or through oral evidence, demonstrating what could be in the interest of justice, *viz.*, whether to grant bail or not to grant bail. The reading in the enactment [2] that an applicant to bail application shall be released unless the court finds that it is in the interest of justice to keep him incarcerated, by no means does it shift the burden of proof espoused under common law that he who alleges must prove. In support of this principle of our law, **Ota J** [3] as she then was, articulated:

> *"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."*

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[1] *(Bail, A Practitioner's guide; 2nd ed, juta, 2007)*

[2] Section 96 of CP&E

[3] Mfanawenkhosi Mbhunu Mntshali and Another v The Director Public Prosecution (180/13) July 2013 SZHC 154 at page 3.

[17] An Applicant has a duty to adduce evidence in support of his application. I must emphasise that one of the cardinal rules favouring bail applications is that the applicant must allude to its defence to the charges preferred against him. It is insufficient to simple state, as it was so in the present matter, *"I shall not plead guilty during my trial".* Such an averment is as good as a bare denial, which in our law does not justify any grant of a prayer.

Ad merits

[18] What exacerbates applicants' application before me is that the investigator deposed as follows:

> *"6. Save to deny that the deceased Sikhumbuzo Dlamini when he met his demise was not acting under the instructions of his superiors or any Game Ranger and was therefore not a Game Ranger nor did he have any authority to invite Applicants to Mlawula Nature Reserve on any other day or specifically the 12th July 2015 around 2100 hrs, a fact known to Applicants and further deny that Applicants were to report to Simunye Police Station whenever required, it was a condition that they report to the Police Station at certain intervals which thing they never did until they were served with summons to appear at Simunye Magistrate's Court. Otherwise the rest of these paragraphs are not in issue."*
>
> *8. As both applicants herein hail from Shewula area – Lomahasha, in the Lubombo District there is likelihood that if released on bail may attempt to evade trial by skipping the*

boundaries of the Kingdom of Swaziland to the neighbouring Mozambique as there is that trend by suspects arrested in this country as extradition could be effected in that country. Further applicants may if released on bail conceal or destroy evidence as it will be proved during trial that they had interfered with the motor vehicle used in the commission of the crimes they are facing in collusion with their car dealer to whose hands the motor vehicles was released to by the Simunye Magistrate's Court and warned not to interfere with the then present identity of the motor vehicle."

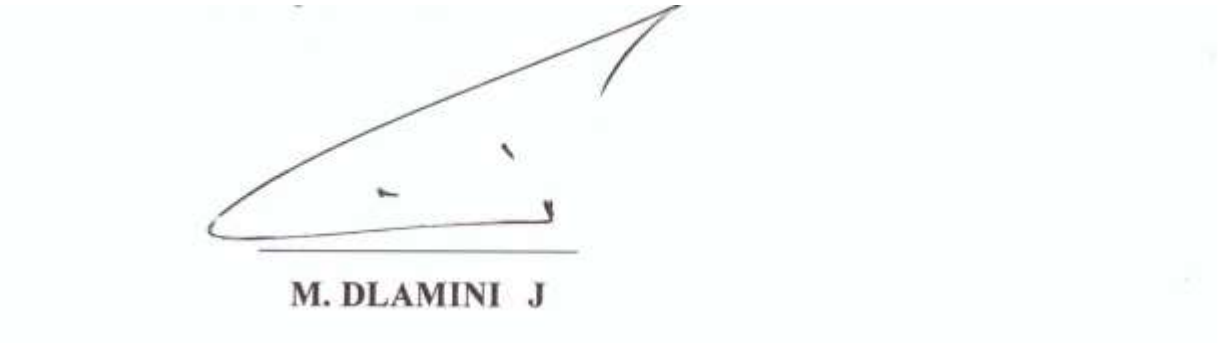
[19] Applicants failed to file a reply to such averments. The court was left with no evidence in contra to that of the investigator. In brief, the evidence by the investigator that the applicant failed to abide by one of the conditions of bail, i.e. reporting at the Police Station, their likelihood that they might escape as both were from Ka-Shewula, an area adjacent to Swaziland and Mozambique border and that they had interfered with one of the exhibits to the charges was not controverted.

[20] No defence was advanced by the applicants despite the court enquiring on it on the day of hearing. The applicants chose to submit that they intended filing an application challenging the constitutionality of the Game Act and that the indictment on murder could not stand following that there were charged some years later. This was no defence at all to the opposition raised on behalf of the crown. In terms of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended, a charge of murder does not prescribe.

[21] Learned Counsel on behalf of the applicants submitted the case of **Maxwell Manqoba Dlamini & Another v Rex, Criminal Appeal Case No. 46/2014** in support of the bail application. In granting bail, the court held:

> *"Ironically, when this matter was heard before this court, the prosecuting counsel informed the court that the Crown was no longer opposing the appeal. The Crown was conceding that the pending constitutional challenge to the two legislation provisions amounted to new evidence warranting the granting of bail. Nevertheless, this Court would like to point out that despite the concession made by the Crown, the evidence contained in the record shows clearly that the appellants had good prospects of success on appeal in the absence of substantial evidence that their release on bail was not in the interests of justice."*

[22] In other words the applicants in the **Dlamini** case *supra* had presented evidence showing "*good prospect of success*". In other words, the evidence showing good prospect of success was their defence. This is not the case in the present application. On the a foregoing, bail was declined on the date of hearing.



M. DLAMINI J

Applicant : **Mr. S. Nhlabatsi of T. R. Maseko Attorneys**

Respondents: **Ms. N. Masuku – Director of Public Prosecutions' Chambers**