IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO …

In the matter between

MARIO THEMBEKA MASUKU **1ST APPLICANT**
MAXWELL MANQOBA DLAMINI **2ND APPLICANT**

and

THE KING **1st Respondent**

HEADS OF ARGUMENT

Introduction

1. The first and second applicants were arrested and charged with sedition and terrorist offences following their participation at a May Day Celebration on 1 May 2014.

2. Soon after their arrest they applied to the High Court to be admitted to bail, and Judge Simelane refused their application, citing that the security of the country would be threatened if they were released. The Judge also found that the first applicant had a high propensity to commit crime, and that the second applicant was likely to evade trial if released.

3. Since the refusal of their application for bail, various new circumstances have arisen which are of relevance to the suitability for bail. The applicants now seek a reconsideration of their bail application, and submit that it is in the interests of justice that they be released on bail pending the finalisation of their criminal trial.

4. In the present matter the applicants submit that because of the presence of various circumstances that were not present when they first applied for bail, the court should reconsider whether it is in the interests of justice for them to be granted bail.

New Circumstances

5. Three separate challenges to the constitutionality of the Sedition and Subversive Activities Act, 1938 and the Suppression of Terrorism Act, 2008, have been filed since the applicants' bail application was refused. These constitutional challenges are directly relevant to the applicants and the criminal charges they face because they relate to the validity of the legislation under which the applicants have been charged.

6. The applicants also intend to file a challenge to the constitutionality of these two pieces of legislation.

7. One potential result of these constitutional challenges to the legislation is that the legislation will be found to be unconstitutional, and therefore invalid. In that case, the Court would strike down the legislation and the charges the applicants face would therefore fall away.

8. It is therefore impractical for the applicants' criminal case to proceed until the constitutionality of the charges has been determined. The conclusion of the criminal trial has therefore been delayed, and unless they are released on bail, the applicants will be required to remain in awaiting trial detention until both the constitutional litigation and the criminal trial is completed.

9. As these applications were only filed after the initial bail application was heard, the judge was therefore not aware of the length of time it will take for the criminal trial to be completed. The filing of these constitutional challenges therefore constitutes

the existence of new circumstances that have a bearing on the determination of whether it is in the interests of justice that the applicants be granted bail.

10. The second new circumstance that has arisen is the deteriorating health of the second applicant. He suffers from diabetes and arthritis and the poor conditions at the remand centre have impacted negatively on his health. Although the judge hearing the initial application was aware of the second applicant's medical condition, he was not aware of how severely it would deteriorate as a result of being in detention.

11. The third new circumstance is the interruption of the first applicant's education. The first applicant is a student at the University of Swaziland and is registered for a Bachelors of Commerce degree. When he was arrested in May this year he was in the middle of writing his university examinations, and he raised this at his bail application. Although the Judge refused to release the first applicant on bail he did stipulate that the first applicant be permitted to write his examination on the day following the hearing. However, after a refusal from the correctional services officials to facilitate this, and then an application from the respondents which led to this aspect of the Judge's order being rescinded, the first applicant was unable to write his examination.

12. We submit that by ordering that the first applicant be transported to the University to sit the examination the Judge had understood the importance of his education and the need to complete the academic term. Given his prioritising of the first applicant's education we submit that had the judge known that the first applicant would be prevented from writing the exam he may have come to a different conclusion regarding his eligibility for bail. The obstruction caused by the correctional services failure to transport the first applicant to the University as well as the application to rescind the order is a fact that is relevant to the consideration of bail, and one which has arisen since the initial application for bail was refused.

The Scope of the Judicial Consideration when New Circumstances are Adduced

13. An accused person whose application for bail has been refused by a Court is entitled to bring a fresh application if there are new circumstances that have arisen since the initial application for bail.

14. In the South African case of *S v Vermaas*[1] the Court held that the existence of new facts requires the Court to undertake a full re-examination of all the factors

> *Obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said the application should not be repeated and the court will not entertain it. But it is a non sequitur to argue on that basis that where there is some new matter the whole application is not open for reconsideration but only the new facts. I frankly cannot see how this can be done. Once the application is entertained the court should consider all facts before it, new and old and on the totality come to a conclusion. It follows that I will not myopically concentrate on the new facts alleged.*[2]

15. This was also confirmed in *S v Mohamed*[3] where the Court remarked that "*if the appellant succeeded in establishing "new facts" on the second outing, then in order properly to adjudicate the appeal, I would have to have regard to all the evidence which was given during both stages.*"

16. The facts sought to be relied on by the applicants must be new in the sense that they were not available for consideration by the judge hearing the initial application. In the present matter the applicants submit that because of the presence of various circumstances that were not present when they first applied for bail, the court should reconsider whether it is in the interests of justice for them to be granted bail.

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[1] 1996 (1) SACR 528 (T).
[2] *S v Vermaas* at 531 E.
[3] 1999 (2) SACR 507 (C).

The Law Governing Bail in Swaziland

17. The Criminal Procedure and Evidence Act regulates bail applications in Swaziland.

18. An amendment to the legislation was enacted in 2004 which included an extensive rewrite of the provisions governing bail applications.

19. Sedition is an offence listed in the Fourth Schedule of the Act. The schedules define the severity of the offences and have implications for the onus and standard of proof that are borne by the accused in an application for bail. Consequently, there are a number of provisions in the legislation that relate specifically to this category of offences. It is important to note that terrorist acts are not listed in any of the Schedules.

20. The Criminal Procedure and Evidence Act confirms that an accused person is entitled to be released on bail unless his or her continued detention is in the interests of justice.

> *96 (1) 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 Schedules, 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 interest of justice that the accused be detained in custody*

21. In *Khumalo and others v The King*[4] M Dlamini J held that "*the reading of this section points of that the approach to be adopted by our courts in bail matters is that bail application should not be refused*."[5] The amendment to the Criminal Procedure and Evidence Act should therefore be read as confirming the importance of bail as a way to limit any infringements of the right to personal liberty.

[4] (313/2013) [2013 SZHC 194.
[5] *Khumalo and others v The King* para 27.

22. Section 95(3) empowers the High Court to grant bail to an accused charged with an offence under the Fourth Schedule.

> *Subject to the provisions of this Act, the High Court shall, where an accused person is charged with any of the offences listed in the Fourth Schedule, if it determines that the circumstances warrant that the accused may be admitted to bail, admit the accused to bail and fix the amount of bail in an amount not less than E15 000 (Emalangeni fifteen thousand), in addition to any other conditions it deems fit.*

23. However, the Act does allow for the imposition of a bail amount of less than E15 000 "*[w]here the court is satisfied that substantial and compelling circumstances exist which justify that the amount of bail be fixed in an amount less than E15 000*."[6]

24. Section 96(12)(b) of the Act places the onus on the accused charged with an offence under the Fourth Schedule to demonstrate that his release on bail is in the interests of justice.

> *Notwithstanding any provision 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 interests of justice permit his or her release.*

25. Although this provision places the onus on the accused to demonstrate that it is in the interests of justice that he or she be released on bail, it does not impose the strict standard that section 96(12)(a) does. Section 96(12)(a) relates to offences referred to in the Fifth Schedule, and requires an accused to demonstrate the existence of "*exceptional circumstances*" which permit his or her release.

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[6] Section 95(4).

26. It is therefore incumbent on the Applicants to demonstrate why admitting them to bail would be in the interests of justice. In a recent case before the High Court Ota J held that this onus must be discharged on a balance of probabilities.[7]

27. In section 96(4), the Criminal Procedure and Evidence Act sets out the factors to be considered by a court when determining what the interests of justice require. The provision states that "*the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one of more of the following grounds are established.*" It then goes on to list five grounds, in subsections (a), (b), (c), (d), and (e).

28. Section 96(4)(a) allows for the refusal of bail "*where there is a likelihood that the accused if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule*".

29. Section 96(5) provides content to this provision and gives guidance to a Court on how to determine the presence of one of the factors in section 96(4)(a). The provision requires the Court to take into account whether there was any violence in the offence the accused is charged with, whether the accused has made any threats of violence or harbours any resentment against any person, whether the accused's past conduct indicates any disposition toward violence or has previously committed an offence under Part II of the First Schedule, and any other factor the Court believes should be taken into account.

30. The first applicant has been charged with various offences in the past, but has never been convicted of them. In September 2014, he was acquitted of charges relating to the unlawful possession of explosives after the Court held that the prosecution had not made out a *prima facie* case. In 2013 he was arrested and charged with sedition after it was alleged that he took part in a rally calling for the boycott of the 2013 national elections, but the trial has not commenced.

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[7] *Mfanawenkosi Mbhunu Mtshali and Another v Director of Public Prosecutions (180/13*) July [2013] SZHC 154, para 3.

31. The second applicant has also been charged with offences, but similarly has never been convicted. In 2000 he was arrested and charged with sedition after calling for multi-party democratic elections but was acquitted in 2002. In 2009 he was acquitted after being again charged with sedition after speaking at a funeral. The second applicant was arrested in 2010, but never charged.

32. The respondents have argued that the existence of these previous charges indicate a propensity to commit offences and therefore justify the refusal of bail.

33. It is incorrect to impute a propensity to commit offences when the applicants have never been convicted of any of the charges brought against them.

34. Furthermore, the offences that the applicants have been charged with are all non-violent, and so even if they had committed them, which they deny, it could not be an indication of a disposition to violence.

35. Section 96(4)(b) states that bail may be refused in the interests of justice "*where there is a likelihood that the accused, if released on bail, may attempt to evade trial*." Section 96(6) then provides guidance to the Court on what factors to take into account in determining whether the accused is likely to evade trial. These factors include the accused's emotional, family and occupational ties to Swaziland, his or her assets and whether he has the means to leave the country or to forfeit the bail amount, and whether there is a likelihood of initiating extradition proceedings if the accused were to flee. The Court is also required to examine the nature and gravity of the offence the accused is charged with and the punishment he or she may face if convicted, as well as the strength of the prosecution's case against the accused. The Court should also consider the binding effect bail conditions imposed on the accused by the Court might have.

36. The respondents have repeatedly referred to the "overwhelming evidence"[8] against the applicants, and that the Crown has a "very strong case".[9]

[8] Respondents Opposing Affidavit at para 34 and 29.
[9] Respondents Opposing Affidavit at para 18.4.

37. It has been repeatedly stated by Swazi Courts that the existence of a strong case against the accused is merely one of the factors to take into account, and cannot outweigh all the others. In *Khumalo and others v The King*[10] the Court remarked that "*the mere fact that the respondent has a strong case should be considered not as a stand alone factor but together with other factors pointing that granting applicants bail is likely to serve the interest of justice*" [11]

38. In *Mntshali and another v Director of Public Prosecutions*[12] Ota J found that the applicants were unlikely to evade trial despite the existence of a strong case against them by considering all factors in their entirety.

> *In reaching this conclusion, I have juxtaposed the Respondents' contention that there is overwhelming evidence against the Applicants which will lead to their conviction thus constituting a veritable ground for them to evade their trial, against the established fact that the Applicants are Swazis; resident at Msunduza Swaziland; they have deep emotional and family roots in the country as well as the established fact that the Applicants also have on going businesses in the country, and in my view, these factors show on a balance of probabilities, that the Applicants are likely to stand trial*[13]

39. It is therefore clear that the existence of a strong prosecution case does not negate the need to examine all the other factors that may indicate that the applicants are unlikely to abscond.

40. Both the applicants have strong family ties to Swaziland, and have no family in any other country. They are both from families with little financial means, and so the forfeiture of any amount set as bail would be inconceivable.

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[10] (315/2013) [2013] SZHC 194 (4th September 2013).
[11] *Khumalo and others v The King* at para 34.
[12] (315/2013) [2013] SZHC 194 (4th September 2013).
[13] *Mntshali and another v Director of Public Prosecutions* at para 11.

41. Their past conduct when facing trial is also indicative of their commitment to standing trial. Neither applicants have ever evaded trial in the past – despite facing offences of a similar serious nature as the ones they are facing now. The first applicant in particular has adhered to very stringent bail conditions imposed on him: in fact, his arrest in 2013 on sedition charges only came about as a result of him abiding by his bail obligation to report to the Police Station even though he knew he would be arrested on other charges when he did so.

42. The High Court has acknowledged that this type of past conduct is relevant in determining whether an accused is likely to evade trial.

> *I am however, more inclined to treat the fact that the Applicant did not violate his previous bail conditions in the charges contained in MD2 as an exceptional circumstance warranting his release on bail. The charges in MD2 are similar to the ones detailed in MD1 which we are currently faced with. There is no evidence to show that whilst out on bail in relation to MD2 the Applicant violated his bail conditions by committing any of the breaches which the Respondents now urge in casu, as detailed in paragraph [6] ante. I am convinced that this factor alone constitutes a veritable ground for the grant of this application.*[14]

43. Section 96(4)(c) states that the Court may find that it is in the interests of justice to refuse to grant bail when there is "*a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence.*" Section 96(7) states that this may be determined with reference to the relationships between the accused and the witnesses, how receptive the witnesses might be influence, and how effective bail conditions prohibiting communication may be. The Court should also consider the nature of the evidence; that is, whether the investigations have been completed and whether the evidence is susceptible to destruction.

44. The respondents' assertions that they have a strong case against the accused mitigate the strength of any argument they may of a risk the accused may interfere with the evidence.

45. Furthermore, the witnesses listed by the prosecution are police officers and so are unlikely to be susceptible to influence. The prosecution case is also based around the

[14] In Zweli Mdziniso v Commissioner of Police and Another, High Court Case No. 13 of 2013 at para 14.

existence of footage of the May Day Celebration and so any influence that may occur would have a negligible effect on the strength of the totality of the evidence.

46. Section 96(4)(d) stipulates that "*where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system*" it may be in the interests of justice to refuse bail. Section 96(8)'s guidelines – when an accused has knowingly provided false information or has previously failed to comply with bail conditions, or is in custody or on parole for another offence – illustrate that it is only in very specific circumstances that a Court would find that the accused would threaten the functioning of the criminal justice system.

47. It is patently obvious that the applicants would not constitute a threat to the functioning of the criminal justice system if released on bail in line with these provisions. As we have already mentioned, although the first applicant is facing charges of sedition in another matter he has not been convicted and so cannot be considered to be in custody or on parole on another charge. Also, as we mentioned earlier, the applicants have always conscientiously adhered to any bail conditions imposed on them.

48. Section 96(4(d) allows for a Court to refuse bail "*if there is a likelihood that the release of the accused may disturb the public order or undermine the public peace or security.*" However, this factor is only relevant "*in exceptional circumstances*". Section 96(9) explains when this factor would be relevant: when the nature of the offence or the release of the accused would lead to shock and outrage in the public or when public confidence in the criminal justice system or the public safety would be jeopardized by the accused's release; or when the safety of the accused would be at risk.

49. The inclusion of the term "*exceptional circumstances*" implies that Courts should not easily find that there is reason to justify the refusal of bail in this situation. The Courts have defined this to mean "*something more than merely 'unusual' but rather less than unique which means in effect 'one of a kind'."*[15]

[15] *Senzo Menzi Motsa v.R* appeal case No. 15/2009 at para 11.

50. The respondents have argued that the statements allegedly made by the applicants are "threatening to the leadership of the country and the nation at large."[16] The respondents then say that they believe that the applicants will carry out the threats made in these statements if they are released on bail. However, as there is no evidence to support the respondents' claim that the applicants will take physical action that threatens the safety of the country, and as the applicants have no history of violence, the respondents have no logical basis on which to make this claim.

51. Given the fact that section 96(4)(d) can only be applied by the Court in "exceptional circumstances" the court simply cannot rely on the respondents unsubstantiated claims that the applicants pose a threat to the safety of the country and its leadership.

52. Having assessed the factors influencing the determination of what the interests of justice would dictate as set out in section 96(4) the Criminal Procedure and Evidence Act then obliges the Court to look at the accused's personal circumstances and the impact refusing bail would have on him or her.

53. Section 96(10) of the Act requires the court to weigh "*the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice the accused is likely to suffer if he or she were to be detained in custody*" and expects the court to take into account various factors. These factors include the period of time for which the accused has already been in detention as well as the expected time the trial would take to conclude; whether there is a reason for the delay in finalization of the trial, and whether the delay is the result of any fault of the accused; the age and health of the accused; any financial loss the accused would suffer as a result of the continued detention; and whether detention would impede the preparation of accused's defence.

54. The applicants have been in detention since they were arrested on 1 May 2014 – a period of more than five months. The criminal trial has been set down to commence on 5 February 2015, by which time they would have been in detention for nine months.

[16] Respondents Opposing Affidavit at para 18.3.

55. The trial had initially been set down for June 2014, but the applicants sought a postponement as their legal representatives were not available. The case had then been set down for 1 October 2014 but was again postponed because of three challenges to the constitutionality of the Sedition and Subversive Activities Act, and the Suppression of Terrorism Act that are pending before court. The applicants also intend filing a challenge to the constitutionality of these pieces of legislation.

56. The reason for the lengthy delay is therefore the existence of the constitutional challenges, which relate directly to the charges the applicants face. If the legislation is struck down by the Court hearing the challenge then the applicants' charges would fall away. It is therefore imperative that the challenges to the validity of the legislation be finalized before the applicants' criminal trial commences.

57. Although the applicants do intend to file an application to challenge the legislation's constitutionality, the existence of the other challenges makes it clear that the delay in the finalization of their criminal trial would have occurred even without them bringing that application. It is therefore impossible to hold the applicants responsible for the delays affecting their criminal trial.

58. The second applicant suffers from diabetes and his condition has deteriorated since he was arrested. The report of Dr David B Wasswa is attached as Annexure C. In his report, Dr Wasswa indicated that the second applicant's sugar level was low and his blood pressure high, and that he was dehydrated. The doctor stipulated that the second applicant be given his meals on time, and that they consist of plenty of roughage and drinking water. The doctor also indicated the importance of the first applicant being able to exercise regularly, and for him to be in a warm environment.

59. The conditions in the Zakhele Remand Centre, where the applicants are held, are poor. The meals provided to the detainees are inadequate, and do not provide the second applicant with the nutritious and balanced diet that his medical condition requires. The windows do not have panes in them which offers no protection against the wind and cold. The detainees are only provided with a sleeping mat and meagre blankets which do not

provide warmth or comfort. The detainees are also not allowed time to exercise, nor do they have space to exercise of their own accord.

60. The question of serious illnesses has been raised regularly in bail applications – in part because of how the conditions in prison can lead to the deterioration of an accused's health. In *Twala v R*[17] Maphalala J held that an accused who was HIV positive and receiving antiretroviral treatment should be released on bail because of the risks that continued detention posed to his health.

61. In *Wonder Dlamini and another vs R*[18] the Supreme Court ruled that an accused who suffered from "*pneumonia and frequent bouts of sinus*"[19] and so required protection from cold and good ventilation should be granted bail. The Court's comments regarding the conditions in Zakhele Remand Centre – where the applicants in the present matter are being held – are instructive:

> *The evidence adduced by the second appellant is to the effect that the living conditions at Zakhele Remand Centre constitute a health hazard because they sleep on a mat which render them susceptible to attract various illnesses. In a democratic country such as ours, one would have expected that inmates be provided with at least mattresses and not sleep on mats placed on a cold cement floor. As the second appellant correctly stated, such a situation would inevitably attract various illnesses*[20]

62. In *Twala* and *Wonder Dlamini* the Court concluded that the accused's medical condition and risk of that condition deteriorating in the poor prison conditions constituted "exceptional circumstances" for them to be granted bail. Although, as we have indicated, the applicants are not required to demonstrate the presence of "exceptional circumstances" to justify their release, it is notable that in cases where the accused has had to bear a greater onus than that which the applicants in the present matter do, the presence of a serious medical condition has justified the granting of bail.

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[17] (383/2012 [2013] SZHC146 (2013) 8th August 2013
[18] (01/2013) [2013] SZHC 2 (2013).
[19] *Wonder Dlamini v R* at para 2.
[20] *Wonder Dlamini v R* at para 24.