

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

FOUNDING AFFIDAVIT

I, the undersigned

MARIO THEMBEKA MASUKU

do hereby make oath and say as follows:-

1. I am an adult Swazi male from the Eveni area in Mbabane. I am 63 years old and have a wife and six children. My children are all adults and offer financial and emotional support to my wife and me. We are a close family, and my wife and I are committed to supporting each other in our old age.
2. I am the applicant in this matter.

3. The facts contained herein are to the best of my knowledge true and correct and are, unless otherwise stated or indicated by the context, within my personal knowledge. Where I make legal submissions, I do so on the basis of advice that I have received from my legal representatives, which advice I verily believe to be correct.
4. The respondent is the State representing the King and duly represented by the Director of Public Prosecutions, an officer entrusted with the duty to prosecute offences in the Kingdom of Swaziland on behalf of the King.
5. This Honourable Court has jurisdiction to hear this matter by virtue of the fact that the offences with which I am charged will be prosecuted before this Court.
6. On 3 May 2014 I applied for bail in this Honourable Court. My application was denied by and I was not provided with written nor oral reasons for the refusal to grant me bail.
7. I submit that there are new circumstances present which justify a reassessment of my eligibility to be granted bail. These new circumstances have a bearing on a just and fair determination of the matter and should therefore be considered by this Honourable Court.

Factual Background

8. On or about 1 May 2014 I attended a May Day celebration at the Salesian School Sports Ground in Manzini. I was arrested by members of the Royal Swazi Police as I was leaving the venue.
9. I was charged under the Suppression of Terrorism Act No 3 of 2008 and the Sedition and Subversive Activities Act No 46 of 1938 as amended for allegedly chanting terrorist slogans. I intend to plead not guilty to these charges.

New Circumstances

First Ground: Related Constitutional Challenge in Another Court

10. Three constitutional challenges to these Acts have been filed this year: two to the Sedition and Subversive Activities Act; and one to the Suppression of Terrorism Act. These three cases have been combined and will be heard by a full bench of the High Court on 1 December 2014.
11. These three cases have all been filed since my first application for bail in the present matter, and so have changed the landscape for my application to be granted to bail.
12. The prosecutor in my criminal case has informed my legal representative that, because the criminal charges relate to the issues to be determined in the constitutional challenges, my trial will not commence until those challenges have been decided. Consequently, although I intended launching my own constitutional challenge – with my co-accused – during my criminal trial, I will now bring a separate challenge to the legislation under which I have been charged.
13. In light of the anticipated delays in finalising the criminal trial because of the constitutional challenges, I humbly submit that it is in the interests of justice that I be released on bail.
14. Furthermore, as the constitutional challenges will be heard before the finalisation of my criminal trial, there is a possibility that the legislation will be declared unconstitutional and the charges I am facing under those laws in the present matter invalidated. It would therefore be unjust for me to remain in detention when there is the prospect that my charges will be withdrawn.

Second Ground: Constitutional Challenge in the Present Matter

15. I intend to plead not guilty in my criminal trial, and I believe my chances for acquittal are high as I have a valid and strong defence.
16. A key element of my defence is that the Suppression of Terrorism Act and the Sedition and Subversive Activities Act are unconstitutional. These pieces of legislation unjustifiably infringe on the constitutionally protected rights to freedom of expression and association. I have been advised that the Swazi Constitution's protection of freedom of expression and of association invalidate the offences I have been charged with. For this reason I argue that the charges I face should not stand.
17. As mentioned above, I intend to bring a challenge to the constitutionality of the laws under which I have been charged. I had not yet finalised this application when I applied for bail in May this year, and so the judge hearing my initial application was not aware of this when he considered that application.
18. The challenge has a bearing on an application for bail because it necessitates a delay in the finalisation of the criminal trial. In addition, because the legislative provisions under which I have been charged are being challenged the charges may have to be withdrawn. In light of this, it is possible that the charges will be withdrawn and I will not stand trial for these charges, and so it is in the interests of justice that I be released on bail.

Third Ground: My Ill-Health

19. I suffer from diabetes, and so need constant medical attention. Although this is not a new condition, and I had been diagnosed when I made my initial application for bail, the time I have spent in detention since my arrest in May 2014 had exacerbated my condition.
20. I attended an appointment with my personal doctor on 29 August 2014 and he informed me that my blood sugar and blood pressure readings indicated dangerous levels. The doctor said

that the lack of suitable and sufficient food in the detention centre, as well as a lack of exercise was harmful to a person in my situation.

21. I have requested a medical report from the medical officer in the Zakhele Remand Centre, but I have been unable to obtain it as it has been refused to me and my legal representatives.

22. When I am at home I follow a rigid and balanced diet which includes fresh fruit and vegetables and meat. At the Zakhele Remand Centre I receive two slices of bread and tea (and occasionally mielie meal) in the morning, two slices of bread at noon, and then rice and cabbages (and occasionally chicken) in the evening. This is not providing me with the nutrition that I need, and is impacting negatively on my blood sugar and blood pressure levels.

23. In addition I suffer from arthritis. The cell in which I am kept does not have panes in the windows, and we are required to sleep on the floor with only sleeping mats and inadequate blankets. The cold in the cell has aggravated my arthritis, and I do not believe it will improve while I remain in detention.

24. As awaiting trial prisoners, we are not given any time for exercise, and the only time we are permitted to leave the cell is for mealtimes and when we have visitors. The lack of exercise is having a negative effect on my health.

My Eligibility to be Admitted to Bail

25. An amendment to the Criminal Procedure and Evidence Act in 2004 governs applications for bail in Swaziland. The legislation distinguishes between different categories of offences, and places certain requirements on applicants seeking bail who have been charged with offences in the Fourth and Fifth Schedules.

26. I am informed that section 95(3) sets the minimum bail amount for schedule four offences at E15 000, although subsection (4) does empower the Court to fix the bail amount at less than E15 000 where “substantial and compelling circumstances exist”.
27. Section 96(12)(b) requires that “*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.*”
28. The Criminal Procedure and Evidence Act classifies sedition as an offence under the Fourth Schedule, but does not classify “terrorist act” under any schedule. Therefore, in order to be granted bail I must demonstrate that the interests of justice permit my release from custody.
29. I am informed that section 96(4) of the Criminal Procedure and Evidence Act provides guidance to courts on when it would not be in the interests of justice to release an accused with my charges from custody. I submit that as none of these circumstances are present in the present case it would be fair and just to admit me to bail.
- 29.1. Subsection (a) requires the court to ascertain whether 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*”. Although I have been charged with other offences I have never been convicted of any crime – violent or otherwise – and so there is nothing to indicate that I would commit a First Schedule offence. In addition, the conduct that led to the charges in the present case was not violent, and so there is nothing to support a claim that I would endanger any person’s safety.
- 29.1.1. In 2000 I was charged with sedition after I called for a multi-party democratic system in Swaziland. I was acquitted of these charges in 2002.

29.1.2. In 2008 I was arrested and charged with sedition after I spoke at a funeral and said that the deceased were heroes, and spoke out in support of PUDEMO. I was acquitted of these charges in 2009.

29.1.3. In 2010 I was arrested, but not charged with any offence.

29.2. Subsection (b) relates to the possibility of an accused evading trial if he or she is released on bail. There is nothing to suggest that I would evade trial. I have a house in Mbabane, and all my immediate and extended family live in the country. I would also be willing to submit my travel documents as a part of my bail conditions. Furthermore, I have no relatives in, or ties to, a country without an extradition treaty with the Kingdom of Swaziland.

29.2.1. In addition, neither I nor my family are in a financial position to forfeit any bail amount. I am retired and do not receive a pension, and although my wife runs a small business she earns an average monthly amount of E5000. Therefore any bail amount set would be a significant amount of money for the family and so we would not be able to surrender that amount if I evaded trial.

29.3. Subsection (c) addresses the concern of an accused interfering with witnesses or attempting to intimidate them. Although I have seen the list of witness prepared by the police services, I do not know any of the witness personally and so there is little chance of my influencing them. I do not have access to any of the evidence beyond having seen the witness statements, and so there is no chance of me concealing or destroying any evidence.

29.4. My legal representative has informed me that there is a video of the event at which I was arrested, and that this will be used by the prosecution. The existence of a video as evidence decreases the importance of eye witnesses, and so witnesses who could be influenced will not play a crucial role in the prosecution's case.

- 29.5. Furthermore, the witnesses listed by the prosecution are all police officers, and so are therefore far less likely to be influenced than lay individuals due to appear as witnesses in a criminal trial. In addition, as I was arrested nearly four months ago, it is likely that much of the police investigation has been completed and my release would therefore not hinder the investigation in any substantial way.
- 29.6. Finally, as the crux of my defence is the unconstitutionality of the offences the existence of evidence linking me to the statements I allegedly made is irrelevant, and I therefore have no incentive to interfere with any witnesses or evidence.
- 29.7. Subsection (d) refers to the possibility of an accused released on bail “*undermin[ing] or jeopardis[ing] the objectives or proper functioning of the criminal justice system, including the bail system.*” There is nothing to suggest that I would undermine or jeopardise any aspect of the criminal justice system. If I am released on bail in the present matter, I will comply with any and all conditions set by the Judge.
- 29.8. Subsection (e) requires that an accused released on bail not “*disturb the public order or undermine the public peace or security.*” I have not been charged with any offences that have involved violence or have incited violence and so have never been charged with anything that breached security. Furthermore, as I have never been convicted of any of the charges I have faced the existence of those charges cannot be seen as an indication of a propensity to disturb the public peace or security.
30. I am informed that section 96(10) requires that courts take into account the personal circumstances of the accused and “*decide the matter by weighing 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.*” This subsection lists a number of factors the court should consider.

- 30.1. Subsection (a) relates to the “*period for which the accused has already been in custody since his or her arrest*”. I have been in continued detention since my arrest on 1 May 2014; a period of over four months. This is an inordinately long period of time to wait for the commencement of my criminal trial, and is an unreasonable infringement of my personal freedom.
- 30.2. Subsection (b) relates to “*the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail*”. As I have already mentioned, the existence of various constitutional challenges – including the one I will bring in respect of this matter – means that the criminal trial will not commence as scheduled on 24 September 2014. The constitutional challenges are set down to be heard on 1 December 2014, and judgment is unlikely to be given until 2015. There is also the possibility of an appeal to any decision handed down in those constitutional challenges. As my criminal trial is dependent on the outcome of those challenges it is impossible to estimate when my criminal trial will commence, but it is clear that it will be many months until all the constitutional challenges are finalised. In these circumstances my right to personal freedom must be seen to outweigh any interests of justice that may prevail in detaining me without bail.
- 30.3. Subsection (c) relates to “*the reason for the delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay*”. Although I intend to challenge the constitutionality of the legislation under which I am charged, which is my right, the delay in the commencement of criminal proceedings in the present matter is not solely due to this application. Even without my challenge, the criminal case would be unable to proceed in light of the existence of the other three constitutional challenges which have already been filed. In addition, the constitutional challenges raise important issues that go to the heart of the contested legislation. They cannot, therefore, be dismissed as a mere delay to the finalisation of the present matter.

30.4. Subsection (d) relates to “*any financial loss which the accused may suffer owing to his or her detention*”. Although I am not working and do not receive a pension, my detention is putting financial strain on my family as they have incurred extra costs in coming to visit me.

30.5. Subsection (e) relates to “*any impediment to the preparation of the accused’s defence or any delay in obtaining legal representation which may be brought about by the detention of the accused*”. I have had great difficulty in preparing for my trial whilst I am in detention. I am not permitted regular access to my attorney. However, more concerning is that my South African advocate has experienced great difficulty in consulting with me, and was kept waiting for three hours before seeing me on her most recent visit. My continued detention is therefore jeopardising my ability to adequately prepare for the trial.

30.6. Subsection (f) relates to “*the state of health of the accused*”. As I have already mentioned I suffer from diabetes and arthritis, and my continued detention and the conditions in the detention facility are compromising my health. Without substantial changes to my detention conditions, and long period of detention will have a detrimental effect on me, and, given the expected length of time before this matter is finalised, the interests of justice cannot outweigh the need to keep me in awaiting trial detention.

31. Based on the foregoing, I therefore submit that if admitted to bail, I will not endanger the safety or any person or of the public nor will I undermine or jeopardise the objectives or the proper functioning of the criminal justice system. Releasing me on bail will not lead to me evading trial, nor will it induce a sense of shock or outrage in the community, and I will not interfere with any witnesses or evidence to be used by the prosecution in my criminal trial.

32. I have every intention of facing the charges against me in court.

33. It is my submission that based on the period I have already spent in detention, and the likelihood of a lengthy wait until the constitutional challenges related to this criminal matter are finalised, as well as my ill-health, it is in the interests of justice that I be released on bail.
34. The conduct that led to the charges being brought against me was neither violent nor threatening to any member of the community.
35. The existence of a variety of constitutional challenges to the offences I have been charged with increases the possibility of the legislative provisions that create those offences being invalidated, and the charges withdrawn. There is therefore a high possibility that I will not be convicted of those charges. Furthermore, all accused persons have a right to be presumed innocent until proven guilty, and so even if there was a high probability of being convicted, it is unreasonable and unlawful to detain me pending trial as a form of anticipatory punishment.
36. I have been advised by my legal representatives that the minimum amount those charged with offences under the Fourth Schedule are expected to pay as a bail deposit is E15 000. However, my attorney has also informed me that the Criminal Procedure and Evidence Act does make provision for this amount to be deviated from when there are substantial and compelling circumstances to do so. I submit that the factors I have listed above constitute the requisite substantial and compelling circumstances, and it is my respectful submission that the amount I will be able to raise is E2 000.

WHEREFORE I pray for the relief sought in the attached Notice of Motion.