

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

REPLYING AFFIDAVIT

I, the undersigned

MAXWELL MANCOBA DLAMINI

do hereby make oath and say as follows:-

1. I am an adult Swazi male from the Mantambe area, in the Shiselweni District, and am the first applicant in this matter.

2. The contents of this affidavit are to the best of my knowledge both true and correct and within my personal knowledge, unless the context indicates otherwise. Where I make submission of law, I do so on the advice of my legal representatives, whose advice I believe to be both true and correct.
3. Where I do not address a particular allegation, it should be taken as denied.
4. I have read the affidavit deposed to by Detective Assistant Supt. Aaron Methula in my application for bail, and respond thereto as follows:

AD PARAGRAPHS 1-3

5. Save to deny that the facts deposed to therein are both true and correct, the contents of those paragraphs are noted.

AD PARAGRAPH 4

6. No oral reasons were given at the time of our bail being denied and neither I nor the Second Applicant were ever informed of written reasons having been handed down by the Court. I am informed that my attorney was also not notified of written reasons having been handed down.
7. The respondent makes reference to The Times of Swaziland article on 7 May 2014, which reported the oral reasons given by Judge Simelane. However, this article also says that Judge

Simelane informed the Court that a written judgment would be provided in due course. Neither I nor the second applicant, nor our legal representatives have been provided with a written copy of the decision to refuse us bail.

8. In any event, I note that the deponent did not attach the written reasons to his answering affidavit and has relied on hearsay evidence to prove this allegation. I am therefore advised to deny the truth of its contents.

AD PARAGRAPH 5

9. I have been advised that the new circumstances raised in a new application for bail do not have to negate the reasons given for the initial refusal. When new facts come to light and are mentioned in a second application for bail all factors have to be reconsidered and re-evaluated to determine whether it is in the interests of justice for bail to be granted.

10. The new circumstances that I have raised in this application therefore do not have to relate directly to the reason given by the Court for the refusal of my bail, namely that I allegedly pose a security risk to society.

11. I specifically deny the correct interpretation of paragraph 5.3. Further legal submissions in this regard will be made by my legal representatives.

AD PARAGRAPH 6

12. The contents of this paragraph are noted.

AD PARAGRAPH 7

13. I denied the contents of this paragraph and the conclusions drawn therein.

14. I submit that I am entitled to bring a challenge to legislation that I believe is unconstitutional, particularly legislation of this nature where my liberty is at stake, and should be not penalized for doing so.

15. The constitutional challenge that I intend launching is not the only one of its kind currently before Swazi courts. There are at least two other cases that have been filed to challenge the constitutionality of the Sedition and Subversive Activities Act, and one other to challenge the constitutionality of the Suppression of Terrorism Act.

16. The delay caused by the constitutional challenges is therefore not solely of my making, and it is incorrect for the respondents to allege so.

17. I accept that my legal representatives requested a postponement of the criminal trial in June 2014.

18. Although 1 December 2014 has been set down as the date for the hearing of the various constitutional challenges that are not only of relevance to my criminal trial, but will likely be

at the core of my defence. There is no way of knowing when a judgment in that case would be delivered.

19. Again, as I have mentioned above, the existence of new facts does not have to refute Judge Simelane's finding in the initial bail application. I am advised that the new facts necessitate that the application for bail be reconsidered in its entirety.

AD PARAGRAPH 8

20. The contents of this paragraph are noted.

AD PARAGRAPH 9

21. As I have mentioned above, I deny the contents of this paragraph as I have been advised that the existence of new facts necessitates a complete re-evaluation of the factors to be considered by a judge in determining whether it is in the interests of justice to grant me bail.

AD PARAGRAPH 10

22. I deny that I am pre-empting the decision of the full bench. I have merely stated that I have good reason to believe that there is a likely possibility that the legislation under which I am charged will be declared unconstitutional and invalid.

AD PARAGRAPH 11

23. These facts were mentioned in the initial bail application, however they are included to explain the relevance of the constitutional challenge to the criminal trial.

AD PARAGRAPH 12

24. I accept that the constitutionality of the legislation has not yet been determined by a Court, however I stand by my submission that the legislation is unconstitutional.

AD PARAGRAPH 13

25. The contents of this paragraph are noted.

AD PARAGRAPH 14

26. As I mentioned earlier, the delay caused by the challenges to the constitutionality of the legislation is not solely of my making as there are at least three other cases in which the validity of the legislation is being challenged.

27. In any event, I am within my rights to bring a challenge to the constitutionality of legislation under which I have been criminally charged.

AD PARAGRAPH 15

28. The fact that the respondent obtained a Court order rescinding the order permitting me to write an exam is irrelevant to the fact that the Court initially refused to grant me bail, but did envisage that I would be allowed to write my exam.

29. I submit that at the time the Court considered my bail application they were under the impression that Correctional Services would assist in enabling me to write the exam. The conduct of the respondent, Correctional Services officials, and the Court after bail was initially refused is therefore irrelevant to this argument.

AD PARAGRAPH 16

30. I deny that I am not prioritizing my education. I maintain that I am entitled, under the Swazi Constitution, to the right to freedom of expression and association, and that my lawful exercise of these rights is being frustrated by my arrest and detention. It is this frustration of the exercise of my rights that is hindering my education, not my conduct.

31. I particularly deny that I am acting in a seditious fashion or that I do not value my education.

AD PARAGRAPH 17

32. I respectfully submit that it is misleading to say that the Court declined the initial bail application without mentioning that the Court did create the opportunity for me to write my exam. The Court therefore did attempt to minimize the disruption to my education.

AD PARAGRAPH 18

33. I admit that these factors are not new, but as I have already mentioned, the existence of new facts requires a complete reconsideration of the application for bail. It is therefore necessary for me to include these factors for the Court to take them into account.

34. I deny that the existence of the 2013 charges of sedition indicate a propensity to commit offences as I have not been found guilty of those charges. The Constitution protects the right to be presumed innocent, and it is therefore incorrect to use the existence of charges, for which I have not been tried, as a supposed indication of my guilt.

35. In any event, the constitutional challenge alluded to above will necessarily have a bearing on those charges as well.

36. It is also incorrect to say, that my “persistence on committing offences of the same nature” which undermines the functioning of the criminal justice system or abuses the bail system. I

have never been convicted of any offence and it is therefore incorrect to claim that I have “committed offences” in order to deny me bail.

37. I deny that there is evidence to support the claim that if I were released on bail I would “employ the means to carry out” the statements I allegedly made at the May Day gathering.

38. I submit that there is nothing to suggest that I would evade trial. I have a vested interest not only in the constitutional challenge but also in ensuring my innocence before this Court.

39. I deny that the claim that the Crown has a strong case against me would induce me to abscond as I have consistently maintained that I am innocent.

40. I reiterate that I have never absconded from any of the previous trials I have been involved in, and have conscientiously adhered to all and any bail conditions that have been imposed on me. This is a strong indication that I have no intention to evade this trial.

41. I therefore stand by my submissions under those paragraphs. My legal representatives will make further legal argument during the hearing of my application.

AD PARAGRAPH 19

42. I repeat that the Court is required to reconsider the factors in totality when determining my eligibility for bail in light of the new circumstances.

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, and am the second applicant in this matter
2. The contents of this affidavit are to the best of my knowledge both true and correct and fall within my personal knowledge, except where the context indicates otherwise. Any legal submissions are made on the advice of my legal counsel, whose advice I believe to be both true and correct.
3. I have read the affidavit by Mr. Maxwell Mancoba Dlamini and confirm the contents of his affidavit insofar as it relates to me.
4. I have read the affidavit deposed to by Detective Assistant Supt. Aaron Methula in my application for bail, and respond thereto as follows:

AD PARAGRAPH 20-21

5. The contents of these paragraphs are noted.

AD PARAGRAPH 22

6. No oral reasons were given at the time of our bail being denied and neither I nor the First Applicant were ever informed of written reasons having been handed down by the Court. I am informed that my attorney was also not notified of written reasons having been handed down.

7. The respondent makes reference to The Times of Swaziland article on 7 May 2014, which reported the oral reasons given by Judge Simelane. However, this article also says that Judge Simelane informed the Court that a written judgment would be provided in due course. Neither I nor the first applicant, nor our legal representatives have been provided with a written copy of the decision to refuse us bail.

8. In any event, I note that the deponent did not attach the written reasons to his answering affidavit and has relied on hearsay evidence to prove this allegation. I am therefore advised to deny the truth of its contents.

AD PARAGRAPH 23

9. I have been advised that the new circumstances raised in a new application for bail do not have to negate the reasons given for the initial refusal. When new facts come to light and are

mentioned in a second application for bail all factors have to be reconsidered and re-evaluated to determine whether it is in the interests of justice for bail to be granted.

10. The new circumstances that I have raised in this application therefore do not have to relate directly to the reason given by the Court for the refusal of my bail, namely that I allegedly pose a security risk to society.

11. I specifically deny the correct interpretation of paragraph 5.3. Further legal submissions in this regard will be made by my legal representatives.

AD PARAGRAPH 24

12. The contents of this paragraph are noted.

AD PARAGRAPH 25

13. I denied the contents of this paragraph and the conclusions drawn therein.

14. I submit that I am entitled to bring a challenge to legislation that I believe is unconstitutional, particularly legislation of this nature where my liberty is at stake, and should be not penalized for doing so.

15. The constitutional challenge that I intend launching is not the only one of its kind currently before Swazi courts. There are at least two other cases that have been filed to challenge the constitutionality of the Sedition and Subversive Activities Act, and one other to challenge the constitutionality of the Suppression of Terrorism Act.
16. The delay caused by the constitutional challenges is therefore not solely of my making, and it is incorrect for the respondents to allege so.
17. I accept that my legal representatives requested a postponement of the criminal trial in June 2014.
18. Although 1 December 2014 has been set down as the date for the hearing of the various constitutional challenges that are not only of relevance to my criminal trial, but will likely be at the core of my defence. There is no way of knowing when a judgment in that case would be delivered.
19. Again, as I have mentioned above, the existence of new facts does not have to refute Judge Simelane's finding in the initial bail application. I am advised that the new facts necessitate that the application for bail be reconsidered in its entirety.

AD PARAGRAPH 26

20. The contents of this paragraph are noted.

21. I also note that the same Counsel will appear for my bail application.

AD PARAGRAPH 27

22. As I mentioned above, the delay caused by the existence of the challenges to the constitutionality of the legislation under which I am charged is not solely of my making.

AD PARAGRAPH 28

23. I deny that I am pre-empting the decision of the full bench. I have merely stated that I have good reason to believe that there is a likely possibility that the legislation under which I am charged will be declared unconstitutional and invalid.

AD PARAGRAPH 29

24. I deny that the Crown has overwhelming evidence against me.

AD PARAGRAPH 30

25. I accept that the constitutionality of the legislation has not yet been determined by a Court, however I stand by my submission that the legislation is unconstitutional.

AD PARAGRAPH 31

26. The contents of this paragraph are noted.

AD PARAGRAPH 32

27. As I mentioned earlier, the delay caused by the challenges to the constitutionality of the legislation is not solely of my making as there are at least three other cases in which the validity of the legislation is being challenged.

28. In any event, I am within my rights to bring a challenge to the constitutionality of legislation under which I have been criminally charged.

AD PARAGRAPH 33

29. I submit that my health has deteriorated since the initial bail application, and so the circumstances have changed significantly since the initial finding of the Court.

30. As I mentioned in my affidavit, I have requested a medical report from the prison authorities which is attached hereto as Annexure "MMx".

31. While I accept that I have a right to receive private medical care under the Constitution, I submit that there have been difficulties in accessing this which has contributed to my deteriorating health. The very nature of my custody has contributed to my deteriorating health condition as noted in the report.

32. I make the same submission regarding my right to receive food, clothing, and other necessities. I further submit that visits from my family, friends and legal representatives have been hindered by the prison authorities, and this has hampered my ability to receive such goods and maintain my health.

33. I respectfully submit that my seriously deteriorating health as indicated in the report outweighs any benefit to the State of continuing to keep me in custody. Without unnecessarily exaggerating my condition, I fear that I will face irreparable health effects due to the aggravating effects of detention on my diabetes if I am kept in detention pending the outcome of my trial.

AD PARAGRAPH 34

34. I deny the contents of this paragraph.

35. There is no evidence to suggest that I would evade trial. Although I acknowledge the serious nature of the offences I am charged with, I maintain that I am innocent. I deny that the Crown has “overwhelming” evidence against me, and reiterate that I believe I have a solid defence.

36. I deny that I would use unofficial routes to leave Swaziland as this would make me vulnerable to further arrest and detention both in Swaziland and elsewhere. .

37. There is no evidence to support the claim that if I were released on bail I would “employ the means to carry out” the statements I allegedly made at the May Day gathering. I deny that the

security of the country's leadership and the nation at large will be compromised should I be released on bail.

38. I deny that I have demanded the overthrow of the King's government and note that these are not the statements that I have been charged with. I further deny that should I be granted bail that I would carry out any threats I have supposedly made in this respect. There is no evidence that I would do so and I deny that I would.

AD PARAGRAPH 35

39. I deny the contents of this paragraph.

40. While I accept that bail is not supposed to be used as a form of anticipatory punishment and is meant to ensure that I do not evade my trial. I respectfully submit that the State has not proven that I would evade my trial or that I am a flight risk or a danger to society.

41. As I have mentioned above, the delays caused are as a result of at least three other constitutional challenges, in addition to the one I am seeking to file. It is therefore not solely as a result of my action that my criminal trial has been postponed.