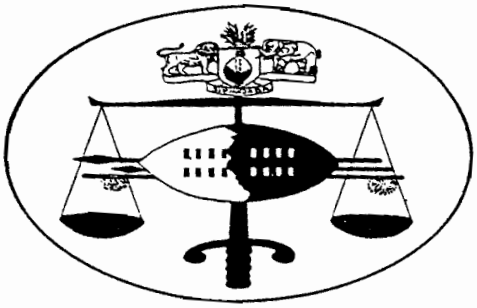

THE HIGH COURT OF SWAZILAND

REX

Vs

SIPHO NHLABATSI

Criminal Case No. 202/2005

Coram	S.B. MAPHALALA – J
For the Crown	MR. MABUZA
For the Defence	MR. P. DLAMINI

RULING

(On bail application)

(09th December 2005)

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[1] Before court is an application for bail under Section 95 (4) of the Criminal procedure and Evidence Act. No. 67 of 1938 as amended which states:

> "Where the court is satisfied that substantial and compelling circumstances exist which justify that the amount less than E15, 000-00, it shall enter these circumstances on the record proceedings and may thereupon fix the amount of bail at such lesser amount".

[2] Applicant was arrested and detained by members of the Royal Swaziland Police on charges of attempted murder. He is currently kept at the Zakhele Remand Centre. It is on this charge that he applies for bail.

[3] In his affidavit in support of the application he avers certain facts which he contends constitute the substantial and compelling circumstances as envisaged by the above-cited sub-section. He avers that as the sole breadwinner of his six (6) children and two wives his family is currently undergoing stressful and tough times occasioned by his incarceration. His children have had to drop out of school and there is no food for the family. Even the wife has pleaded with the authorities for his release. Secondly, he avers that he is HIV positive and suffers from a catalogue of illness, *inter alia* tuberculosis, pneumonia consequent thereform. His continued detection deteriorates his condition daily and by the time his matter comes to trial he will be long dead if he is in prison. He has filed annexure "SN1" being a medical record reflecting that he has "CD4 count" and thus HIV positive.

[4] The Crown as represented by Crown Counsel *Mr. P. Dlamini* accepts that Applicant's medical condition would constitute the substantial and compelling circumstances required by the Act. But if Applicant is released on bail he is will interfere with the complainant who is his child staying in the same homestead. He will also interfere with one of his wives who is a key witness in the criminal case. Therefore, so the argument goes, the interests of justice will be adversely compromised if accused is released on bail.

[5] It appears to me from the facts advanced that in *casu* there exist substantial and compelling circumstances as envisaged by Section 95 (4) of the Act. It is common cause between the parties that the medical condition which presently inflicts the Applicant is such a circumstance. Therefore as required by the said sub-section this fact is accordingly recorded.

[6] The only question for determination is whether it would be in the interest of justice to release the Applicant on bail. As it has been stated above the Crown fears that if Applicant were to be released on bail, he will interfere with Crown witnesses, namely his wife and the complainant. It is a trite principle of law that in assessing the

risk of interference, the court is entitled to consider the relationship between the accused and the state witnesses (see generally *De Jager vs Attorney-General, Natal 1967 94) S.A. 143 (D); Ex parte Taljaard 1942 OPD 66* and *R vs Phasoane 1933 TPD 405).* In *ex parte Nkete 1937 EDL 231* bail was refused where witnesses feared the accused and had been threatened. But the *mere* fact that state witnesses happen to be friends or relatives of the accused is not *per se* sufficient reason to refuse bail (see *R vs Kok 1927 NPD 267*).

[7] There are four basic principles which govern bail conditions. First, a bail condition may not be *contra bonos mores*. In *De Jager (supra)* at *143* it was held that a bail condition prohibiting a husband to communicate with his wife – who happened to be a state witness in her capacity as complainant was not *contra bonos mores*. Secondly, bail conditions should be neither vague nor ambiguous (see *S v Budlender 1973 (1) S.A. 264 (c) 271 (A)*). Thirdly, a bail condition should not be *ultra vires*, i.e. condition outside those permitted by law not to be inserted (see *R vs Conradie 1907 T.S. 455*). Fourthly, a bail condition must not be practically feasible (see *R vs Fourie 1947 (2) S.A. 574 (O)* at *577*).

[8] On the facts of the present case it appears to me that if applicant were to be released on bail, in view of the close relationship between him and the two witnesses, he is likely to interfere with them; and thus jeopardizing the interests of justice. On the other hand his continued incarceration adversely affects his whole family, as he is the sole breadwinner. This is indeed, a very fine balancing act. However, it would appear to me that the interests of justice should take precedence over the Applicant personal circumstances. For this reason I am obliged to decline granting bail to the Applicant on these facts. In *casu* I find that a condition that Applicant should not interfere with the two witnesses will not be practically feasible (see *R vs Fourie (supra)* It would also appear to me that in the interest of justice the Crown ought expedite the procedure of trial, and that Applicant be tried as soon as possible to ameliorate his continued incarceration

[9] In the result, application for bail is refused on the basis of the afore-going reasons.

S.B. MAPHALALA

JUDGE