

THE HIGH COURT OF SWAZILAND

JAMES ZULU

Applicant

And

COMMISSIONER OF CORRECTIONAL SERVICES

(PRISONS)

1st Respondent

COMMISSIONER OF POLICE

2nd Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Civil Case No. 3552/2005

Coram

For the Applicant For the

Respondents

S3. MAPHALALA - J

MR. S. SIMELANE

MR. P. DLAMINI

RULING

(4th October 2005)

[1] The application before court is for a writ of *habeas corpus* and is supported by the Founding affidavit of his attorneys deposed to by an Articled Clerk, one Martin Dlamini. The application was filed under a Certificate of Urgency where, amongst other things, the court is asked to order and direct either the 1st Respondent and/or the 2nd Respondent to release and liberate the Applicant in their custody forthwith and further that the court award cost of suit at attorney and client scale.

[2] The basis of the application is that the Applicant had been granted bail by the Mbabane Magistrate Court on criminal charges of extortion which he paid and was awarded a Liberation Warrant by that court. However, on presentation of the said Warrant the officers of the 1st Respondent declined to honour it. Thereafter followed "cat and mouse" chase by Applicant's representative of officers of the 1st and 2nd Respondent as to the whereabouts of the Applicant. It appears that Applicant had been released to the police under questionable circumstances. This action has propelled the Applicant to launch these proceedings alleging that his continued detention and incarceration is unlawful and that the Respondents are in contempt of court.

[3] All the Respondents have been served with the papers but they have not filed any opposing affidavits in view of the fact that they were served during the weekend, the Attorney - General was served with the application papers whilst he was attending the graduation ceremony at the University of Swaziland on Saturday.

[4] When the matter was called Mr. Phila Dlamini who happened to be attending another criminal case before me stood for the 3rd Respondent and he applied to be given an opportunity to take instructions on the matter. The case was stood down for a while for this purpose. When the matter resumed he informed the court that Applicant had been released in accordance with the dictates of the Liberation Warrant issued by the Magistrate Court and thereafter he was re-arrested by the police in connection with other criminal charges. He was presently in the custody of the police.

[5] My initial view at this juncture was that the application had been overtaken by events in view of what *Mr. Dlamini* for the Crown had submitted. It appears to me that whatever order the court granted will be *bruten fulmen* in the circumstances. *Mr. Dlamini* for the Crown was in agreement with me on this point but *Mr. Simelane* for Applicant took the position that Applicant is entitled to the order sought in paragraph 2 of the Notice of Motion on the basis of what is averred in paragraph 8 of the Founding affidavit. I put it to *Mr. Simelane* that in that case there is a dispute of fact between what is averred by the Applicant and what was submitted by the Crown from the Bar as to the circumstances in which the Applicant was released by the 2nd Respondent and thereafter re-arrested by the police. It is imperative therefore, in my view, that the Respondents file their Answering affidavits to what is averred by the Applicant in the Founding affidavit. I cannot rule the matter only on the basis of the Applicant's Founding affidavit without hearing the other side on such serious allegations of contempt of court levelled against both the 1st and 2nd Respondent.

[6] In the result, for the afore-going reasons the Respondents are to file their Answering affidavit within 7 days from the issuance of this ruling and thereafter the matter to take its normal course.

S.B. MAPHALALA

JUDGE