THE HIGH COURT OF SWAZILAND

BAKHE DLAMINI

1st Applicant

MBONENI MOTSA

2nd Applicant

And

THE SENIOR MAGISTRATE - SHISELWENI DISTRICT

1st Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

Civil Case No. 16/2004

Coram: S.B. MAPHALALA - J

For the Applicants: MR. B.S. DLAMINI

For the Respondents: MISS LUKHELE

JUDGMENT

(11/03/2005)

[]] Before court is an application for the review and setting aside the bail amount fixed by the Magistrates Court in the criminal matter pending against the Applicants as improper and/or unreasonable. In prayer (c) that an order be issued granting a fair and reasonable amount to be paid by Applicants as bail.

[2] The Founding affidavit of the l^{sl} Applicant is filed in support thereto. The 2" Applicant has filed a supporting affidavit to that of the I$^{s'}$ Applicant.

[3] The tacts of the matter are that the Applicants face three counts of robbery at the Magistrates Court, Nhlangano in the Shiselweni Region. Both Applicants applied for bail before the Senior Magistrate (1st Respondent) and were granted bail at E8, 000-00. Applicants were aggrieved by the amount and applied for reduction of bail before this court wherein the court ordered that same application be made before the Senior Magistrate. At the Magistrates Court bail reduction was refused and now an order reviewing and/or setting aside the amount has been moved by Applicants.

[4] The Respondents as represented by the office of the Director of Public Prosecutions filed a Notice of Intention to Oppose dated the 11th November 2004, but did not file the requisite opposing affidavits.

When the matter appeared before me for arguments on the 22ml December 2004, Counsel for the Respondent strenuously opposed from the bar the granting of the order sought. I granted the Respondents an indulgence to file their opposing affidavits by the 24th December 2004, and by which date the matter was to proceed with or without their opposing papers.

[5] On the return date being the 24th December 2004, Miss Lukhele filed an application for condonation in terms of Rule 27 of the Rules of the High Court Rules. This application was handed from the bar and it accompanied what is termed "Respondent's Heads of Argument". The court was urged to adopt the latter as an opposing affidavit, thus the application for condonation.

[6] Rule 27 thereof provides as follows:

27. (1) In Lhe absence of agreement between the parties, the court may upon applications on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems fit

(2) Any such extension may be ordered although the application therefore is not made until after the expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems fit as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.

(3) The court may on good cause shown, condone any non-compliance with these rules.

(4) After a rule nisi has been discharged by default of appearance by the Applicant, the court or a Judge

may revive the rule and direct that the rule so revived need not be served again.

[7] It appears that matters affecting time are to be determined under sub-rule (1) but other matters requiring condonation fall under sub-rule (3). In regard to the latter, exceptional circumstances, as well as good cause, must be shown.

[8] According to Erasmus, Superior Court Practice (Juta) at Bl - 174 citing the case of Brumloop vs Brumloop 1972 (1) S.A. 503 (o) at 504 F where it was held that in as much as the court is given a discretion to condone any non-compliance with the rules, so also it has a discretion to waive a requirement thereof. The wide powers of the court to condone non-compliance with its own rules is subject to the requirement, and safeguard that good cause must be shown.

[9] In casu good cause as envisaged by the rule has not been shown. There is no explanation whatsoever why a proper affidavit has not been filed in accordance with the rules. Having said that, however it is my considered view that it would be in the interest of justice that I consider all the facts before me.

[10] The legal point raised on behalf of the Respondents that reduction of bail should not be granted by this court, as this is a mandate to exercise its discretion. To buttress the point the court was referred to the provisions of Section 102A of the Criminal Procedure and Evidence Act (as amended) that it would be improper and/or unreasonable for this court to reduce the bail for a lesser amount as the bail amount is provided for by a statute. The court was further referred to unreported case in Austin Hlatshwayo vs Rex - Criminal Case No. 33/2003 at page 3, wherein an application for reduction of bail the court held,

inter alia, that under this Section the court is not entitled to make any order which the Magistrate was not competent to make (see Mazibuko vs Attorney General, Transvaal 1963 (2) S.A. 118 T).

[11] Section 102 A of the Act reads as follows:

"102A(1) Notwithstanding the provisions of subparts A and B (1) of this Part the amount of bail to be given by a Magistrate in respect of theft or any kindred offence shall be:

a) E500 if the value of the property in respect of which the offence is E2, 000; or

b) One half of the value of the property in respect of which the offence is committed if the value of the property exceeds E2000.

(Ibis) Notwithstanding any provisions of this Act the deposit of the amount of bail given under subsection (1) shall be made in cash only. (Added A.8/1992).

(2) Notwithstanding the provisions of subparts A and B (1) of this Part a Magistrate shall not admit to bail on recognisance any person charged with theft or any kindred offence, if the value of the property in respect of which the offence is committed is E2, 000 or more."

[12] In casu, it appears that the Magistrate erred in favour of the Applicant, as he cannot exercise any discretion in granting bail in such matters. Bail according to the Section is regulated wherein the court has no mandate to exercise its discretion. Therefore, following what was said in Austin Hlatshwayo (supra) this court is not entitled to make any order which the Magistrate was not competent to make,

(see also Mazibuko vs Attorney - General (supra).

[13] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHALALA

JUDGE