IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. CASE NO. 21/08

In the matter between:

NHLANHLA LINCOLN SIKHONDZE **APPLICANT**

VS

MAGISTRATE PHILISIWE DLAMINI N.O. **1st RESPONDENT**

THE ATTORNEY GENERAL **2nd RESPONDENT**

CORAM: **MAMBA J**

FOR ACCUSED: **B.S. DLAMINI**

FOR CROWN: **T.N. SIMELANE**

JUDGEMENT

23rd SEPTEMBER, 2008

[1] It is common cause that the Applicant appeared in the Magistrate's court on a criminal charge and was warned to appear again on the 23rd July 2008, but on this day he did not turn up in court whilst his attorney did. The attorney did not have any explanation about the absence of his client and rather candidly informed that court that the Applicant was being dishonest to him. He threatened to withdraw his services.

[2] The Crown successfully applied for a warrant for the arrest of the Applicant following his non appearance.

[3] On the 30th July, 2008 the Applicant appeared in court on his own as the warrant of his apprehension had not yet been executed. He was not asked at all about his non appearance on the 23rd July 2008 but after some preliminary questions germaine to this application the court ruled that the applicant

> "... has to be kept in custody whilst the court inspects Books of record at Fincorp. [He] has to be present since a warrant of arrest was issued and he was never arrested. Today he has resurfaced without a reasonable explanation to secure financial interest of complainant. ...Bail is forfeited by court"

I do not know what is meant by the last phrase in the penultimate sentence - "to secure financial interest of complainant." What is clear though is that the Applicant had made an undertaking to reimburse the complainant the monies that were the subject of the criminal charge and had informed the court that he had applied for a loan from Fincorp in order for him to make the repayment to the complainant.

[4] The Applicant has applied to this court on an urgent basis for an order

reviewing and or setting aside the Magistrate's decision of the 30/7/2008 remanding him into custody. He complains that this order is "wrongful, unlawful and irregular - [as] no fresh charge of contempt of court had been preferred against me and that I was out on bail for the charges I am presently facing." The Applicant further avers in his papers that the crown did not apply for the estreatment of his bail deposit. This is obviously incorrect as the record clearly shows that such an application was made by the Public Prosecutor. What is significant in this regard though is that the Applicant was not heard on the issue at all. He was also, as stated above, not asked to explain his failure to attend court on the 23rd July 2008.

[5] The order effectively withdrawing the bail granted to the Applicant has adverse consequences on him inasmuch as it not only resulted in a forfeiture of the bail deposit but also took away his liberty and condemned him to jail pending the finalization of his trial. He should have been heard on both counts. As a general rule, and this is in keeping with the audi alteram partem rule; bail may not be withdrawn or estreated, for whatever reason, without the Accused being afforded the chance to be heard on the issue. The normal procedure is that the court orders the provisional estreatment of bail when the warrant for the apprehension of the accused is granted. In an application for bail the court will always lean in favour of the liberty of an accused and therefore the court will not lightly withdrew bail once granted, thus the need for a proper inquiry to determine what is in the best interests of justice. The estreatment is provisional because an inquiry has not been concluded to determine whether or not the forfeiture should be made. **(See S v Cronje 1983 (3) SA 739 (W).** In South Africa the position is regulated by Section 67 of the Criminal Procedure Act 51/1977). The inquiry will of necessity involve the Accused being heard on the matter. This was not done in this case and the learned Magistrate was, with due respect, in error in failing to

do so and the forfeiture order is set aside.

[6] The Applicant has, properly in my view, not sought to contest the validity or legality of the warrant for his apprehension. He has, however, argued that his incarceration was not based on that warrant but rather on his failure to recompense the Complainant the monies which are the subject of the criminal charge against him. He bases this in part, on the fact that he attended court on his own volition and not on the strength of the said warrant. I do not think that this conclusion is correct. The court record clearly shows that the court was persuaded by the Public Prosecutor's plea that the Applicant should be remanded in custody because "there is no guarantee that he will come back." In view of the warrant for his apprehension, I do not think the Applicant can legitimately argue that the Magistrate was wrong in acceding to the Crown's application to remand him into custody, but he should have been heard on this application.

[7] The worrying issue though is that the Applicant is still in custody and that is why he has applied for his release. It is always desirable that where an accused person finds himself being arrested and brought to court for his failure to attend court as in this case, the inquiry pertaining to his non appearance or attendance, should be held on his first appearance or at the earliest available opportunity. This is a salutary rule of practice and I believe has been the norm in this jurisdiction. It is undesirable that minor enquiries such as the one under consideration herein should be left undetermined for such a long period that they should result in an application such as the present. The situation is further worrying because on the 30/7/08 the

Applicant herein attended court on his own volition. The crown's submission that was accepted by the Magistrate that "there was no guarantee that he will come back" ignored this fact and was to that extent an exaggeration and incorrect. I do not think that justice would be served by keeping him in custody any further

pending the inquiry into his non appearance on the 23rd July, 2008. I order that he must be released from custody forthwith unless lawfully held for any other cause. His bail is, however, provisionally estreated pending the inquiry referred to herein.

[8] There is another matter that deserves mention in this application and that is, the learned Magistrate's prayer in her affidavit that the application should be dismissed with costs. Notwithstanding that the Magistrate has been cited, in her official capacity as the presiding officer in the court below as the 1st respondent, it is undesirable for her to include such a prayer in her deposition. Her duty to this court and her own court is to remain neutral and above the fray or dust of conflict. Her duty is to supply the facts to this court and the reasons for her decision in a dispassionate manner. A prayer for the dismissal of the application may tend to lead to the unfortunate perception that she was and is not impartial on the issue. These views which are worth repeating were expressed by Hull CJ (as he then was) in Director of Public Prosecutions v The Senior Magistrate, - Nhlangano and Another, 1987-1995 (4) SLR 17 @ 22G-I and repeated by this court in Mbuyisa Dlamini v Senior Magistrate Joe Gumedze & Another (case No 2627/06, judgement delivered on 26th January, 2007. The learned CJ stated the position as follows:

> "Criminal trials, and applications for review, are of course not adversarial contests between Judicial officer and Prosecutor. It is wrong and unseemly that they should be allowed to acquire that flavour. Ordinarily on a review, the Judicial officer whose decision is being called into question is cited as a party for formal purposes only. He will have no need to do anything beyond arranging for the record to be sent up to the High Court, including any written reasons that he has or may wish to give for his decision.
>
> It may be necessary, very occasionally, for him to make an affidavit as to the record. This is, however, to be avoided as far as possible. It is, generally, undesirable for a Judicial officer to give evidence relating to proceedings that have been taken before

him. In principle, there may be a need for a Magistrate to be represented by Counsel upon a review, if his personal conduct or reputation is being impugned but this too will be in exceptional circumstances."

[9] In summary therefore, the following order is made:

1. The decision of the court a *quo* withdrawing the Applicant's bail and forfeiture of the bail deposit is set aside and is substituted with a provisional - cancellation of the Applicant's bail and (provisional) forfeiture of his bail deposit.
2. The Applicant is to be released from custody forthwith, unless otherwise lawfully held for any other cause.
3. The court a quo (not necessarily the 1st respondent herein) is to conduct an enquiry into the non appearance in court by the Applicant on the 23rd July, 2008
4. There is no order for costs made.

MAMBA, J