IN THE HIGH COURT OF SWAZILAND

Case No. 118/2012

In the matter between:-

JOHN ROLAND RUDD **Applicant**

and

REX **Respondent**

Neutral citation: *John Roland Rudd v Rex* (118/12) [2013] SZHC10 (30th January 2013)

Coram: HLOPHE J

For the Applicant: Mr. S. Khoza

For the Respondent: Mr. S. Dlamini

Heard: 23rd & 24th /01/2013

Delivered: 31st January 2013

JUDGMENT

[1] Subsequent to a Judgment of the Supreme Court in which it directed that the application for the release of the surety from his bail surityship he had entered into in favour of the Applicant herein as well as for the withdrawal of the accused's (applicant's), bail and its forfeiture, be reverted to the High Court for rehearing within fourteen days, the Applicant instituted an application for his release from custody or on bail following the lapse of the fourteen days period without the matter having been heard.

[2] The application was set down to proceed before me as duty Judge of the week on which the date for the hearing of the matter following its set down fell. For clearer understanding of the facts and circumstances of the matter I need to recite the history of the matter which is undoubtedly a long one:-

> Following the Applicant's arrest on charges of two counts of attempted murder allegedly committed against two members of the Umbutfo Swaziland Defence Force and further counts of illegal possession of a firearm and ammunition, the Applicant applied for bail which came before Judge Mabuza. The said application was granted on the terms that the Applicant pays cash in the sum of five thousand Emalangeni (E5000.00) and also provide a surety to the tune or sum of E10 000.00.

[3] The Applicant paid the bail deposit as fixed by court and went on to provide a surety who undertook to produce him in court for trial or put

differently who undertook that the accused/ Applicant was definitely going to stand trial and in the event he did not, he was going to pay the state the E10 000.00 he had pledged. This surety was stood by one Zwelithini Dickson Masuku, who it later transpired in court was a close friend of the Applicant.

[4] It would appear that the release from custody of the Applicant pursuant to the bail granted him by court was on the 22nd June 2012 even though sometimes the date for such release is stated as the 23rd June 2012. There is nothing in my understanding that turns on this slight disparity which in my view is only attributable to the passage of time and therefore a natural memory lapse.

[5] It transpired that on the 24th June 2012, the Applicant, his girlfriend Dumsile Shiba, one Alex Langwenya and Zwelithini Dickson Masuku (Dickson) met at a certain house situate at Bhunya Residential quarters at a place called Moyeni, where a braai took place. It was during this braai according to Dickson that the Applicant informed him (or them, it was unclear), that he was going or he intended escaping or absconding to South Africa because he was seeing unknown strangers loitering around his house which he feared would kill him. For reasons that were never clarified in court, he suspected the said strangers to be members of the security forces. It suffices that applicant himself would not shed light on why he suspected these people to be members of the security forces and why they would have him killed.

[6] According to Dickson, on Monday 25th June 2012, he proceeded to Mbabane in his car whilst in the company of the Applicant. Having

dropped the Applicant who was on an undisclosed mission in town, he proceeded to the Mbabane Police Station whereat he met one of the investigating officers in the matter of the Applicant in whose favour he had stood surety. This was Detective Constable Charles Shongwe. He informed him that he wanted to withdraw from standing surety for the Applicant because the latter intended or was about to escape or abscond to South Africa. Of course the escape or absconding to South Africa by the Applicant would have been against his bail conditions one of which warned him to remain in Swaziland.

[7] Detective Constable Shongwe having learnt of Dickson's desires called crown counsel Mr. Macebo Nxumalo as well as the Registrar of the High Court and informed them of what he had just been told by Dickson Masuku. They were later called to court whereupon they were taken by the Registrar to Judge Dlamini's chambers.

[8] Dickson Masuku was made to record a statement under oath before Judge Dlamini. The contents of the statement were actually recorded on the court file cover by Judge Dlamini and therein Dickson is shown as having stated that the Applicant intended escaping or absconding the jurisdiction of this court and twice that he intended to escape to the Republic of South Africa, with the last of these two instances, clarifying that his said escape was going to be effected through crossing at informal crossings or structures. Dickson then requested that he be released from standing surety for the Applicant. The crown counsel present also asked for an order of court authorizing the arrest of the Applicant, withdrawal of his bail and the forfeiture of bail deposit.

[9] The court per Judge Dlamini granted all the orders as mentioned above which resulted an order for the arrest of the Applicant being made including another one withdrawing the Applicant's bail as well as that directing a forfeiture of the bail deposit. At the same time, Dickson Masuku was released from being a surety.

[10] One of the subsequent actions taken by the Applicant was to appeal the decision of Judge Dlamini to the Supreme Court. Whilst the said appeal was still pending, the Applicant in July 2012, applied for bail pending appeal. The matter appeared before Judge Dlamini who *inter alia* ordered that the decision concerned was not a matter for appeal but review and therefore dismissed the application for bail pending appeal.

[11] In opposition to the said application the crown filed over and above the affidavit of the investigating officer that of Dickson Masuku. In this affidavit Dickson Masuku stated at paragraph 4 thereof that the Applicant had told him during a braai session they had had that he was going to escape to the Republic of South Africa. In a subsequent paragraph he clarified that the Applicant had said he was to cross into South Africa through one of the informal crossings.

[12] When the matter reached the Supreme Court, it directed after having concluded that the matter had not been lawfully dealt with, that the matter reverts to the High Court for the application seeking the release of the Applicant's surety, withdrawal of the bail granted applicant and forfeiture of the bail deposit. It directed further that these issues be determined by a different Judge to the one who initially heard the matter, presumably because of the nature of the relief sought and the

circumstances surrounding such reliefs, that the Applicant remains in custody. This inquiry, the Supreme Court directed had to be conducted within 14 days of the handing down of the Supreme Court Judgment.

[13] For some reason the matter was not proceeded with within the 14 days as directed by the Supreme Court which I was informed elapsed on the 20th December 2012. I am not sure how the computation of the days was carried out in view of the provisions of the Rules of Court that court days do not run between the 16th December and 16th January of each year. This point was not raised though.

[14] Having noted that the matter was not heard within the 14 days directed by the Supreme Court the Applicant instituted application proceedings in terms of which he sought an order of court directing that he be released from custody in view of the crown (according to him) having failed to prosecute the matter within the period directed by the Supreme Court.

[15] In its opposition to this application, the crown filed the affidavit of crown counsel, Mr. Dlamini, in which he refuted the claims by the Applicant. It was contendend by Mr. Dlamini that there was no merit in the Applicant's assertion. The truth he submitted was that the crown was not responsible for the said delay. In fact crown counsel concerned had engaged both Applicants different attorneys in Mr. Khoza and Mr. Gama trying to arrange a hearing date. Furthermore, the Registrar of the High Court had himself engaged the Applicant by going to the Remand Centre where he advised him that a date could not be set because there was no Judge to hear the matter then in view of the fact that only a limited number of Judges could do so as four Judges had already heard

it and were now disqualified in terms of the Judgment. It was therefore not possible to secure a judge because most of them were already on vacation, and that the matter was to be allocated a date as soon as a Judge was available to deal therewith.

[16] On the basis of these grounds, I could not accede to the Applicant's application that he be summarily released as a result of failure to hear his matter within 14 days of the Supreme Court Judgment. I could not find that the reason why the matter could not be dealt with within the fourteen days as directed was attributable to the Respondent than to reasons of possibility or feasibility of performance. In any event I am of my own doubtful that the 14 court days as contemplated by the rules, which do not conceive the days between 16 December and 16 January of each year to be court days, had lapsed. Because of these considerations I was of the view that all that needed be done was compliance with the order of the Supreme Court. In view of the matter being an urgent one by its very nature, I decided to give the parties a hearing date.

[17] When the merits of the application for the release of the surety together with the bail withdrawal and the forfeiture of the bail deposit was to proceed, the parties were *ad idem* that they did not need to file papers but maintained that the application be dealt with through the leading of oral evidence, with counsel for the crown indicating that his witness were ready to proceed with the matter. It was agreed that the Respondent had the duty to begin as they are the ones who sought the reliefs referred to above. I have however decided to maintain their initial citation as Applicant and Respondent.

[18] The crown led two witnesses namely Zwelithini Dickson Masuku (Dickson) and Detective Constable Charles Shongwe. Dickson Masuku after taking the oath informed the court that:-

Following his having stood surety for the Applicant and subsequent to the interview he had been subjected to by the High Court Registrar, he had gone to fetch the Applicant from the Police Station in line with the bail he had granted and he drove him in his car to Bhunya. The terms of his bail suretyship were that he pays E10 000.00 in the event of the accused absconding or escaping his trial.

[19] He says on the 25th June 2012, he attended a braai held at a certain house at Moyeni, Bhunya Residential quarters. Others in attendance he says were the Applicant, one Alex Langwenya as well Dumsile Lushaba. He says it was during the braai that the Applicant informed him that he was planning to escape because he feared for his life from people who loitered around his house. Asked by the Applicant's counsel under cross – examination if he had said where he wanted to escape to, the witness said he could not remember. It was suggested to him that the Applicant had only said he wanted he leave Bhunya for Big Bend in view of the people who always loitered around his house the witness denied knowledge of that saying if it was said it would have been in his temporary absence as he would from time leave the braai area to answer the call of nature.

[20] Although he says he transported the Applicant to Mbabane the next day, the 25th June 2012, he had later decided to approach the Police from whom he had secured the Applicant's release, and report to them that he

intended withdrawing his bail suretyship in favour of the Applicant because the latter had informed him the previous day that he was to abscond or escape. He again did not mention where he had said he wanted to escape to.

[21] Detective Constable Charles Shongwe was much clearer in his evidence, telling court what he had been told by Dicksom Masuku. He said Dickson came to his office on the 25th June 2012 and told him that he wanted to withdraw as a bail surety for the Applicant because the Applicant had advised him that he wanted to abscond to the Republic of South Africa where he was going to cross through the informal structures/ crossings. He said he had then called crown counsel Mr. Macebo Nxumalo and requested that he assists them in court with Dickson's request.

[22] Arrangements were made with the Registrar who produced them before Judge Dlamini where the said Dickson Masuku repeated his story including his application to be released from his bail suretyship. The court had granted his application as well as that moved by Mr. Nxumalo for the arrest of the Applicant, withdrawal of his bail as well as forfeiture of the bail deposit.

[23] It was put to this witness that the Applicant had not said he was to escape to the Republic of South Africa because Dickson Masuku had not said so in court. It was being put to this witness that he was untrustworthy because he was saying what Applicant himself would not maintain in court this witness was however adamant that Dickson had told him he was to escape to South Africa. The crown's case was then

closed and the Applicant's case was to commence. The time was however such that we adjourn for lunch then. I must say that I was somewhat disturbed on what the truth was here because the Detective Constable was certain of what Dickson Masuku told him and what he had allegedly said to Judge Dlamini. I felt clarity was required in this regard.

[24] When I considered the entry on the court file for the 25th June 2012, I noted that Judge Dlamini had recorded verbatim the statement under oath by Dickson Masuku. It was stated therein that the Applicant wanted to escape the jurisdiction of this court and later on that he wanted to abscond to the Republic of South Africa and lastly that in his said escape or abscondment, he meant to use the informal crossings. I also considered the affidavit filed in opposition to the application for bail pending appeal attested to on the 31st July 2012 by Dickson Masuku. I noted in it that the said Dickson had stated that Applicant had told him he wanted to escape to the Republic of South Africa and that he had meant to cross on the informal crossings.

[25] It became clear to me that there was something wrong here as the version told by the said Dickson under oath on two occasions was confirmed by Detective Constable Shongwe. It became clear that in the interests of justice I had to recall the said Dickson Masuku for him to clarify this situation. I was also aware that if he does not clarify this area, he would succeed in casting doubts on the administration of justice as well as the fact that there was likelihood he had lied under oath which in itself needed to be corrected as it would have been a serious offence for him to have done so.

[26] Owing as well to the fact that the Applicant kept on referring to himself as an activist who was highly sought after by the security forces, it was then necessary in my view that the matter is dealt with on the basis of openness, evidence and truth as much as possible.

[27] Accordingly I caused the said Dickson Masuku to be produced in court the following day and I felt he had to do that before the Applicant leads his own evidence so as to ensure that the Applicant is afforded an opportunity to deal with what the witness would have said in its entirety.

[28] On resumption of the matter, I clarified to the accused why he had been recalled particularly on the fact that he was shown by his previous statements having revealed everything he had allegedly recorded before Judge Dlamini as well as in an affidavit attested to by him filed in opposition to the Applicants application to be released on bail pending appeal. I caused him to be read the statement made under oath and recorded by Judge Dlamini as well as the affidavit concerned. I also reminded him on what he had said in court the previous day on this area. I further warned him it was an offence for one to tell a lie under oath and that he could be dealt with for such lies should they be proved. I asked him to clarify which one was the truth between his two previous statements and what he had said in court before me.

[29] Dickson Masuku informed the court that although he had forgotten to mention that the Applicant had told him he was to escape to South Africa, he had since remembered that he had indeed said so. He

maintained that the truth between the two situations was that the Applicant had informed him that he was to escape to the Republic of South Africa and that he was going to use informal crossings to do so. This position he maintained even under cross – examination. When asked why his statement was different from the one stated in court the previous day, he denied it was inconsistent maintaining that he had stated on the said date that he could not recall whether or not the Applicant had told him he was to escape to the Republic of South Africa. he apologized profusely for having caused confusion in court saying he had made a mistake.

[30] I then told the witness he was going to be informed on the day of Judgment whether or not I was of the view he had committed perjury.

[31] Giving his version, the Applicant informed the court that after his release from custody on the 22nd June 2012, he had gone to Bhunya where he was staying being driven thereto by Dickson Masuku. On the 24th June 2012 and whilst in the company of Alex Langwenya, his girlfriend Dumsile Lushaba and Dickson Masuku he had engaged Alex Langwenya in a discussion, wanting to find out how he had dealt with his predicament where his house had been blown by strangers. He says he sought such advice because he had noted that there were some strangers who kept loitering around his house which made him fearful of staying at his house.

[32] He says it was during that discussion that he stated to Alex Langwenya that he was going to leave Bhunya and go to stay in Big Bend with his brother. He therefore denied having said he wanted to escape to the

Republic of South Africa. He also denied having said he was going to escape to South Africa using the informal crossings.

[33] The question here is whether or not there is evidence (acceptable evidence) indicating that the Applicant was meant to escape to the Republic of South Africa much against his bail conditions, particularly that he should remain within the jurisdiction of this court. The idea is that if there is such evidence then sufficient ground would have been laid for an order releasing the surety from his bail suretyship of the Applicant as well as to withdraw his bail. The last enquiry being whether if it was clear that his bail be withdrawn it necessarily followed that his bail deposit or amount was to be forfeited to the state.

[34] Mr Khoza for the Applicant indicated that he had no problem with the surety hitherto, Dickson Masuku, being released from suretyship. According to Mr. Khoza however, if that happened then the Applicant was to be authorized to find another surety. He submitted this was the procedure contemplated by section 107 of the Criminal Procedure And Evidence Act of 1938. According to Mr. Khoza it was not necessary to consider whether or not to withdraw the Applicants bail as well as the forfeiture of the bail deposit.

[35] On the existence of the evidence grounding not only the release of the surety but also the withdrawal of the bail and the forfeiture of the bail deposit, Mr. Khoza submitted that the evidence by Dickson Masuku was not credible or reliable because his initial version before court was inconsistent to the version initially made under oath.

[36] He had for instance, so the submission went, initially denied that the Applicant had stated that he was going to escape to the Republic of South Africa contrary to what he had said in the statement recorded under oath from him by Judge Dlamini as well as in his affidavit deposed to on the 31st July 2012.

[37] Mr. Dlamini on the other hand submitted that there was evidence to ground all the reliefs sought which were namely the release of the surety from his suretyship, the withdrawal of the bail and the forfeiture of the bail deposit paid by the Applicant. It was submitted that it was not true that Dickson Masuku had given contradictory evidence to that he had recorded before Judge Dlamini and in a subsequent affidavit. Even when he gave his initial evidence in court, he had not said that the Applicant had not said he was to escape to South Africa but he had said he could not recall at the time. Indeed after he was confronted with his earlier versions on the issue he had been quick to point out that he had since remembered and was now very clear that Applicant had said he was going to escape to the Republic of South Africa. this he said prompted him to approach the Police and court for his release from surety.

[38] It was contended by the crown that the evidence of Dickson Masuku was credible for it was a natural phenomenon for a human being not to remember everything that transpires in a discussion at a given point but to manage to do so upon being reminded. The witness, Dickson Masuku, had clarified that the truth was in his maintaining that the Applicant had said he was to escape to the Republic of South Africa, which he was maintaining in court.

[39] The release of the surety from his bail suretyship not being disputed, the issues are only whether or not material has been placed before me to withdraw the Applicant's bail and also to order a forfeiture of the bail deposit. In other words has reason to believe that the accused is about to abscond so as to evade justice been established.

[40] The position as advocated by Mr. Khoza is in my view not applicable to a matter having the facts as revealed in this one. I am of the view the position that the surety is released and then replaced by another one would apply only in a case where the release of the surety was not because he was contemplating that the person on whose behalf he had stood surety was about to abscond and evade justice. Where that is the case, I have no doubt the court must go further and determine whether there is any credence in such allegations and if it finds there is it is in my view bound to withdraw bail and keep the accused or that person in custody until the finalization of his trial.

[41] Indeed these positions are covered by two different but applicable sections of the Criminal Procedure And Evidence Act they being sections 107 and 111 of the said Act. Section 107 which deals only with the release of a surety because he decides to apply for such release without being prompted by fears of escape by the accused reads as follows:-

Release of Sureties

"107 (1) All or any sureties for the attendance and appearance of an accused person released on bail may at any time apply to the court or judicial officer before whom the recognizance was

entered into to discharge such recognizance either wholly or so far as it relates to them.

(2) On such application being made, the court or judicial officer shall issue a warrant of arrest directing the accused to be brought before it or him.

(3) On the appearance of the accused pursuant to the warrant or on his voluntary surrender, the court or judicial officer shall direct the recognisances to be discharged either wholly or so far as it relates to the Applicant and shall call upon such accused to find other sufficient sureties and if he fails to do so, may commit him to prison".

[42] As indicated above this section would apply only in a case where the surety applies to withdraw or to be released from such suretyship without making further allegations such as that the accused is about to escape from the Jurisdiction of this court. If the reason for the withdrawal is absconding to a foreign Jurisdiction the matter would be dealt with differently.

[43] This would be according to section 111 of the Criminal Procedure And Evidence Act of 1938. In a nutshell what allegedly happened in this case was not only the Applicant seeking to be released from suretyship for the fun of it but the Applicant or the person in whose favout he had stood surety was allegedly about to abscond. This would invariably call for the withdrawal of his bail as long as there was evidence proving it.

[44] Section 111 of the Criminal Procedure And Evidence Act states the position as follows in support of this reasoning:-

A person released on bail may be arrested if about to abscond

"If an accused person has been released on bail under this part, any magistrate may, if he sees fit, upon the application of any peace officer and upon information being made in writing and upon oath by such officer or by some person on his behalf that there is reason to believe that such accused is about to abscond for the purpose of evading justice, issue his warrant for the arrest of such accused, and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, commit him, when so arrested, to gaol until his trial."

[45] When considering the circumstances of the matter including the submissions made, I agree with the position as expressed by Mr. Dlamini, that although the evidence of Dickson Masuku was not flowing as one would have expected it to, same is however credible when considering that his initial position did not refute or deny that the accused said he was intending to escape to South Africa, or words to that effect, but had instead stated he did not recall if the Applicant had said so. There is in my view a difference between one saying something was not said at all and one who says he cannot recall, but later recalls upon being reminded.

[46] It seems more probable to me that the Applicant had said that he was going to escape to South Africa and I am also convinced he had taken steps to effect the said escape. This probability stems from the fact that the surety who was a close friend of his had to apply to be released from suretyship which remedy the still insists upon todate. The two of them had not quarreled so as to justify the surety, to fabricate a case against the Applicant and withdraw from such suretyship. The evidence

from the Applicant himself could not give a reason for his friend to behave in them manner he did. Furthermore the accused himself revealed that he had already sold his movables in Swaziland.

[47] Furthermore the Applicant was arrested having packed his bags in a manner that suggested he was leaving for an unknown destination. Judging by the surety's actions, he must have meant to escape that night.

[48] For the foregoing reasons I am of the view there is reason to believe that the accused is intending to escape the jurisdiction of this court so as to evade justice.

[49] The foregoing being the position, I have no hesitation withdrawing the accused's bail on the grounds that he is about to escape the jurisdiction of this court so as to evade justice.

[50] On the last inquiry, which is whether the crown has made sufficient ground for the forfeiture of the bail deposit in the sum of E5 000.00, it seems to me that in a case where the accused or Applicant in the context of this case was arrested before he could actually evade the court's jurisdiction, it would be a bit premature to declare that he forfeits his bail deposit. This I say because the arrest was preemptive and it was before the accused/Applicant could breach the bail conditions. Bail should in my view be forfeited in a case where the bail conditions had been violated and not in a case where the Applicant was still contemplating the violation. Consequently I am of the view that Applicant's bail deposit ought to be refunded.

[51] I am convinced that the application for the withdrawal of applicant's bail should be granted and I accordingly grant this relief as sought. The same thing cannot be said to the application forfeiture of the bail deposit which I direct should be refunded Applicant.

[52] For the foregoing reasons this is the order I make.

1. The surety to the Applicant herein (Zwelithini Dickson Masuku) be and is hereby released from such suretyship.

2. The bail, granted Applicant by this court on the 22nd June 2012 be and is hereby withdrawn with the result that the Applicant shall remain in custody pending finalization of his trial.

3. The Applicant is to be refunded the sum of E 5 000.00 paid by him as a bail deposit.

Delivered in open Court on this the ……day of January 2013.

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N. J. HLOPHE

JUDGE