



**IN THE HIGH COURT OF SWAZILAND**

Case no. 242/2013

In the matter between:-

**THE DIRECTOR OF PUBLIC  
PROSECUTIONS**

**Applicant**

And

**SANELE NXUMALO**

**Respondents**

**Neutral citation:** *The Director of Public Prosecutions v Sanele Nxumalo* (242/13) [2013] SZHC257 (21<sup>st</sup> November 2013)

**Coram:** HLOPHE J

**Heard:** 12/11/2013

**Delivered:** 21/11 2013

**Summary:**

*Application for an order inter alia withdrawing the Respondent's bail as well as issuing a warrant of her arrest for violating her bail conditions and forfeiture of the bail deposit paid – Despite being out on bail on conditions*

*which inter alia entailed surrender of all her passports and travel documents to the Police, and not to leave the jurisdiction of this Court without the Court's leave, Respondent violating such conditions – Violation discovered after two or so months of occurrence – Purpose of bail to ensure that whilst accused remains out of custody he shall attend trial – Whether cancellation of bail proper remedy in the circumstances of this matter – Considerations on what same entails – Not being contended that Applicant about or intending to abscond or to evade trial – Clear that at the heart of the application was punishment for the Respondent for her unbecoming actions – Whether withdrawal of bail can be done as a punishment for a previous violation of bail conditions – Bail cancellation or withdrawal not to be used as a punishment where a proper punishment for the violation can be effected in the Court's view, independent of cancellation or withdrawal of bail – All parties agreed a proper sanction be imposed by this Court as an alternative to cancellation of bail which would be too drastic in the circumstances.*

## **JUDGMENT**

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- [1] On the 26<sup>th</sup> June 2013, this Court admitted the Respondent to bail pursuant to an urgent application she had instituted seeking such an order. This followed her being arrested with others and charged with among other offences, fraud allegedly resulting in the loss of a sum of over E5 Million Emalangeni to the complainant therein.
- [2] The bail was otherwise not opposed by the crown and the bail order form, which is usually filled in and signed by the parties themselves or their Respondents where same is not opposed, had already been filled

and signed. The said form indicates what conditions attach to the accused person's bail release should the Court accede thereto, and in practice the Court often grants bail in line therewith unless it disagrees with a particular condition, which it is always at liberty to modify or alter.

[3] In the matter at hand, among the conditions agreed upon and eventually endorsed by this Court as attaching to the accused or Respondent's bail release were that she surrenders all her passports and/or travel documents to the police and that she does not obtain a new one pending finalization of the matter and that she remains within Swaziland until her matter was heard and finalized. The first one of these conditions was to be complied with prior to her release on bail. Whilst the second one was to be complied with after her release on bail.

[4] In line with the first relevant condition herein, the Respondent, having paid the required bail deposit, surrendered her travel document in line with the condition aforesaid. Her actions suggested the travel document was the only document or passport she had and which she could use to leave the country. She was to remain in Swaziland and would therefore not be entitled to leave the jurisdiction of this Court without its permission or leave.

[5] Around the 27<sup>th</sup> of August 2013, some of the people with whom the Respondent had been charged in the matter that resulted in her being released on bail as referred to above, were arrested and charged with other criminal offences on allegations that they had, whilst, acting in furtherance of a common purpose, defrauded the Swaziland

Government sums of money in the region of E444 000.00. The Respondent was allegedly one of these people.

- [6] It transpired that she was nowhere to be found and could not be arrested as perhaps intended by the police and the officers of the Anti – Corruption Commission, and indeed on or around the 29<sup>th</sup> August 2013, an article was published in one of the Daily Newspapers circulating in Swaziland, conscientizing members of the public that she was on the run and that anyone who saw her should inform the Anti – Corruption Commission or the police, without delay.
- [7] Several days later she surrendered herself to the police in the company of her attorney Mr. Mabila. It is unclear, what transpired then, with it being alleged by the Respondent that several confidential talks ensued between the parties. A fact however is that she was not arrested then but remained out of custody. Both sides do not divulge what was happening except for the insinuation by the Respondent that meetings whose contents are not disclosed, were being held between the parties and their counsels.
- [8] It was only on or around the 4<sup>th</sup> October 2013, that the Applicant says they discovered that the Respondent had defaulted on her bail conditions by not surrendering her Diplomatic Passport in line with her bail conditions as she had only surrendered her travel document. It is alleged further that owing to some rubber stamps effected or stamped on her Diplomatic Passport and only on the South African side of the Ngwenya/ Oshoek Board Gate, she was shown as having crossed into the Republic of South Africa on the 27<sup>th</sup> August 2013 and returned

therefrom on the 28<sup>th</sup> August 2013. As the International Passport was only stamped on the South African side of the Border gate, it was alleged that she had managed to leave the Swaziland side using personal connections and influence on the immigration officers based there both when she left Swaziland and when she returned.

[9] Consequently she was charged with the offence of fraud involving the sum of around E444 000.00 just like some of her previous co-accused and new others. She was released on bail by the High Court on the same day. The Court ordered that her release be on the same terms as her previous bail release. It is common cause this bail application was not opposed by the crown, which did not disclose or alleged in Court that she had previously violated the same bail terms

[10] It is not in dispute that upon the crown having convinced itself that she had left the country to the Republic of South Africa in breach of her bail conditions, as well as contrary to the provisions of the Passport Act 19 of 1971, she was charged with contravening the said Act. On the day of her appearance before the magistrate on the charge of violating the Passport Act of 1971, the crown opposed her release on bail contending that when she committed the offence for which she was before Court she had violated her previous bail terms by going to South Africa without leave of Court and had failed to surrender her Diplomatic passport despite her being ordered to do so. The magistrate released her on bail nonetheless. It is alleged that Respondents attorney had submitted that as concerns her alleged violation of her bail conditions, an application had to be moved before the High Court which was the

proper Court to enforce its orders and conditions. This resulted in her being admitted to bail by the Magistrate Court.

[11] It was a sequel to these facts that the current application was moved by the Applicant herein, the Director of Public Prosecutions, who sought specifically the following orders:-

11.1 Dispensing with the time limits as to forms and procedures and treating this matter as an urgent one for the reasons mentioned in paragraph 11 of the Founding Affidavit.

11.2 A warrant of arrest be issued against the Respondent for breach of her bail conditions returnable on the 25<sup>th</sup> October 2013 or so soon thereafter as Respondent is (sic) apprehended to show cause why an order forfeiting his bail should not be granted;

11.3 That the Respondent's bail be withdrawn or cancelled forthwith for non-compliance with her bail conditions as per the bail recognizance (form) signed on the 26<sup>th</sup> June 2013.

11.4 That Applicant's bail among (sic) (should be amount) be forfeited to the state for failure to comply with the bail conditions;

11.5 Any other relief.

- [12] The thrust of Applicant's complaint against the Respondent is that whilst out on bail on the 27<sup>th</sup> and 28<sup>th</sup> August 2013, the Respondent had left for the Republic of South Africa through the Ngwenya Border Gate, at which she only produced and got stamped on the Republic of South Africa's side of the Boarder Gate, her Diplomatic Passport, having utilized her personal connections and influence on the local Immigration Officers to avoid getting her said passport stamped in Swaziland and being allowed to go through to the South Africa side.
- [13] It is contended by so doing, the Respondent violated her bail conditions in two ways which are firstly; her failure to surrender her Diplomatic Passport to the police as was required of her in terms of the Court order releasing her on bail and not applying for a new one before embarking upon her trip and secondly by leaving the Jurisdiction of this Court without its leave or permission.
- [14] Because of this alleged violation of the bail terms, the Applicant applied that the Respondent's bail be withdrawn or cancelled and that she be made to forfeit her bail deposit paid to the state as well as that she be arrested and taken into custody for the said violation of her bail terms.
- [15] The Respondent on the other hand denied having breached or violated the terms of her bail release. She denied having used her Diplomatic Passport to cross into the Republic of South Africa on the 27<sup>th</sup> and 28<sup>th</sup> August 2013 or even having left the Jurisdiction of this Court on the said dates. No explanation was however given why the Diplomatic Passport was stamped on 27<sup>th</sup> and 28<sup>th</sup> August 2013. On the Republic of South Africa's part of the Boarder Gate.

[16] It was contended further that there were no basis for the withdrawal or cancellation of her bail conditions including for the forfeiture of the bail deposit she had paid; just as it was contended there was no basis for her to be taken into custody after having remained out of custody for months since the day of her alleged bail conditions' violations, even assuming she had breached her bail conditions.

[17] There were also raised certain points *in limine ex facie* the papers which were however later abandoned in Court. These included a contention that the matter was not urgent and that such urgency as may be conceivable was of Applicant's own making. It was contended further that the Applicant had not disclosed the grounds entitling it to move as a matter of urgency as is required it one in terms of Rule 6 (25) of the Rules of this Court.

[18] In the alternative it was argued that despite that according to the Applicant the bail conditions had been violated on the 27<sup>th</sup> and 28<sup>th</sup> August 2013; the Applicant had chosen not to do anything then until around the 29<sup>th</sup> October 2013, when the application was moved as one of urgency. In short it was contended that the Applicants themselves did not realistically believe she could evade trial when considering the time she had spent out of custody with their full knowledge of her having allegedly violated her bail conditions. This application it was contended, albeit subtle, was prompted by the fact that the Applicant had failed to secure concessions they hoped to get from her as can be construed from the meetings held between the parties and then decided to have her locked up.



[19] In fact sometime around the 19<sup>th</sup> September 2013, it was contended that the Respondent had applied for a variation of her bail conditions by asking for the release of her passport to her and allowing her to travel to the Republic of South Africa. The Applicant it was contended, had taken no issue with the said application even though on her own accord the Respondent later decided to withdraw it. Even when she moved her bail application on her subsequent arrest on the 4<sup>th</sup> October 2013, the Applicant had not opposed same resulting in the High Court granting it. Had the Applicant harbored genuine fears of the Respondent absconding and not attending trial, it was contended, they would have opposed the application and placed before Court all the facts about the bail conditions' violations by the Respondent.

[20] What I could glean from these contentions raised as points *in limine* was a submission to the effect that the Respondent was not a flight risk and that the Applicant itself did not believe that she was one, as opposed to a belief that she had, on the dates concerned, left the country on her Diplomatic Passport to the Republic of South Africa much against her bail conditions, which called for censure as it was contemptuous on her part. Certainly the censure contemplated by the Applicants it is clear was a withdrawal of the Respondent's bail together with a forfeiture of the bail deposit she had paid.

[21] Now that the Respondent had raised the point *in limine* concerned and denied going to the Republic of South Africa using the passport which has not been surrendered as well as having left the Jurisdiction of this

Court without leave there is a need to determine the correctness of these allegations.

[22] As concerns the point *in limine* referred, it is a fact that whatever their merits and or demerits, they were not pursued during the hearing of the matter; Mr. Mabila having submitted they were being abandoned. In fact I must clarify that Mr. Mabila indicated his abandonment of same after this Court had *mero mutu* wanted to know from the Applicant what their case was in reality; that is, was it insisting on the prayers made on the belief she was likely to abscond and evade trial or was it insisting on the reliefs simply because it believed she had done what she should not have done in violating the bail conditions upon which she was released, which called for her to be punished?

[23] In other words, were the reliefs sought, sought because there was a likelihood that she was going to evade trial or was it because the withdrawal of her bail and forfeiture of her deposit was being used as a form of punishment? All these questions were being raised because of the period it had taken to institute these proceedings as well as the period it took the Applicant to know that she had at one point gone to South Africa. In fact whilst she had left on the 27<sup>th</sup> and 28<sup>th</sup> August 2013, the Applicant claims to have discovered on the 4<sup>th</sup> October that she had left Swaziland for the Republic of South Africa at some stage. I shall have to return later to this aspect of the matter. It suffices to point out that there are clearly no new facts being alleged to suggest she was about to abscond.

[24] On which one of the version by the parties is to be accepted between, the alleged visit to the Republic of South Africa by the Respondent without leave of Court in violation of her bail conditions and her alleged failure to surrender all her passports and travel documents to the police, again in violation of her bail conditions, vis – a – vis her denying these allegations, there does not seem to be much difficulty in concluding that the position is as asserted by the Applicant which is to say she failed to surrender all her passports and also left the jurisdiction of this Court without leave of Court.

[25] This is because if she had surrendered her said Diplomatic Passport to the police, then who would have stamped it in the Republic of South Africa given that it is not in dispute it was stamped there. Secondly, for what reason would any person stamp it there? Furthermore there is the affidavit of 3935 Sergeant Kheshe Dlamini which is unequivocal that the Respondent had only surrendered her Travel Document only at the time of her initial release on bail and not the Diplomatic Passport. There is also the affidavit of Gugu Nozipho Khumalo who states that she gave Respondent a lift at Oshoek where she found her hiking and dropped her at Springs in the Republic of South Africa. Although these affidavits were filed in Reply, it seems to me that these affidavits are properly before Court when considering that they were a reaction to issues placed in issue by the respondent in terms of the Answering Affidavit. It was incumbent upon the Respondent to file further affidavits if they really believed the affidavits were raising issues prejudicial to their interest.

[26] I therefore have no doubt that on the 27<sup>th</sup> and 28<sup>th</sup> August 2013, the Respondent left Swaziland for the Republic of South Africa without leave of court and returned respectively and therefore was in violation of her bail conditions. I also have no hesitation in finding that the Respondent had, in violation of her bail terms or conditions, not surrendered her Diplomatic Passport contrary to the clear terms of the Court Order expressed in terms of the bail conditions. These I find to be proved facts before me.

[27] The question to answer is what is the effect of these findings? That is, does it mean I should cause Respondent to be arrested, cause her bail to be withdrawn and cause her to forfeit her bail deposit?

[28] Although applying in matters before the Magistrates Court, Section 111 of the Criminal Procedure and Evidence Act of 1938 empowers a magistrate upon application in writing by a peace officer who believes that a person initially released on bail was about to abscond, to then issue a warrant of arrest against such accused person and upon being satisfied that the ends of justice would otherwise be defeated, to cause him to be committed to gaol until his trial was finalized. I have no hesitation that by analogy, and in developing the common law, a similar position would apply in the case of bail granted by the High Court whose conditions have been violated. It is now settled that this Court has inherent power to control its processes including protecting its own judgments or orders. There can be no doubt that bail conditions are analogous to a Court Order and this Court would be entitled to protect such an order.

[29] It seems to me that, in the enforcement of bail conditions, this Court exercises a discretion which it must apply judiciously. As indicated above, the question is more whether the interests of justice are served at a given point. I have no doubt that whether the interests of justice are served, depends upon the peculiar circumstances of each case. In the section of the Criminal Procedure and Evidence Act referred to, it does not follow that simply because an accused or person out on bail is shown to have violated his bail conditions then his bail ought to be withdrawn without further questions. It seems to me this should be the position even at common law when a Court with inherent jurisdiction like this one seeks to control its processes. Instead the consideration should therefore be whether the interests of justice would be defeated by the accused's bail not being withdrawn including his bail deposit not being forfeited.

[30] I have no doubt that in answering this question, the consideration should be whether the particular accused was about to abscond and/or evade trial. It seems to me that where the conditions were violated without it being indicated or shown that the accused was intending to evade trial or that there was still a likelihood by him to evade trial, it would not be just to withdraw bail than it would be just to impose an appropriate punishment for the violation of her bail conditions which is the same thing as violating a Court Order as that is what bail conditions amount to.

[31] I must however be clear that this approach would only be appropriate in very limited a case where it can be shown that the accused is actually not about to abscond or to evade trial and that there was no likelihood

of him or her evading trial. It seems to me that a person who violated her bail conditions more than two months ago without any genuine fear she would evade trial, being harboured in view of the time she spent in the country thereafter, particularly where the reason for her having had to leave the jurisdiction of the Court was allegedly to seek medical attention, cannot have her bail withdrawn with her forfeiting her bail deposit, without the interests of justice being defeated. In fact the crown's own approach to the matter, is not consistent with a fear that she is about to abscond trial as the time it took it to apply for her arrest does not confirm that.

[32] I have no doubt that the crown's concern is the fact that she violated her bail terms or conditions when she left for the Republic of South Africa on the 27<sup>th</sup> and 28<sup>th</sup> August 2013 without leave of Court just as she failed to surrender her Diplomatic Passport being released, for which actions she deserves to be punished on the basis of being contemptuous. Convinced that this was the most appropriate measure to take than the withdrawal of bail, particularly because, of the reasons given for her having left for the Republic of South Africa in the first place, I find that the withdrawal of bail and causing her to forfeit her bail deposit, would not be a just result and that the most appropriate remedy was to punish her for her having violated her bail conditions and thereby holding this Court in apparent contempt.

[33] Both counsel involved in the matter agreed that this was the most appropriate approach in the circumstances of this matter. Of course counsel cautioned that this Court must make itself clear that it was not saying that at all times where someone violates his bail conditions, the

Court had an option to either punish him for contempt of Court as opposed to withdrawal of bail. Whilst there is merit in this caution, I do not think there was ever a doubt that in this matter, the Respondent would not have his bail withdrawn not because of any option the Court has but simply because from the facts of the matter, it is clear he is not about to abscond the jurisdiction of this Court even though he had acted contemptuously. The incident on which he left the Jurisdiction of this Court was an isolated one and was allegedly brought about by her in consideration of her health status and took only two days of being away after which she came back and thereafter remained in the country after surrendering her Diplomatic Passport without any basis being shown that she intended to abscond this Court's jurisdiction at some stage or even that there was a likelihood she absconds on some day.

[34] Owing to the peculiar circumstances of this matter, and in a course embarked upon out of convenience, and not being viewed as prejudicial by either parties, I come to the conclusion that I do not withdraw the accused's bail and do not cause her to forfeit her bail deposit but instead, that I impose what I consider to be an appropriate sanction for her having violated the conditions of her release on bail and treated this Court with contempt. I then caused counsel to address me at length on this aspect of the matter. It transpired she was a first offender; that she had left for a very short period with a clear intention to come back and that she had left for medical attention. Of course I considered against her the fact that she deliberately violated a Court Order which was serious misconduct on her part. She had decided to violate the Court Order when she clearly had a lawful option which was to apply for the

release of her travel document as well as to be granted permission to leave the jurisdiction of this Court.

[35] I am therefore convinced that by her conduct the Respondent was contemptuous of this Court but was not about to abscond or to evade trial and therefore that the following order is an appropriate one to make in the circumstances:-

- (i) The Respondent be and is hereby ordered to pay a fine of E2000.00 failing which she is to be imprisoned for two years for Contempt of Court.
- (ii) Half of the amount to be paid as a fine or the period to be spent in prison whichever is the case, is suspended for two years on condition she is not found guilty of a similar misconduct.

**Delivered in open court on this the .....day of November 2013.**

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**N. J. HLOPHE**  
**JUDGE – HIGH COURT**

**For the Applicant:** Mr. Lapan

**For the Respondent:** Mr. M. Mabila