



**IN THE HIGH COURT OF SWAZILAND**

Case no. 92/2012

In the matter between:-

**The Commissioner of Police**

**Applicant**

**And**

**Basil Thwala**

**Respondent**

**Neutral citation:** *The Commissioner of Police v Basil Thwala* (92/12)  
[2013] SZHC275 (21<sup>st</sup> November 2013)

**Coram:** HLOPHE J

**For the Applicant:** Mr. T. Dlamini

**For the Respondent:** Mr. L. Mzizi

**Summary:**

*Application for arrest of Respondent and withdrawal of his bail upon an alleged violation of bail conditions-Respondent called upon to show cause why his bail should not be withdrawn as well as why he cannot be caused to forfeit his bail deposit.*

*Accused deported to Swaziland and dropped at the Ngwenya Border post by South African Immigration authorities on account of his being a prohibited Immigrant in that country- Accused allegedly arrested whilst in the company of others for being illegally in South Africa.*

*Accused denying his having been arrested in the Republic of South Africa (RSA) but contending to have been arrested by the members of the South African National Defence Force as he was standing on what he called a no- man's land between Swaziland and South Africa.*

*Dispute of fact as regards circumstances of accused person's arrest- dispute referred to oral evidence to resolve same – In view of his admitted deportation from RSA, prima- facie case established against Respondent who then has the duty to begin leading his evidence-Balance of probabilities-Court accepting version by the applicant's witness whilst rejecting that by Respondent. Respondent's bail accordingly withdrawn- Respondent to be refunded the amount of money deposited as bail owing to the peculiar circumstances of the matter.*

## **JUDGMENT**

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[1] On the 9<sup>th</sup> April 2013 I heard and granted an urgent application brought ex parte by applicant's counsel seeking an order couched in the following terms:-

- 1.1 Dispensing with the (provisions of the Rules of court as relate to time limits) forms and procedures and treating

the matter as urgent for reasons mentioned in paragraph 11 of the founding affidavit hereof,

1.2 A warrant of arrest be issued against the Respondent for breach of his bail conditions returnable on the 12<sup>th</sup> April 2013 or as soon as Respondent is apprehended to show cause why an order for forfeiting his bail should not be granted;

1.3 Any other alternative relief.

[2] The application was supported by a founding affidavit deposed to by one 3819 Inspector Dumisani Dube; who averred that sometime back, the Respondent had been convicted by the Magistrate's Court sitting in Manzini for various offences which comprised the contravention of section 6 as read with section 7 of the Public order Act of 1963.

[3] Having been duly sentenced (the extent of such sentence is not disclosed in the papers), the Respondent was granted bail pending appeal by the High Court on the 21<sup>st</sup> day of August 2012. The bail conditions as contained in the copy of the court order annexed to the application were couched as follows:-

“Having heard both counsel for the applicant and for the respondent, it is ordered that;

(a) Bail is fixed at eight thousand Emalangeni (8000-00)

(b) Applicant is to report fortnightly at the Manzini police station on every alternate Friday with effect from the 24<sup>th</sup> August 2012.

(c) Applicant is to surrender his travel document with the investigating officer and is not to apply for another one pending finalization of the appeal.

[4] As a result of a failure by the Respondent to report at the Manzini Police Station on the 22<sup>nd</sup> March 2013, in line with his bail conditions, investigations were allegedly carried out which revealed that he was arrested in the Republic of South Africa for being illegally there and he was eventually deported into Swaziland on or around the 8<sup>th</sup> April 2013. There was annexed to the application a copy of an extract from his reporting record at the Manzini Police Station. It confirmed that his last reporting date was the 8<sup>th</sup> March 2013 and that he had not been able to do so on his subsequent reporting date on the 22<sup>nd</sup> March 2013.

[5] The deponent to the founding affidavit referred to above, expressed a fear that the Respondent was likely to abscond the jurisdiction of this court and not to stand his trial taking into account his having been arrested in the Republic of South Africa for being there illegally. This court was then urged to issue an order that the Respondent be arrested for him to face contempt of court charges as well as for violating his bail conditions.

[6] It was explained why the matter was brought on an ex parte basis, it being alleged as follows at paragraph 10, that:-

*“This matter has been brought before this court under Exparte proceedings because service on Respondent will perpetuate Respondent to flee trial, the very same thing this application seeks to avoid. Further, Respondent has already demonstrated that he is not willing to meet and accept any court process from the police.”*

[7] Although the above - cited paragraph is couched in a categorical and sweeping language, it is clear that the contention was about the Respondent’s likely hood to abscond the jurisdiction of this court and therefore evade trial considering the Respondent’s arrest and detention in the Republic of South Africa when he had been released on bail whose conditions *inter alia* did not allow him to leave the jurisdiction of this court, without its permission which he had neither sought nor been granted.

[8] There has also been annexed to the founding affidavit, a document written on its face at the top the following words:-

Department of home affairs  
Republic of South Africa  
Notification of deportation

[9] A closer consideration of this document indicates that same was addressed to the Respondent notifying him that he was to be deported to his country of origin; Swaziland because of his being an illegal immigrant in the Republic of South Africa. It further on its face,

notified the respondent, about some rights of his which included the one to appeal the decision to deport him to Swaziland to the Director-General within 10 days from date of receipt of the notice as well as to, at any time request any officer attending to him, to have his detention for the purpose of deportation confirmed by a warrant of the court. The Respondent was further advised Ex-facie the notice, that if he chose not to exercise the rights mentioned in the notice, he would be detained pending deportation or where he chose to exercise the said rights, he was to remain in custody pending the hearing of his appeal. Clearly in this case the Respondent chose not to exercise such rights but to remain in custody pending his deportation. In other words his alleged status as an illegal immigrant in South Africa was not being disputed.

[10] On the acknowledgment part or section of the document concerned, the Respondent who was eventually caused to sign the document and also to indicate his choice of what he preferred on the rights set out above; is shown as having stated that he wished to be deported to Swaziland at the very first reasonable opportunity whilst he remained in custody. This he indicated by ticking the appropriate box on the document. The document also shows the Respondent as having further indicated that he did not wish to appeal the decision deporting him to Swaziland just as he did not need to have his deportation confirmed by a court of law in South Africa. Of significance is that ex-facie the document concerned, the Respondent is not being shown as one who had an issue with his arrest and detention at the police station concerned on the basis of being an alleged illegal immigrant.

[11] Faced with these circumstances, I issued a Rule nisi operating with immediate effect authorizing the arrest and production in court of the Respondent him to show cause why his bail should not be withdrawn including why he should not be caused to forfeit the bail deposit paid, in view of his being prima facie shown to have violated his bail conditions by illegally leaving the jurisdiction of this court, contrary to his bail conditions prohibiting such.

[12] After his arrest the Respondent was produced in court on the 11<sup>th</sup> April 2013 and was represented by Mr. Mzizi who applied for a postponement to the next day so as to enable him file their opposing papers. The circumstances necessitated that the Respondent be kept in custody pending finalization of the inquiry on whether or not to withdraw his bail and cause him to forfeit his bail deposit.

[13] The answering affidavit filed did not dispute that indeed the Respondent was arrested, detained and eventually deported from the Republic of South Africa to Swaziland. It however stated that the Respondent was arrested by two members of the South African National Defence Force patrolling the South Africa/ Swaziland boundary or border line, whilst standing on what was described as a No -man's Land between the two countries talking to his friends or colleagues from Swaziland who were already on the South African side of the boundary line. He suggested that his arrest was a result of a suspicion by the said soldiers that he was about to cross the boundary

line into the Republic of South Africa yet he had no such desire as he had only gone there to hand over certain documents or contracts concluded between the Swaziland Trade Union of which he was a secretary general (Swaziland Transport and Allied Workers Union (STAWU)) and its South African counter parts. The colleagues of his he alleged, had already crossed at the border gate and were already in South Africa when he called them to give them the documents which were essential for the meeting they were attending in the Republic of South Africa. He says It was agreed that he would hand over the documents to them at the place at which he was arrested, which in his papers he referred to as a No-man's Land.

[14] The Respondent confirms that having been arrested by the South African soldiers afore-said, he was taken to a police station called Haartbeeskop, where he said he was detained for days before he was eventually deported to Swaziland.

[15] In a replying affidavit, the applicant disputed the case by the Respondent; particularly that he was arrested whilst on the No –man's Land or even on the Swaziland side of the boundary or border line between the two countries. It was instead maintained that he was arrested inside the Republic of South Africa about 1.5km from the border line. In fact he was said to have been arrested next to the Cultural Centre Building said to be situated just below the main road from the Oshoek Border Gate on the South African side of the boundary or border line.



[16] The affidavits of the two South African soldiers who allegedly arrested the Respondent namely, L. T. Jeffrey Maphuthi Boshomane and PTE Maphale Enos Makgale, together with certain statements obtained from them were annexed to the replying affidavit. The upshot of such affidavits and statements is that the Respondent was arrested by the two South African soldiers on the South African side of the border line about 1.5kilometers on the South African side of the Border. It goes on to clarify that at the time of his arrest, the Respondent was in the company of two other people and that he had a bag carrying his clothes with him. Leading to their arrest, It is stated the Respondent and his companions were seen crossing the borderline between the two countries into the Republic of South Africa and that they were watched and followed until their arrest. Having been arrested they are said to have been taken to the Haartebeeskop police station, where they were detained in line with South African laws.

[17] The reality is that a dispute of fact did emerge as regards the point of the Respondent's arrest and the reason for such. Whereas the latter claimed to have been arrested on the No –man's Land and later claimed to have been arrested in Swaziland; the affidavits of the arresting officers, taken together with the undisputed fact that he was on some date actually deported from the Republic of South Africa into Swaziland following his having been detained at Haartebeeskop police station, a need arose that the true position be ascertained through evidence being led. The affidavits had also painted a picture of Respondent having been arrested on the South African side about 1.5kilometers into that country. The document explaining his rights

annexed to the founding affidavit, suggested otherwise as well which necessitated that he explains the situation. It became clear that the matter could not be disposed off without oral evidence having to be led. I then referred it to oral evidence as regards where exactly the Respondent was arrested in light of the two conflicting versions.

[18] There then arose the question of the duty to begin leading evidence. Whereas Mr. Mzizi was of the view that the applicant was the one to begin leading his evidence, Mr. Dlamini for the applicant was of a different view, being that the Respondent was the one to begin, given that it was not in dispute that he was actually deported into Swaziland from South Africa through the Ngwenya Border gate following his being released from detention at Hartebeeskop police station. This had obviously given rise to a presumption of his having been arrested on the South African side. Considering his not having challenged his arrest and detention there. This therefore necessitated his showing cause it was not so including clarifying where and why he had been arrested and detained.

[19] I agreed with Mr. Dlamini's submission not only because it was not in dispute that the Respondent had actually been detained in the Republic of South Africa and eventually deported into Swaziland through the Oshoek/ Ngwenya Border Gate, but because the order issued by this court ex parte on the 9<sup>th</sup> April 2013, had called upon the Respondent to show cause why his bail could not be withdrawn and his bail deposit forfeited in view of the accused having failed to comply and abide by his bail conditions resulting in him being

detained in South Africa and subsequently being deported into Swaziland. It appeared to me that prima facie, the Respondent's not challenging his having been detained in South Africa and eventually having been deported into Swaziland, created a strong presumption that he was arrested there from.

[20] Having ruled that the Respondent was to begin leading evidence on the basis of the foregoing considerations the Respondent was led by Mr. Mzizi as the only witness for the Respondent on the question. He maintained having been arrested on the No – man's Land as well as having been arrested on the Swaziland side of the border line whilst firstly alleging that he was standing on the No – man's land talking to his colleagues who were already on the South African side and latter saying he was at the time of his arrest by the two members of the South African Defence Force, awaiting the arrival of his colleagues who had crossed through the Border gate but needed to get from him the confidential documents he had in his possession, for use at the meeting they were meant to attend in South Africa.

[21] The aforesaid South African soldiers he said, arrested him on the basis of a suspicion that he intended to illegally cross into the Republic of South Africa. This he said was due to the fact that he had approached the informal crossing point in the company of some people who crossed into South Africa as he remained standing there, and were later arrested by the said soldiers who then came to arrest him whilst standing on the Swaziland side, where he had remained.

[22] The Respondent had stated in his papers that he was arrested whilst on what he referred to as the No-man's land between the two countries. An impression was also given that this place of arrest was very close to the Border Gate or within its vicinity.

[23] As it was not clear what he was talking about including exactly the place he referred to as the point of his arrest, I directed that an inspection in loco be conducted so that one could understand what the Respondent was referring to.

[24] The inspection in loco was conducted on the 26<sup>th</sup> April 2013 where the court was led by the Respondent to the place he referred to as the point of his arrest. This is about 1.5 kilometers from the Ngwenya Border Gate, following the North-Eastern border line from it. The court was led to a field where maize was grown, which is situated about a meter from the border line. Amidst the wattle trees grown on either side of the border line were some in-elegant pathways. Otherwise the border line is made of several barbed wire lines lying horizontally.

[25] Asked about the whereabouts of the No-man's land he had talked about in his papers and earlier, it became apparent that the Respondent was himself unclear on what that was as he ended up wandering what the court was talking about. This was surprising as it now suggested that the term No-man's land had been created by the court yet it had been referred to by him in his papers and repeated by him as he was led in evidence. He otherwise stated that he was found standing next

to the Border line by less than a meter into the Swaziland side. Furthermore he was not now talking to some colleagues of his as he had initially stated in his founding affidavit and in his evidence in chief. By now his story was that he was waiting for his colleagues who were to come from the South African side to fetch the agreements referred to from him. Clearly this was a deviation from his own earlier evidence, which indicated inconsistency.

[26] Otherwise the applicant led two witnesses namely a South African police officer a Mr. Nkosi, and the investigating officer in the matter 3819 Inspector Dumisani Dube. Mr. Nkosi stated that he was based at Hartbeeskop police station. He remembered the detention of Mr. Thwala, the Respondent at Haartebeeskop police station on the 18<sup>th</sup> March 2013, who was brought in by the two South African soldiers referred to above, who claimed to have arrested him for having entered South Africa illegally.

[27] Mr. Nkosi clarified that upon the arrest and detention of Mr. Thwala, he was read his rights in terms of the South African constitution which entailed what he could and could not do, including what was required of him as a person detained for his being allegedly an illegal immigrant in that country. He alleged these rights as the following ones:-

- (a) ...the right to consult with a legal practitioner of his choice, or should he so prefer, to apply to the Legal Aid

Board to be provided by the state with the services of a legal practitioner.

(b) ...the right to challenge the lawfulness of his detention in person before a court of law and to be released if such detention is unlawful;

[28] The Respondent was also read, and actually handed a list of his rights which included, the right to remain silent and not to confess to any crime just as he was also advised of his right to be brought before a court of law as soon as was reasonably possible but not later than 48 hours after his arrest. I must add that at the time he described himself, Mr. Thwala said he was engaged as a Legal Advisor to the Union he was working for, known as STAWU, which means that he had no difficulty appreciating his rights.

[29] As I understood it the thrust of the evidence of this witness was that the Respondent did not bring it to their attention at Haartebeeskop Police Station, that he was arrested whilst on the Swaziland side of the border line nor did he register a grievance with any of the established authorities there. Instead he is shown to have accepted that he was a prohibited immigrant in the Republic of South Africa hence his having indicated that he needed to be deported to Swaziland at the earliest possible opportunity and within 30 days of the date of his having been read his rights. In that regard he chose not to challenge his arrest and detention in court contrary to his having been read his rights.

[30] According to DW2, Inspector Dumisani Dube, he received a report from one Babazile Mabuza in charge of prosecution matters who informed him on the 23rd March 2013, that the Respondent had not reported to the police in line with his bail conditions on the 22<sup>nd</sup> March 2013. His last day of reporting had been the 8<sup>th</sup> March 2013. This failure to report suggested to him that the applicant was in contempt of court and he sought to have him arrested for that offence as well as for an inquiry on whether or not his bail should not be withdrawn, including him forfeiting the bail deposit.

[31] It was during his investigations that he said he discovered that the Respondent was arrested in the Republic of South Africa at Haartebeeskop Police Station for having been illegally in that country. He discovered, he said, that the respondent was to be deported back into the country on the 8<sup>th</sup> April 2013. On this date he went to the Ngwenya border gate to ascertain if indeed the Respondent was the one detained in the Republic of South Africa.

[32] After his being handed over to the Swaziland Police who included this witness, and in view of his not having obtained a warrant of his arrest, he gave the Respondent a lift to Manzini where after he arranged for his warrant of arrest. He intended having Respondent arrested for him to answer to contempt of court charges and for the above mentioned inquiry to be conducted. The Respondent was eventually arrested in terms of a court order on the 9<sup>th</sup> April 2013 and produced in court.

[33] I must clarify that Counsel for the Applicant informed the court he was having difficulties in securing the attendance of the soldiers who required a lot of Diplomatic red tape to be embarked upon before they could do so. I was informed they required more than two weeks notice. I indicated we would deal with the matter on the basis of the material before us and determine whether or not same sufficed. It is clear that although this witness was under the impression that the Respondent was in contempt of court for failure to comply with his bail terms that is not the matter before me in terms of the notice of motion read together with the founding affidavit. Even if contempt of court was mentioned in the affidavit, it is not the type of inquiry I would engage upon at this stage as I would concentrate on the primary question whether a case has been made or not for the Respondent's having violated his bail conditions.

[34] Section 11 of the criminal procedure and evidence Act of 1938 provides as follows:-

*“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 jail until his trial”.*



[35] Although the section contemplates the magistrate court being the one that issues the warrant of arrest of an accused person who intends or is suspected of attempting to evade trial, I do not see why the same power cannot avail this court under common law as a court of unlimited and original jurisdiction in deciding matters as well as in exercise of its inherent power to control its own judgments given that the bail whose conditions or terms have allegedly been violated was granted by it.

[36] It is otherwise a settled position that where there is a reasonable apprehension that an accused person intends to evade justice, then his bail can be withdrawn, including a possible forfeiture of the bail deposit if he cannot show the contrary through an explanation.

[37] In the matter at hand the Respondent, who has not alleged that he did not understand his bail terms, to be refusing him or preventing him from leaving the jurisdiction of this court, was allegedly arrested and detained in the Republic of South Africa resulting in his subsequent deportation to Swaziland. He wants to say he was arrested whilst either on the so called No –man’s Land or whilst in Swaziland contrary to the assertions by the crown that he was arrested inside the Republic of South Africa.

[38] From the evidence placed before me, I am unable to agree that the Respondent was arrested whilst standing on the so called No –man’s Land or on the probabilities, Swazi side of the border line. His own

story in this regard is contradictory and/or inconsistent. In his affidavit he stated that he was standing on the no- man's land, talking to his friends or colleagues who were on the South African side of the border line. He created an impression all this was within the vicinity of the Ngwenya/Oshoek border gate. After an inspection was conducted, it turned out that firstly the area where he said he was arrested was not within the vicinity of the border gate but was some estimated 1.5 kilometers away on the North Eastern side of the border line and along same, and there was no No-mans land there which he himself could not even explain. His version changed and he started wondering what the court was talking about when it asked him of the whereabouts of the no- man's land he had referred to. The important fact being that there was no No – man's land there, thus eliminating the possibility of his having been arrested on the alleged no – man's, land.

[39] Further still whilst in his evidence in chief in court he had attested to his having been arrested whilst talking to his colleagues on the South African side of the border line. His version changed during the inspection in loco as he now said that he was arrested whilst awaiting the arrival of his friends who had already crossed into South Africa. These inconsistencies in his evidence damaged his credibility beyond any mend.

[40] In any event the improbabilities in his story as regards his point of arrest were so obvious when considering that, where he says he was standing, that is on the Swazi side of the border line, is a huge field

growing maize, situate within a metre from the borderline which is obviously attended to when one looks at its nature and the size of the maize it produced. Clearly one would have expected caring for the field to have been impossible to attend to if indeed Swazis or people would be arrested by the South African security forces for being there.

[41] Further still both documents given to him, being the one containing his rights and that of his deportation from South Africa to Swaziland, do not disclose his having lodged a grievance with the South African officials or Police indicating he had been allegedly arrested whilst in Swaziland and charged with being an illegal immigrant in the Republic of South Africa. In fact he did not even insist on going to court to insist on such a right of his, despite being advised of same.

[42] In my view the Respondent, who had a duty to explain why he had to be deported from South Africa, which had created a strong prima facie case against him, failed to give such an explanation and from what he attested to in court and in his papers, I am constrained to reject his version and instead prefer that of the applicant's witnesses both as expressed in the papers as well as through oral evidence.

[43] Furthermore, I am convinced this is not a matter where the interests of justice would be said not to be served by an order withdrawing his bail. This is because despite it being clear and as I have found, he was arrested in South Africa carrying his bags, he never gave a sound explanation on why he had not applied for a lawful variation of his bail conditions just as he did not say when he was going to come back

from there if he ever was, which strengthened the view he was absconding bail with a view to evading his trial. This necessitates that his bail be withdrawn.

[44] In view of the lack of direct evidence that he was not going to come back, I will assume in his favour that he be given the benefit of the doubt with regards the forfeiture of his bail deposit.

[45] Having come to the conclusion I have, I accordingly make the following order:-

45.1. The Respondent's bail be and is hereby withdrawn for him to remain in custody pending finalization of his appeal, which should be expedited.

45.2 The bail deposit paid by the Respondent be refunded him, upon him filing a proper claim and proof of payment of same.

Delivered in open court on this \_\_\_\_\_ day of September 2013.

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