IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.150/2015

In the matter between:

MANGALISO SIMANGA LWANE SIMELANE **Applicant**

and

REX **Respondent**

Neutral citation: *Mangaliso Simanga Lwane Simelane Vs Rex (150/2015) [2015] SZHC 107 (06th May2015)*

Coram: Hlophe J

For Applicant: In Person

For Respondent: Miss N. Masuku

Date Heard: 17th April 2015

Date Delivered: 06th May 2015

Summary

Application proceedings – applicant asking for an order reducing his bail from half of the value of the items allegedly stolen by him to what he terms a affordable one – Whether this court properly seized with the matter vis-a-vis the one that granted the order being challenged – Which court can be said to be properly seized with matter in the circumstances.

Applicant facing thirty counts comprising twenty-six House Breaking and Theft, two of Theft and two of Robbery – There is also a further 14 counts of House Breaking and Theft pending against the accused arising from offences allegedly committed by the accused which were left pending in court when Applicant absconded trial before he was arrested and charged with the current thirty charges he is facing – Whether Applicant was even entitled to bail in the first place in the circumstances of this matter.

Applicant's trial has already commenced and is pending finalization – Whether this court has the power to reduce bail in a matter where bail was fixed by the Magistrates' Court in compliance with a mandatory statutory requirement – Court's jurisdiction in a matter like this limited to an appeal or review depending on availability of appropriate grounds to each such relief – Court that dealt with the bail application the one to deal with one for the variation of its terms or for controlling its terms provided that variation is competent in law – Application cannot succeed and is dismissed.

JUDGMENT

[1] Applicant who represents himself herein commenced these proceedings by means of a letter addressed to the Registrar of this court, in which he requested to have the bail granted him by the Manzini Principal Magistrate reduced from half the value of the goods allegedly stolen by him as fixed by the Learned Magistrate to an amount he said would be affordable to him.

[2] In his own words, the Applicant says that he was arrested by the Bhunya Police on the 26th March 2014 and charged with two counts of Robbery, two counts of Theft and twenty six counts of House Breaking and Theft. He says after his arrest he was caused to appear before the Principal magistrate in Manzini who admitted him to bail fixed at a sum of E102, 000.00 over and above the other usual bail conditions with which he appears to be having no qualms. He admits that the sum of E102, 000.00 amounts to half the value of the goods allegedly stolen by him. He also does not dispute that fixing bail in this manner is as required in terms of the Criminal Procedure and Evidence Act of 1938 which inter alia covers the grant or otherwise of bail in matters like the present.

[3] He says he has remained in custody since the day of his arrest as he could not afford the bail deposit fixed by the Honourable Magistrate. It was for this reason, that he instituted the current proceedings seeking an order reducing his bail deposit to what he termed an affordable one. He suggested in his aforesaid letter that he would afford bail fixed at E50, 000.00 with E2000.00 of the said amount being paid as a cash deposit whilst the balance of E48, 000.00 would be guaranteed by a surety. I must say the bail terms he suggests have become a normal practice in this court, obviously because they make the payment of bail affordable to most Applicants. This however only happens before this court because unlike in the Magistrates Court, there is no provision by the applicable Statute, the Criminal Procedure And Evidence Act of 1938, to limit the payments of bail to cash only.

[4] The Applicant sought to blame the Magistrate for the fact that his trial had not commenced as at the time he moved the current application, on the 23rd February 2015, even though he indicated that same had since been allocated the 13th April 2015 as a trial date. He contended the Magistrate kept on postponing the matter on the arrival of each trial date earlier set by the court. An attempt by him to have his bail deposit reduced by the same court that granted him bail on the terms complained of had not been successful, he said, because the Principal Magistrate had

advised him to move same before the high Court, which is why he wrote to the Registrar of this court and instituted the current proceedings.

[5] He went on to make the usual pleas in motivation of his application including allegations that he was a bread winner at his home and that he was responsible for the maintenance and up bring of two children under his custody.

[6] The application was opposed by the Respondent through an affidavit filed by a Police Officer who briefly described himself only as 5752 Nathi Dlamini, who said he was based at Bhunya Police Station and that he was the investigator in the matter. While he did not dispute that the Applicant was granted bail fixed at half the value of the goods allegedly stolen by him, he approached the matter more as if he was opposing a bail application and hardly paid attention to the fact that the application before this court was about the reduction of bail already granted and fixed by the Manzini Principal Magistrate. He for instance contended that the Applicant should not be granted bail as it was clear from the charges he was facing that he had a propensity to commit the same offences. Over and above the charges contained in his charge sheet, the accused was alleged to be facing a further 14 counts of House breaking and Theft charges which he allegedly committed around Mbabane after which he

was charged and eventually produced in court where he escaped from lawful custody while at the Mbabane Magistrate Court. This was allegedly before he was arrested and charged with the current charges.

[7] It was alleged further that there was a serious likelihood that he was to abscond given the strength of the cases against him and that he had strong connections outside the country which would prompt him to abscond when considering that most of the items he had allegedly stolen were taken to such areas in the republic of South Africa as Piet Retief, Ermelo and Amsterdam, where some of the said items were recovered after being pointed out by him.

[8] It was contended as well that there was a strong likelihood that he was going to interfere with and influence or intimidate crown witnesses considering that he allegedly knows the said witnesses and their places of abode very well and had allegedly used a knife to effect his intimidatory tactics on them at the time he committed the offences in question.

[9] Unlike the Applicant, the Respondent denied that the delay in the commencement and continuation with the trial date was attributable to the Principal Magistrate as alleged by the former. The Respondent's version was that the Applicant was the one responsible for the said delay. He

had, at least on three occasions, stalled the hearing and possible finalization of his matter by claiming to be sick, thus forcing a postponement.

[10] The Respondent contended further that the Applicant could not possibly be released from custody because he had, on a previous occasion and as stated above, escaped from lawful custody whilst he had gone for a remand hearing at the Mbabane Magistrates Court. This is where he was facing the 14 counts of House Breaking and Theft allegedly committed prior to the ones he currently faces which are 26 of House Breaking and Theft, two of Robbery and a further two of Theft which in all total 44 pending charges against the Applicant.

[11] I must say from the onset that I do not agree with the approach to this matter adopted by the crown. While it could be making weighty argument for the opposition to the grant of bail, the current application is not one for the grant of bail but for the reduction of a bail deposit fixed by the Principal Magistrate. This means that bail has already been granted with the only question being whether this court does have the power to reduce a bail deposit lawfully granted by the court that was seized with same. I say lawfully granted because the Applicant never took same on appeal for the said order to be revisited by a higher court.

[12] I am therefore not in a position to know whether the grounds for the opposition of bail as are now made an issue were actually raised and considered by the court that granted the Applicant the bail as I do not have before me the record of proceedings. I am however certain that with the question of the grant or otherwise of bail having already been determined by a properly constituted court, this court can no longer reopen that question as that issue is now res judicata. Therefore whatever views I could be having with regards the propriety or otherwise of the grant of bail by the Principal Magistrate, I cannot in the context of this matter, make public such views, which would be a different case if these were either review or appeal proceedings, of course depending on the availability of appropriate grounds for each such relief sought as the case may be.

[13] Having made these observations, it does not mean that we have now reached the end of this matter as this court must determine whether or not it does have the power to reduce bail granted by the Magistrate's Court including answering the question whether the reduction of bail is a competent relief obtainable from this court in the circumstances of this matter. I have no hesitation this is a legal question which I directed the parties to address the court on during the hearing of the matter.

[14] I was not referred to any provision of the Criminal Procedure and Evidence Act or any other law granting this court the power to sit and reduce a bail deposit fixed by the Magistrate's Court other than in the course of an appeal or possibly a review and I am personally unaware of any legislation or law giving this court such power. As indicated above it would of course be different if the reduction of the bail deposit requested by the Applicant was sought in the course of an appeal or review brought to this court on the grounds respectively that the bail deposit as fixed by the court *a quo* was excessive and perhaps contrary to the provision of the law or that it was irregularly fixed.

[15] I therefore do not see why the court that granted Applicant bail on the terms complained of cannot itself be approached to reduce the bail it fixed either under the rubric of a variation of the court order granting Applicant bail or that of the said court being approached as the one in law entitled to control its processes or orders as the circumstances may warrant. Ofcourse this can only be possible if in law such court has a discretion on what the bail deposit to order can be. I am not however suggesting that the Principal Magistrate concerned in the context of this matter had such power.

[16] Although Applicant avers in his letter that it was the same court which directed him to approach this one for a reduction, I very much doubt the correctness thereof in the absence of a record. Surely the said Magistrate could have advised him to appeal his decision which this court would perfectly be entitled to entertain, but I doubt it would have advised him to apply to this court for bail reduction as a distinct relief contradicting its own earlier order. I have no hesitation such advice would be illegal as it would have had no legal backing or statutory backing. I will for purposes hereof not accept what Applicant says in this regard for these reasons. It would however be up to the Applicant to move an application for bail reduction before the same court that granted him bail, provided the law permits it in the circumstances of this matter.

[17] On these grounds alone, I am convinced that this court has no power strictly speaking to reduce bail granted by the Magistrate Court outside it doing so in the course of an appeal or review as the case may be. This becomes more pronounced where the relief sought is opposed by the other side having an interest in the proceedings.

[18] There is however in my view an even more compelling reason why this court does not have power to grant the relief sought by the Applicant. The grant of bail in matters of what is commonly known as theft and

kindred offences is governed by the Criminal Procedure And Evidence Act of 1938 per Section 102 A. For the removal of doubt theft and kindred offences are defined in Section 102 A (3) of the same Act and include offences such as theft either at common law or under any statute; robbery, arson, house breaking into nay house or structure both at common law or under any statute, receiving any stolen property well knowing it to be stolen, fraud or forgery or uttering of a forged document well knowing it to be forged.

[19] The Applicant's charges include various counts of robbery, theft and house breaking and theft, which means that they fall into the class of offences known as Theft and Kindred offences, and therefore the award of bail by a Magistrate in such cases ought to be in terms of the said section.

[20] Sections 102 A (1) to 102 A (2) provides as follows:-

> *"Conditions of bail for theft and kindred offences"*
> *"102 A (1) Notwithstanding the provisions of subparts A and B (1) of this Part the amount of bail to be given by a Magistrate in respect of theft or any kindred offence shall be –*
>
> *(a) E500.00 if the value of the property in respect of which the offence is committed is E2000.00 or*

(b) One half of the value of the property in respect of which the offence is committed if the value of the property exceeds E2000.00.

(1) bis Notwithstanding any provisions of this Act the deposit of the amount of bail given under subsection (1) shall be made in cash only.

(2) *Notwithstanding the provisions of subparts A and B 1 of this part, a Magistrate shall not admit to bail on recognizance any person charged with theft or any kindred offence, if the value of the property in respect of which the offence is committed is E2000.00 or more".*

[21] Making submissions before court the Applicant averred that the E102, 000.00 fixed by the Magistrate as a bail deposit amount represented half the value of the items allegedly stolen by him. If this is what the Act provides for in situations like the present, the question becomes what power does this court have to interfere with such a decision or order if clearly the Learned Magistrate cannot be said to have either misdirected himself or to have committed any irregularity? I have no hesitation that the answer is that the court has no such power to interfere with the order

issued by the Learned Magistrate if same was in line with the provisions of the said Act as it was lawful. There was also argument to the contrary with Applicant maintaining his approaching this court for the relief in question was based on what he said was the Principal Magistrate's advice to him. I have already commented on the said advice if it was ever made including what its legal effect is and I need not repeat same here.

[22] Dealing with provisions having a similar effect on bail applied for in ***Mfanukhona Dlamini V Rex Criminal Appeal Case No 04/2013***, the Supreme Court had the following to say which in my view is apposite in this matter:-

> *"Now a correct reading of Section 18 (1) of the Theft of Motor Vehicles Act 1991and Section 95 (6) of the Criminal Procedure and Evidence Act will show that in both Sections bail in respect of offences covered by the relevant Sections of the Theft Of Motor Vehicles Act 1991 must be fixed at no less than half the value of the property stolen.*
> *Both provisions are mandatory in this regard. The court fixing bail simply has no discretion in that regard". (Emphasis are mine)*

[23] It is clear that the fixing of the bail amount at half the value of the alleged stolen goods in this matter was mandatory for the court to fix and it had no discretion to exercise. Even though this aspect of the matter was not

argued at all before me, I do take note, at least from what transpired in the Mfanukhona Dlamini case referred to above, that it cannot be said to be excessive on account of section 16 (7) of the Constitution because, the determination by this court whether bail conditions are reasonable or not, is an objective one, to be determined on the basis of existing exceptional circumstances. The Supreme Court in that matter found that the provisions of Section 18 (1) of the Theft of Motor Vehicles Act of 1991 and Section 95 (6) of the Criminal Procedure and Evidence Act 1938, which both limit the grant of bail in matters like the present to half the value of the stolen goods amounted to what is known as exceptional circumstances and therefore constitutionally compliant. This reasoning should follow herein in my view.

[24] Although the Applicant prayed for an order allowing him to provide a surety as part of the amount of bail deposit in order for his bail to be affordable, I have no hesitation that this is not conceivable in terms of the Act as Section 102 A (2) and (3) make it clear that the bail deposit to be made shall have to be in cash only and no recognisances are to be allowed. I am therefore convinced that given that the Learned Magistrate's actions were all covered by law which had mandatory provisions, there would be no basis for this court to interfere with the order issued by him in this matter.

[25] I comment in passing that the Applicant seems to have been lucky in the first place to have obtained bail even on the terms fixed by the learned Magistrate given the facts revealed by the crown such as his having at some stage escaped from lawful custody and the string of offences of a similar nature which were allegedly supported by his pointing out of some of the stolen items. It is unclear if these facts were ever placed before the principal Magistrate concerned for consideration before he granted bail on the concerned terms. It suffices that these are issues not before me in the context of the present matter and I should therefore not concern myself with them.

[26] For the foregoing reasons, I have come to the conclusion that Applicant's application cannot succeed, and it is accordingly dismissed.

N. J. HLOPHE
JUDGE - HIGH COURT