THE HIGH COURT OF SWAZILAND VUSI PETER KHUMALO

Vs

REX

Criminal Case No. 341/2002

Coram	S.B. MAPHALALA - J
For the Applicant	MR. S. MDLADLA
For the Respondent	MRS. M. DLAMINI Acting Director of Public Prosecutions

JUDGMENT

(28/11/2003)

Serving before court is an application brought under a certificate of urgency for an order directing that the Applicant be discharged and/or released in terms of Section 136 (2) of the Criminal Procedure and Evidence Act 67/1938 forthwith.

The Applicant, on or about July 2002 was arrested by Mbabane Police and charged with the crime of armed robbery. On 10th October 2001, he was committed to the High Court for trial. However, he has not been allocated a date of hearing and two sessions of the High Court have passed without his matter being allocated a hearing date. The sessions being referred to commenced on 20th January 2003, and 19th April

2003 a period of six (6) months has lapsed since his committal and there being no date fixed for his trial.

He avers in his founding affidavit that he is desirous to be discharged and/or released from custody in terms of Section 136 (2) of the Criminal Procedure and Evidence Act 67/1938. He complains that his continued detention is unlawful hence he should be discharged from custody. He further undertakes not to demean himself in a manner that is likely to defeat and/or jeopardize the ends of justice.

Respondent opposes the application and to this end the Acting Director of Public Prosecutions Mrs. Dlamini raised a point of law from the bar, to the effect that:

a) The Director of Public Prosecutions chambers should be cited as the 2nd Respondent in Section 136 (2) applications; and

b) The office of the Registrar of the High Court should be cited as the 1st Respondent, as the office primarily responsible for ensuring that accused persons are allocated trial dates timeously.

I have had occasion to answer this question posed by the Respondent in casu in a number of cases (see Senzo Tsotso Vilane and two others vs Rex - Case No. 18/2003 and Thokozani Moses Mashilwane and others vs Rex - Case No. 295/2003, 133/2003, 187/2003, 191/2003, 129/2003, 130/2003, 131/2003, 83/2003 and 340/2003.)

It would appear to me that the reasons advanced by the Respondent in favour of the joinder of the Registrar is that, he allocates trial dates and he has to explain why the Applicants have not be brought to trial.

However, in my respectful view, this cannot be so for a number of reasons. Firstly, there is nothing in the wording of Section 136 which requires or calls upon the Registrar to explain why an Applicant has not been brought to trial. On the contrary, if the Section calls upon the Registrar to show sufficient cause, then a proper case of non-joinder would have been made.

Secondly, prosecutions of accused persons are brought by the office of the Director of Public Prosecutions in the name of the King. To this end the saved provisions of the 1968 Constitution and the Public Prosecution Order 1973, spells out the position of the office of the Director of Public Prosecutions beyond doubt. A person is kept in custody on the instance of the Crown, therefore the question of non-joinder does not arise at all in casu.

Lastly and most importantly, in my view, the joinder of the Registrar will only be a joinder for convenience. A party has a direct and substantial interest in the following circumstances. Whether the third party would have locus standi to claim relief concerning the same subject matter, or whether as a result of the non-joinder, could the situation arise where the order of court would not be prejudicial against that party entitling him to approach court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance. (see Amalgated Engineering Union vs Minister of Labour 1948 (3) S.A. 63 7 (A)).

In light of the afore-going, the Registrar has no direct and substantial interest in the subject matter of the litigation, which is the discharge of the Applicant from custody. The point raised by the Respondent therefore ought to fail.

In the result, an order is granted in terms of prayer (2) of the notice of application.

S.B. MAPHALALA

JUDGE