IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 128/2017

In the matter between

SAKHAWAT HOSSAIN **1st Applicant**

SAKHAWAT NARSIN HOSSAIN **2nd Applicant**

And

REX **Respondent**

Neutral Citation: *Sakhawat Hossain & Another Vs Rex (204/2017) [2017] SZHC 128 (21 June 2017)*

Coram: Hlophe J.

For the Applicants: Mr N. Mabuza

For the Respondent: Miss N. Masuku

Date Heard: 07th June 2017

Date Handed Down: 21 June 2017

Summary

Bail Application –Variation of Bail terms –Whether case made for the reliefs sought –Requirements of the Reliefs sought – Where order sought to be varied is interlocutory this relief is granted rarely –This is done where the variation sought is purely procedural or incidental , where fresh facts have arisen since the grant of the order ; Where the order does not reflect the intentions of the applicant or where it does not serve the object for which it was sought or Where the variation will not affect the final judgement – Whether the requirements were met –Fresh facts have apparently arisen justifying variation – Variation to enable Applicant obtain passport to allegedly go and bury his relative – Variation will not affect the final judgement granted by the Court – Application granted to the extent of releasing Applicant's passport for the specific trip –The other prayers sought are bound to affect the final order –Court's power to vary its orders is more akin to this court being able to control its process which is an inherent power for any court –Application as prayed for cannot succeed but an order allowing the applicant to access their passports for the reason disclosed in their papers is granted.

JUDGEMENT

[1] The Applicants instituted the current proceedings under a certificate of urgency, seeking orders of this Court releasing the Applicants' travel documents into their possession every time they needed to travel outside the country, or in the alternative, an order altering the applicant's bail conditions by removing the condition that applicants should surrender their travel documents to the Police.

[2] The reality is that there has developed a practice in this jurisdiction in terms of which applicants who have been released on Bail have one of the conditions being that they surrender their passports or travel documents to the Police or to the custody of the investigating Police officer. Whenever they needed to go outside the jurisdiction of this Court they would then apply to this Court seeking an order that their passports be released to them for that particular trip and be returned to the Police upon return. This order is often granted as there is usually no objection to its grant. In those rare instances where there was an objection, the orders sought were normally granted after it was found to be in the interests of justice to grant same or because a strong case for the objection would not have been made.

[3] The request for the release of the passports in this particular matter was different in that it sought to have the passports released to the applicants whenever they wanted to go outside the jurisdiction of this court, and this it was prayed was to be done through the applicants merely approaching the Police without the court being involved. In the alternative, there was sought an order totally removing the condition that the Passports or travel

documents be surrendered to the Police. I must say from the onset that whereas a case has most apparently been made for the release of the Passports for the intended single trip, which the court has heard is to attend to the alleged a funeral, it does not seem to have been made, in my view, for the perpetual release of the passport to the applicants any time they felt the need to leave without the involvement of the court that issued the order in the first place or the alternative one that the condition for the surrender of the passport be permanently removed. The obvious problem with these prayers in my view is that they seek to trivialize the conditions imposed by the court; and to thereby downplay the fact that the bail in question was granted in recognition of the totality of all the conditions that underpinned the order in question. There could be other conceptual challenges to be faced by the applicants with regards the extent of the power the court has to alter or vary its decisions including whether they can be said to have been met herein; an aspect of the matter I deal with in greater detail herein below.

[4] As I understand it, the Respondent has opposed these orders to the extent that the variation sought is aimed at ensuring that the applicants obtain an order that allows them to go to the Police and obtain their passport anytime they desired to do so without involving the court. In the alternative there is

sought an order having the effect that the initial order granting applicants bail be varied in the sense that the passports surrendered to the police be permanently removed from the police. In other words the condition calling for the surrender of the passport be expunged as a condition. Otherwise the normal variation to the effect that the passports or travel documents are released to the applicants to enable them travel on the immediate intended trip and be surrender to the thereafter, is not being challenged or opposed. I proceed with the matter from this premise therefore.

[5] This application suggests that it is a sequel to what transpired before this court on the 5th May 2017, when I, as the court hearing the unopposed bails' roll, refused to grant the order sought by the applicant which was couched in the following terms: "releasing the applicant's travel documents into their possession, every time they need to travel outside the country". This was despite that the crown had indicated it was not opposing the application. I had found it unrealistic that a condition imposed by this court on the release of the applicant's passport could effectively be altered outside this court's authority. On the concern I raised, I wondered if the term as relates to the surrender of the passports in this matter should have been imposed in the first place if the term relating to the surrender and release of the passports in

the manner suggested by the applicants was being acceded to. This I said in realization of the fact that the conditions for the bail formed part of the consent order recorded by the parties themselves.

[6] Having expressed the said concerns, I had gone on to grant an order allowing the applicant's to be given their passports for the immediate trip they had revealed in their papers after which they were to return same to the Police upon their return, unless the order requiring the passport surrender was varied by being completely deleted, assuming such was legally possible. I think this was possibly the reason the current application was instituted on the 24th May 2017, a few weeks after the 5th May 2017 after I had commented in the manner set out above.

[7] The reality is that this matter has a background to it, namely that the applicants were arrested by the Royal Swaziland Police at Ngwenya (Oshoek) Border Post on the 26th March 2017 for being found in possession of a sum of E265,000.00 in hard cash. The said sum of money had apparently not been declared. This it was contended was in violation of the

Money Laundering (Prevention) And Financing of Terrorism Act, No.5 of 2016.

[8] On the 27th March 2017, an urgent bail application was instituted before this court in terms of which the applicants effectively applied for an order releasing them on bail which was couched as follows: "admitting the applicant to bail on such terms and conditions as the Honourable Court may deem meet."

[9] This application not being opposed by the crown, was granted on the terms agreed upon between the crown and the applicants' counsel. These were contained in a certain Form designed for bail court orders in such situations. The said terms were filled in by the parties' counsel who had gone on to sign them. Among the various terms contained in the forms pursuant to the agreement reached between the parties themselves, are two terms relevant to the question in this matter. These are the terms to the effect that the **applicants were not going to leave the jurisdiction of this court without its leave and that they were to surrender their passports or travel**

documents to the Police and were not to apply for any new ones in the interim. These were conditions 3 and 6 on the form concerned.

[10] These were the terms governing the bail granted the applicants when on the 5th May 2017 the matter was mentioned before me as stated above. It was in consideration of the above two terms or conditions that I made the observations or comments referred to above. Whereas I had granted an order for the release of the passports for the trip then immediately intended, I had refused to grant the order that the passports be released by the police anytime they were sought without the court being involved.

[11] It was with this background when the Applicants moved the current application seeking the orders mentioned above, mainly to have their passports released to them anytime they were wanted by them from the police without an involvement of this court and that in the alternative, the terms or conditions of the bail be varied by removing in its entirety the term that required the passports to be surrendered.

[12] An immediate comment is warranted with regards the first order being sought. It is a strange prayer in that it is brought in the same matter where exactly the same prayer had been refused by the court on the 5th May 2017. It should be very clear that the bringing about of this prayer was irregular and was not competent to seek in these proceedings. The court had already pronounced itself on the matter making it improper for it to pronounce itself once again on the same point in the same matter. This is not allowed because this court had at that stage become *functus officio*. In law a court that has pronounced itself fully and finally on a subject is *functus officio,* meaning that it has since lost authority over the subject matter or over the issue in question. The only court to hear a matter on that same subject or question is a higher court or one that exercises appellate power over the initial one. Faced with a similar situation in **Sibusiso Bonginkosi Shongwe High Court Case No. 191/2016, Neutral Citation [2015] SZHC 106 at page 16, paragraph 22**, I had occasion to express myself as follows on that question:

> *"In that sense the High Court is functus officio, which means that it has since pronounced itself finally on the subject and has in law lost authority over the matter. It*

is only a judge or judges of the Supreme Court who can now pronounce themselves on the subject."

See also: **Lwazi Kubheka And Others Vs Rex. Consolidated Case Numbers:390/2009; 91/09;51/2010; and 214/07,** as well as that of **Tornado Construction (PTY) LTD Vs Takhiwo Business Centre & Another, Civil Case Number 1623/2014.**

[13] This position was put succinctly and in the following words in **Firestone South Africa (PTY) LTD Vs Genticuro A.G. 1977 (4) SA 298 AD at 306 F.G**.

"The General Principle now well established in our law, is that once a court has duly pronounced a final judgement or order, it has itself no authority to correct, alter or supplement it. The reason is that it there upon becomes functus officio: its jurisdiction in the case having been fully and finally; exercised, its authority over the subject matter has ceased," (the relevant judgements on the principle are then cited here).

[14] In so far as I made final orders that the Applicants could not be granted the reliefs prayed for by them, namely that this court grants them an order entitling them to a release of their passports each time they wanted to leave the country by merely approaching the Police officers and not the courts, it seems to me that this court had become *functus officio* on that question and therefore that it was irregular or improper for the applicant to institute the current application and still seek the same order that I had refused to grant him on the 5th May 2017 when I merely granted the order that allowed them access to their passports for that particular trip. In this sense the first relief sought in this application cannot be entertained on this ground alone and because this court has become *functus officio* in that regard.

[15] It is true that the principle extracted from the **Firestone South Africa (PTY) LTD Vs Gantucuro A.G.(Supra)** Case referred to above has some exceptions which were expressed as follows in the same extended quote from the same judgement at **Page 306 G-H.**

> *"There are however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this court. This, provided the court is approached*

within a reasonable time of its pronouncing the judgement or order, it may correct alter or supplement it in one or more of the following cases."

(The court in that matter went on to deal with the exceptions in detail including the applicability or otherwise of each such exception to the facts of that case. For purposes here of the exceptions are dealt with herein below.)

[16] These exceptions, whilst expressed in a long and detailed manner in the said judgement, were captured in a brief and direct manner in the **Botswana Court of Appeal Judgement in Mannanyana Vs The State [2002] 1 B.L.R 72 (CA);** where the following was stated:

"In the Firestone Case, (Supra), the court held that there were four exceptions to the general principle and that the court may correct, alter or supplement its judgement or order: (i) in respect of accessory or consequential matters e.g. costs or interest on a judgement debt which the court overlooked or inadvertently omitted to grant; (ii) in order to clarify, if its meaning is obscure, ambiguous or uncertain, provided it does

not alter the sense or substance of the judgement or order; (iii) to correct a clerical, arithmetic or other error in expressing the judgement or order but not altering its "sense or substance"; (iv) making an appropriate order for the costs which had not been argued; the question of costs depending on the court's decision on the merits of the case."

[17] Having considered the first substantive prayer made by the applicant in this matter, which as I have indicated above, is essentially the same one I had made a ruling on, on the 5th May 2017, I am convinced that what I made then was indeed a final and definitive order or judgement, and that having made same, this court constituted as is now, or through any Honourable Judge of the same jurisdiction, is *functus officio*. I further acknowledge that the prayer in question by its very nature does not fall within the ambit of any of the four exceptions to the *functus officio* principle which means that this court has no jurisdiction to deal with the first prayer in its current form.

[18] I have already indicated that when the substance of the application was gleaned from the papers filed of record and understood from the oral

submissions made, it became clear that the request for the variation in question was based on an intended trip to allegedly attend a funeral of the applicants' relative somewhere in one of the Far East Countries. I have already pronounced myself that in so far as that is the only intended remedy, and bearing in mind that the applicants have on at least one occasion accessed their passports and still came back to the country and resurrendered them, I cannot realistically deny them the remedy in that limited sense or form for the number of days disclosed in their papers. That is in being given their passports to attend to the aforesaid funeral, particularly because this aspect of the application was not being opposed.

[19] I am convinced that there could be a number of legal justifications for the variation of the initial order without interfering with the *functus officio* principle. Under the Common Law a final order may not be varied but an interlocutory one can be varied in certain circumstances. To underscore this point, **Erasmus H.J. in his book, Superior Court Practice 1996 Edition, at page BI – 306** puts the position as follows:

> *"At Common Law, an interlocutory order may at anytime before final judgement in the suit be varied or set aside by the*

Judge who made it or by any Judge sitting in the same jurisdiction. While the courts are generally reluctant to grant such a variation, they will do so where the variation sought is purely procedural or incidental, where fresh facts have arisen since the granting of the order, where the order does not reflect the intentions of the applicant or serve the object for which it was sought and where variation will not affect the final judgement."

[20] Although the grant of the Bail under the conditions grounding it may not be termed as an interlocutory order, I do not think that there would in law be anything wrong with granting an order that varies the said judgement in a manner that does not change the sense or substance of the main judgement or order. In this sense while a final order granting the applicant bail on the terms agreed was issued, it would not change its substance or sense to vary one of the conditions temporarily even though the same thing may not be said with changing the same terms permanently. This variation I am referring to is that of once again allowing the applicants access to their passports for them to attend to the funeral referred to and to later return them.

[21] I am convinced that even if I was conceptually wrong on this point with regards the variation of a judgement, it seems to me that I would certainly not be wrong to say that the court can, under the rubric of its having the inherent power to control its processes, be entitled to issue the variation order sought if it has a limited effect in the sense that it does not change the substance or essence of the judgement.

[22] There is, it seems, an even more legal and plausible reason why a temporary order in the terms referred to in the foregoing paragraphs (that is the reconfigured variation) will be appropriate. This variation would, unlike the one prayed for in the first prayer as couched and cited above and in the Notice of Motion, which I have already found cannot be varied because it was a final order, be competent to grant in the context of one of the exceptions to the general rule that a final and definitive order cannot be varied or altered referred to above.

[23] This is the exception that the final order or judgement can be altered where that is for accessory or consequential matters. It seems to me that to merely

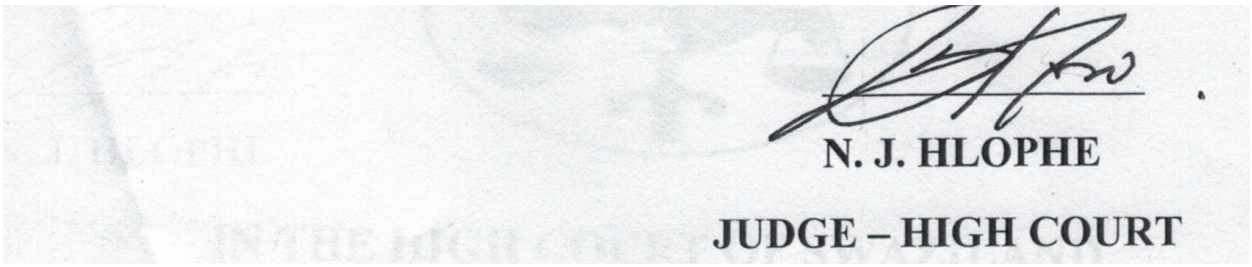
ask for a release of the passport for a brief period is accessory and does not change the substance of the final order. Ofcourse the same thing cannot be said of the initial first order prayed for as a grant of it would have the effect of changing the substance of the order I made on the 5th May 2017 and perhaps even the order granting the applicants bail.

[24] This decision brings about the question whether or not the court can grant the alternative prayer sought. This prayer sought an order varying the final order for bail by removing the condition calling for the surrender of the passports in its entirety. This prayer was an alternative to the first one which, as indicated above, sought to have access to the passports each time they were needed.

[25] The order that granted the applicants bail was in my view made on the understanding that they were to surrender their passports, and that was a final order. If this was the case, then that order could not be altered by the same court that granted it in terms of the general rule referred to above. It can only be altered by the Supreme Court as an appeal court.

[26] The general rule I am referring to herein is the one referred to above to the effect that once a court has duly pronounced a final judgement or order, it has itself no authority to correct, alter, or supplement it as stated in the **Firestone South Africa (PTY) LTD Vs Genticuro A.G. case (Supra)**. One can therefore not change that order in my view, without changing the substance of the initial order for bail. Altering it can also not be said to be accessory or consequential in my view. This means that the order sought in the alternative, does not fall under any of the exceptions to the general rule that a final order cannot be varied, altered, corrected or supplemented by the court that granted it as it has become *functus officio*.

[27] For the above stated reasons, I am convinced that this is not the kind of matter where the final order by this court granting the applicants bail can be altered in the manner prayed for by the applicants. Consequently, the applicants' application cannot succeed in its present manner or form. For the reasons also mentioned above, I see no reason why an order allowing the release of the applicants' passports to them for the specific trip disclosed in their papers for the limited period disclosed therein cannot be allowed. Accordingly the applicants passports are to be released to them for the said trip.



N. J. HLOPHE

JUDGE – HIGH COURT