IN THE HIGH COURT OF SWAZILAND

Case No. 117/2006

In the Matter between:

CHARLES MYEZA **APPLICANT**

VS

REX **RESPONDENT**

Neutral citation: *Charles Myeza v Rex* (117/06) [2013] SZHC 280 (9th September 2013)

CORAM: HLOPHE J

Date Heard: 3rd September 2013

Date Delivered: 9th September 2013

Summary:

Application for bail pending Appeal- Applicant convicted on 50 counts comprising 20 of fraud; 15 of forgery and 15 of uttering a forged document well knowing it to

be forged and sentenced to five years imprisonment- Applicant applying for bail pending appeal-general contention made that it was possible a different court could come to a different decision, but no sound basis for such contention put forth-Requirements for applicant to succeed in such an application are proof that the applicant is not a flight risk and that the applicant has prospects of success - court not convinced there are prospects of success as none are spelt out concisely and fully – Application accordingly dismissed.

JUDGMENT

[1] On the 3rd September 2013, I sentenced the applicant to five years imprisonment following his having been found guilty of all the fraud, forgery and uttering a forged document well knowing it to be forged, charges he had been charged with, which the court found had resulted in the loss of a total sum of E661 043-13 to the complainants, in the trial matter.

[2] Soon afterwards the applicant noted an appeal against the conviction contending generally that the court hearing the mater had misdirected itself in convicting the applicant. He further contended that there was a possibility another court could come to a different conclusion or decision particularly as regards the signing of the invoices, including its purpose and intention which this court had found to be fraudulent. It was not disputed that the applicant received the invoices concerned in the name of one "Vusie Silindza segt" He also went on to enter the name of "A. V. Mkhaliphi Assistant Supt" as the person who concluded a contract between the Royal Swaziland Police and the 4th Accused, when he had not done so and had not authorized the applicant to enter his name thereon or even to conclude the said contract in

his name. The import of the Notice of Appeal was that a different court would come to a different conclusion on the receipt of the invoices concerned in the name of Vusie Silindza as well as on the entering of the authorized officer's name in the signing of the contract to benefit his company.

[3] It was contended in the papers before me that the applicant was not a flight risk and that there were prospects of success in his appeal. These were said to be the requirements that the applicant had to meet in order to succeed in an application of this nature. These papers had been filed through Miss. N. Ndlangamandla who represented the applicant in these proceedings.

[4] The application was opposed by the Respondents through Advocate Norman Kades SC, who contended in their papers that the application was bad in law in so far as no grounds of appeal other than a bare assertion were contained in the papers. It was contended the notice aforesaid was unclear as to which counts the appeal related to including how the court was being said to have misdirected itself. Furthermore, the application, it was contended, did not meet the requirements that must be met for such an application to succeed.

[5] It was contended for instance in this regard that it had not been shown in the papers filed of record that the applicant was not a flight risk and therefore that he deserved to be released on bail pending appeal. This it was contended was despite the bare and general allegations made that the applicant was not a flight risk. It was further contended that the applicant had not established any prospects of success other than contenting itself with bare and general allegations, there were prospects of success.

[6] I agree that the position is now settled that an applicant seeking to be released on bail pending appeal needs to establish primarily that he was not a flight risk and that he had prospects of success on appeal. The case of ***S vs. Williams 1981(1) SA1170*** is instructive in this regard just as is that of ***R v Milne and Erleigh (3) 1950 (4) SA 599 (W) and that of Alexander George Whithead and others v The State case No. CA & R 2/06*** (Unreported) delivered on 7th July 2006.

[7] In the matter at hand the applicant was found guilty of all the counts because, as regards the fraud charges, it was shown that he had whilst acting in common purpose with the fourth accused, his company as represented by its Managing Director or Manager, Paul Hlatshwayo, received certain invoices which claimed for work not done at all or partly done in some instances. When receiving these invoices, the applicant entered the name of and signed like, Vusie Silindza Segt in most instances. On limited occasions he received such invoices in his own name. The receipt of these invoices was in terms of established procedure meant for an officer in the Research and Planning Department of the Royal Swaziland Police which is where Vusie Silindza was based. The reason why the applicants received the invoices in the name of the said Vusie Silindza was because he was often the one at the Research and Planning Department tasked with determining if indeed work had been done including for how much. In other words it was to misrepresent that silindza had received same.

[8] The purpose for the receipt of the invoices by an officer in the Planning and Research Department, usually Vusie Silindza,was to ensure that the said

officer had verified that the work had been done, which he was to confirm through receiving the invoice by entering his name and/ or signing same in acknowledgment.

[9] Even where the applicant had personally received the invoices in his own name, he had made it look like the work had been done because that was the whole purpose of entering one's name as having received the invoices concerned. The applicant was clearly circumventing the procedure to the benefit of his company in that regard.

[10] The applicant had not denied having received the invoices in the name of Vusie Silindza or even in his own name just as he had not denied what the purpose of receiving and signing the invoices from the service providers or contractors was- that, is it was to confirm that work had been done and that the concerned invoices had to be processed for payment.

[11] On the forgery charges, it was established in the evidence that the act of entering the name of Vusie Silindza on the invoices and that of entering the name of the officer entitled to conclude contracts on behalf of the Royal Swaziland Police, one A. V. Mkhaliphi on the contract awarding his company the fourth accused, work which the latter misrepresented was concluded by the said A. V. Mkhaliphi, when that was not the case, was a forgery. As such the applicant had made the document tell a lie about itself; which is the essence of the offence of forgery.

[12] The applicant has not disputed or denied having entered the name of A.V. Mkhaliphi on the said contract. The reasons he put forth for that were highly

improbable and fanciful. A fanciful or improbable explanation does not suffice as a sound or reasonable explanation in a matter. See ***R v Difford 1939 AD***. His entire act circumvented established procedure and was in terms of the evidence led against him not supposed to be done by him because in terms of procedure it could not even be delegated so delegated.

[13] As for the counts of uttering of a forged document knowing same to be forged, it was not disputed that the applicant is the one who presented the documents for payment, going on later to access the proceeds as a signatory to the fourth accussed's bank account together with his wife.

[14] It was against the background set out in the foregoing paragraphs that the applicant was convicted and duly sentenced. In his application other than a bare assertion that another court could come to a different decision, I have not been shown where it is said the prospects of success lie against the judgment of this court. Clearly, and admittedly so, one of the requirements for succeeding on a bail pending appeal, is to establish prospects of success by the applicants. As same have to be shown to be in existence, I have not been able to find any in this matter and counsel for the applicant had a difficulty showing me any during the hearing of the matter and ended up saying, there was a possibility another court could come to a different decision. In ***S vs Williams*** (supra) the position was expressed as follows:-

> "*…A Judge has a discretion and the proper approach should be towards allowing liberty where that can be done without any danger to the Administration of Justice. To apply this test properly it is necessary to put in the balance both the likelihood of applicant*

absconding and the prospects of success on appeal and these two factors are clearly interconnected because the less likely the prospects of success are the more inducement there is on the applicant to abscond."

[15] Given that in the said matter no prospect of success were established, even if the applicant was not likely to abscond, the court in the ***S v Williams*** (supra) matter, came to the conclusion that the application could not succeed and dismissed same.

[16] Further still in ***S vs Mabapa 2003(2) SACR 579 (A) 589***, the test was said to call for a lesser standard than prospects of success properly so called where the likelihood to abscond was not apparent. The standard in such instances it was stated, should be whether there was reasonably arguable appeal. This was put in the following words:-

"*Once there is no concern about whether the applicant will abscond…, there is no reason not to apply a lesser standard on the question of prospects of success. In other words, if the Appeal is reasonably arguable and not manifestly doomed to failure, bail should be allowed. If the grounds are frivolous, it may be deduced that the appellant is simply seeking to delay imprisonment and the application should be denied*."

The question is whether in the matter at hand even assuming I agree the Applicant is not likely to abscond, and therefore I do not insist on the prospects of success proper, can I come to the conclusion that there is a

reasonably arguable appeal shown *ex facie* the papers? I do not think so. I am not convinced that the applicant has a reasonably arguable appeal, and he has not attempted to show me any, which means his application does not meet the required standard even in this regard. The case of ***Alexander George Whitehead and Others vs The State, Case No. CA & R 2/06*** (Unreported), is instructive in this regard.

[17] I must clarify that although the pleaded material is too scanty to enable the court to conclude whether or not the applicant was a flight risk, I am prepared, in view of what transpired throughout the trial, including after having convicted the accused; that he complied with and observed all his bail conditions; to assume in his favour that he was not a flight risk. However this alone, as shown above, cannot guarantee his release on bail pending appeal for the reasons stated above which are also informed by the fact that his fate has already been determined distinguishing his matter from that where the presumption of innocence applies. It has been said that at this stage of the proceedings bail is not just for the asking but the requirements, referred to above have to be met. I have found that the said requirements have not been met.

[18] That being the case I have come to the conclusion that the applicant's application for bail pending appeal, cannot succeed and I dismiss same.

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N. J. HLOPHE

HIGH COURT JUDGE