IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 315/14

In the matter between

MARWICK THANDUKUKHANYA KHUMALO APPLICANT

Versus

REX RESPONDENT

Neutral citation: *Marwick Thandukukhanya Khumalo v Rex (315/14*) [2014] SZHC 208 (29 August 2014)

Coram: M. S. SIMELANE J

Heard: 26 August 2014

Delivered: 29 August 2014

Summary: Variation of bail conditions – execution of judgment pending appeal – application dismissed.

Judgment

SIMELANE J

[1] It is convenient for me to refer to the parties as they originally appeared in the application before Dlamini J resulting in the judgment of 18 August 2014.

[2] It is apposite for a proper understanding of the issues *in casu,* to detail a brief history of the matter.

[3] **BACKGROUND.**

The Respondent was admitted to bail in June 2013 and one of the bail conditions was that he surrenders his passport to the police. The Respondent then moved an application to be permitted to travel to attend Commonwealth Parliamentary Association the (CPA) meeting in London but was denied such permission on the basis that there was a real likelihood that the granting of the relaxation of the bail conditions would prejudice the administration of justice. This is per the judgment of the High Court of the 17 July 2013.

[4] Thereafter the Applicant moved another application praying that he should be allowed to travel for medical attention and the Court granted him this application in terms of a Court order dated 21 February 2014. However in the same order the Court emphasized that before he can leave he must apply to Court to give specific and full information on the private or official duties and place he intended to visit. He was further ordered to furnish the office of the Director of Public Prosecutions with his medical history indicating his alleged chronic illness. Finally, the Court stated that allowing him to travel anytime and to any place would be equal to rendering him a person who is not on bail.

[5] In August 2014, the Applicant launched another application seeking the same order *inter alia*, to be allowed to attend the CPA meetings in London to be held on 8th, 9th and 13th September 2014. The Crown opposed the application on the basis that the Applicant will interfere with the Crown's evidence since there is a Mutual Legal Assistance process that is being sought from the CPA International in London where the Applicant has to do a handover of the same documents the Crown expects to be part of the Crown's evidence in the criminal charges faced by the Applicant. The Court granted the Applicant herein the permission to attend the said meetings. This is per the High Court judgment of 18 August 2014.

[6] The Crown then noted an appeal challenging the decision on the basis that the Honourable Judge of the Court a quo misdirected herself in a number of issues.

[7] As a follow up to the appeal noted and in the face of the fact that the Applicant had commenced execution of the judgment of 18 August 2014 by proceeding to retrieve his travel document from the police the Respondent moved an *ex-parte* application on the grounds of urgency for the Court to order the return of the Applicants passport to the police pending the appeal.

[8] When the matter served before me on 21 August 2014, I granted an interim order in the terms sought returnable on 4 September 2014. The Applicant thereafter moved an application dated 25 August 2014 seeking the following reliefs:-

(a) Leave to execute the order granted on the 18 August 2014;

(b) Leave to consolidate the Applicant's application for leave to execute the judgment of the 18 August 2014 and the Respondents *ex-parte* application heard on the 21 August 2014.

[9] It is also on record that prior to the return date being 4 September 2014 Mr Howe for the Applicant filed a counter application in the following terms:-

1. Leave be granted consolidating Applicant's applications for leave to execute the judgment of the 18 August 2014 and the Respondent's *ex-parte* application heard on the 21 August 2014.

2. That the said applications proceed as one application on Tuesday 26 August 2014 or soon thereafter the matter may be heard.

3. Leave be granted to the Applicant in this application to anticipate the Rule Nisi (granted to against him to show cause on the 4 September 2014) and now that it be heard on the 26 August 2014 or so soon thereafter as the matter may be heard.

4. That the Rule Nisi issued by the Honourable Court on the 21 August 2014 be discharged.

[10] I heard argument from both sides on 26 August 2014. It is apposite for me to state that the Respondent had no objection to the consolidation of the application for leave to execute the judgment of the 18 August 2014 with the Respondents *ex-parte* application heard on the 21 August 2014 hence the matters were argued simultaneously. The Respondents also had no objection to the counter application to anticipate the rule.

[11] **<u>The Applicant's case.</u>**

The Applicants contention is that Rule 6 (4) of the High Court Rules makes provision for *ex parte* applications. An *ex-parte* application is used when

a) the Applicant is the only person who is interested in the relief sought.

b) Where the relief sought is a preliminary step in the proceedings like in applications to sue by edictal application, for substituted service, to attach, found or confirm jurisdiction.

c) Where the nature of the relief sought is such that the giving of notice may defeat the purpose of the application like Anton-Piller order.

d) Where immediate relief, even though temporary in nature is essential because harm is imminent.

[12] It is the Applicant's contention that he ought to have been served with the application consideration being had to the fact that he had direct and substantial interest in the application.

[13] It is further the Applicant's contention that one of the tenets of natural justice is the *audi alteram paterm* rule, which implies that a person shall not be condemned, punished or have his rights compromised by a Court of law without being heard. The Applicant contends that he had to be afforded an opportunity to make representations before the issuance of that order in the *ex-parte* application.

[14] The Applicant further submits that the Appeal lodged by the Respondent is frivolous, on the grounds that no leave of the Court was

obtained prior to the noting of the appeal. It is submitted that the appeal is not in compliance with Section 4 (2) (1) and Section 6 (2) of the Court of Appeal Act.

[15] **The Respondent submitted *au contraire* that:**

The Applicant's application seeking an order for the execution of the judgment issued on 18 August 2014 must fail as it lacks merits. It is the Crown's contention that the Applicant wants the High Court to usurp the powers of the Supreme Court in determining whether the appeal noted by the Crown is properly before the Supreme Court or not. The Respondents submit that this is a determination that can only be made by the Supreme Court itself and not the High Court.

[16] The Respondents further contend that Section 4 (2) (a) and Section 6 (2) of the Court of Appeal Act are not applicable in the instant matter as bail applications are a hybrid of both civil and criminal cases. The Respondents' submission is also that Section 6 (2) of the Court of Appeal Act deals strictly with criminal matters and bail applications are not by their nature strictly criminal.

[17] The Respondents' further contention is that leave to appeal is governed by Section 14 of the Court of Appeal Act of 1954. The argument advanced herein being that the challenged order of the High Court is a final order not an interlocutory order hence appealable as of right, requiring no leave to appeal.

[18] It is pertinent that I note here that it is crucial in an application such as this that the Court considers who stands to suffer more harm. This principle of law was succinctly pronounced in the case of **SOUTH CAPE CORPORATION (PTY) LTD V ENGINEERING MANAGEMENT SERVICES (PTY) LTD 1977 (3) SA 534 (AD) at D-546A Corbett JA (at the time) speaking on behalf of the court held that;**

"a. The court exercises a discretion based on what appears to be "most consistent with real and substantial justice" having regard to what is "just and equitable in all the circumstances";

b. In giving effect to this the court; "would normally have regard, inter alia to the following factors:

(i) The potentiality of irreparable harm or prejudice being sustained by the Appellant on appeal…if leave to execute were to be granted;

(ii) The potentiality of irreparable harm or prejudice being sustained by the Respondent on appeal…if leave to execute were to be refused;

(iii) The prospects of success on appeal, more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose e.g. …to gain time to or harass the other part; and

(iv) **Where there is the potentiality of irreparable harm or prejudice to both Appellant and Respondent, the balance of hardship or convenience, as the case may be", (emphasis added).**

> **"The Appellate Division held that, whatever the true position may have been in the Dutch Courts, it is today the accepted common-law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given to it, except with the leave of the Court which granted the judgment. To obtain such leave, the party in whose favour the judgment was given must make special application."**

[19] I am inclined to agree with the Respondents that if the judgment was to be executed the Crown will suffer irreparable harm. This I say because an appeal has already been noted and if the Supreme Court were to set aside the High Court judgment of the 18 August 2014, the result of the appeal will be rendered academic. It is trite that the noting of an appeal automatically stays the execution of the judgment appealed against. The effect of the noting of an appeal is the restoration of the *status quo ante*.

[20] I am also mindful of the fact that Section 22 (4) (a) of the CPA International Constitution makes provision for what the chair person must do if the Treasurer is unable to attend or execute his or her duties. The said Section provides as follows:

> **"(a) In the event of a casual vacancy in the office of Treasurer, the Chairperson of the Executive Committee may appoint a person qualified under Article 33 as Acting Treasurer to perform the functions of Treasurer until the next meeting of the Executive Committee."**

[21] It follows that the Applicant and the CPA will not suffer any irreparable harm or prejudice if the said judgment is stayed.

[22] Counsel for the Applicant also argued that this Court does not have jurisdiction to deal with the instant application. He argued that the matter should be heard by the judge who issued the impugned judgment. I reject this contention because this is a simple application like any other application contrary to the argument by Mr Howe that this is a special application. One wonders what is special with this application. The Applicant failed to show the Court what takes this application to the special realm or what circumstances makes the case special. This is an application that can be heard by any judge so long as it is properly allocated. No authority was advanced to the contrary.

[23] On the submission that the Applicant had to be given an opportunity to make representation and it was not proper for the Court to grant the order on an *ex-parte* basis, I reject the Applicant's application in this regard. This is because in my view the Applicant suffered no prejudice by the grant of the interim order *ex-parte*. He has not been foreclosed. He was given an opportunity to appear before Court to show cause and apply for the discharge of *rule nisi* if he so pleased. In any case an appeal had already been noted and its very nature

should operate as an automatic stay of execution. The Court was of the considered view that the relief sought was immediate and harm was imminent and there was need for an interim Court order to preserve the status quo which was consequently granted. I hasten to mention that there is nothing outrageous about it. That is one of the reasons why the law provides for *ex-parte* applications, as recognized by the Applicant himself in his argument as detailed above.

[24] I find that whether the appeal is properly before the Supreme is not a determination that can be made by this Court. It is in the exclusive preserve of the Supreme Court to make that determination. It is not for the High Court to interrogate Sections 4 and 6 of the Court of Appeal Act. This is a duty for the Supreme Court. The parties will cross that bridge before the Supreme Court.

[25] CONCLUSION

I find the Respondents' application meritorious. It succeeds. The Applicant's application and prayer 4 of his counter application fails and are hereby dismissed.

[26] COURT ORDER

(1) The Applicant's application for the execution of the judgment by Dlamini J pending the appeal is hereby dismissed.

(2) Prayer 4 of the Applicant's counter application is hereby dismissed.

(3) The Rule nisi granted by this Court on the 21 August 2014 be and is hereby confirmed.

(4) The matter be and is hereby stayed pending the Appeal.

(5) The Applicant's passport be and is hereby ordered to remain in the custody of the Registrar of the High Court pending the appeal.

M. S. SIMELANE J.
JUDGE OF THE HIGH COURT

For the Applicant: **Mr L. Howe**
For the Respondent: **Mr M. Nxumalo**