IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 42/2017

In the matter between

PHINDILE GWEBU **Applicant**

And

THE KING **Respondent**

Neutral Citation: *Phindile Gwebu Vs The King (42/2017) [2017] SZHC 65 (20th April 2017)*

Coram: Hlophe J.

For the Applicant: Mr S. Bhembe

For the Respondent: Mr M.Nxumalo

Date Heard: 05th April 2017

Date Delivered: 20th April 2017

Summary

Criminal Procedure –Bail Pending Appeal –Applicant convicted of Bribery and two counts of fraud involving E880,000.00 and E3,462,000.00 Respectively and sentenced to an effective 10 years custodial sentence –Following her noting an appeal against both conviction and sentence, Applicant applies for bail pending appeal –Requirements for Bail pending appeal to succeed in law considered –Applicant has a duty to establish that she is not a flight risk and that there are prospects of success –Inquiry done through balancing the two requirements –Whether requirements to obtain bail pending appeal are met or not –When balancing the two requirements, court is of the view prospects of success are very weak if at all they are there –In terms of the applicable principle of law, bail pending appeal cannot be granted –Application dismissed.

APPEAL ON SENTENCE

[1] The Applicant is one of twelve accused persons in High Court Case No 42/2007 who were charged with various counts of fraud and bribery. At the end of that case she was convicted on three counts namely counts 4, 5 and 6. These counts entailed Bribery (as a Bribee) on the first one and fraud entailing sums of E880, 000.00 and E3, 462,000.00 respectively on the last two. She was subsequently sentenced to six years, imprisonment on each one of the first two counts and ten years on the last count. Two years on each one of the six year sentences were suspended for a period of three

years. All the sentences were ordered to run concurrently with the result that the accused was to serve an effective 10 years in custody.

[2] After noting an appeal against both conviction and sentence on all the counts, the applicant instituted the current proceedings where she sought to be released on bail pending appeal. It was contended that the court had erred, both in law and in fact, in convicting the accused persons of the offences in question. It was argued as well that the sentence imposed was excessive and that it induced a sense of shock therefore.

[3] Extending from the contention that the Court had erred in convicting the applicant as stated above, it was contended that the applicant was not a flight risk and that she had prospects of success on her appeal. It was argued she had already demonstrated that she was not a flight risk because at the time of her trial she remained loyal and in attendance throughout. This it was argued had remained the position even after her conviction but before her sentencing. As concerns the prospects of success, it was argued they were there because there was allegedly no evidence showing that she had acted in common purpose with her co – accused persons in the commission of the

offences. Otherwise nothing further was said on the sentence both in the papers filed of record and during the hearing of the application, than the bare assertion that it was excessive.

[4] Without disputing that the Applicant had loyally complied with all her bail terms during the trial even after her conviction, the Respondent argued that there were no prospects of success at all in favour of the applicant or that if they were there they were very weak. This position, it was further argued was likely to prompt applicant to abscond. It was argued further that this position made it impossible for the Court to grant such a remedy as the law was emphatic that the weaker the prospects the more difficult it should be to obtain bail.

[5] It was argued a very strong case had been made against the Applicant during the trial because on the bribery charge, where as she was shown receiving a sum of E754, 000.00, albeit in different amounts at a time, the payment of this much money was against a background where the person who herself paid her the said sum of money was paid huge sums of money amounting to E880,000.00 and E3,462,00.00 respectively for work not done from the

Accounts Department of the Ministry of Finance. The Applicant was one of the only two people from that department who could have processed the payments concerned, by being complicit to the filing and processing of the fraudulent claims. These were the applicant and the 11th accused, Tsembani Simelane, who was acquitted after she had given an explanation and after having been cleared by the evidence. The applicant had chosen not to explain why she was paid the amounts paid to her.

[6] In fact the only explanation given by the 7th accused as the person who had paid applicant the said sum, on why she had been paid, had turned out to be palpably false. It was argued the Court could not help drawing an adverse inference against applicant in those circumstances.

[7] The applicant had failed to give the explanation in a situation where a duty to do so was placed on her given that a prima facie case was made against her. It was argued further that in keeping with what the law said in situations where reliance was placed on circumstantial evidence, the inference drawn against the applicant was the only reasonable one to draw

and was consistant with all the facts of the matter. See in this regard RV Blom 1939 AD.

[8] The difficulty with applications for bail pending appeal is that they in a way require the Court that convicted and sentenced the applicant to consider whether a different court, the appeal court, could possibly find differently from it. This observation is compounded by the fact that during the hearing of the application for bail pending appeal, there is always a temptation on the parties to find themselves arguing the appeal itself as they address the question of the existence or otherwise of prospects of success. Being this as it may, there is no doubt that there is a rationale in this rule of practice. It was expressed as follows in **S.V.Williams 1981(1) SA 1170 (ZA):**

> *"There is, of course, the difficulty which any judicial officer who has convicted an accused person may have in saying that there is a reasonable chance of another Court taking a different view – a difficulty touched on by Lucas AJ in a slightly different context in* ***RV Milne and Eleigh (3) 1950 (4) SA 599 (W)****. But, despite this, it seems to me that in an urgent application of this nature there is a far better chance of an informed decision from*

the magistrate who has heard the case than from a Judge who has little knowledge of the facts and no notice or grounds of appeal and to whom no detailed critism of the magistrate's reasons is offered. It is certainly not the Judge's task to examine the reasons without assistance. Nevertheless, I must deal with this case now as best I can."

[9] The test on whether or not to grant an application for bail was recorded as follows in the same Judgement of SV Williams 1981(1) SA 1170 (ZA) at page paragraph.

> *"[A] Judge has a discretion and the proper approach should be towards allowing liberty to persons 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 the applicant absconding and the prospects of success on appeal and these two factors are clearly inter – connected because the less likely the prospects of success are the more inducement there is on the applicant to abscond."*

[10] The significance of this test is in the direction that one does not have to consider each one of the requirements for the grant of bail pending appeal in isolation. The requirements of the likelihood or otherwise to escape or abscond should be considered together with that of the existence or otherwise of prospects of success. This is done by balancing them, against the other. The effect of this approach is that the existence of prospects of success alone should not necessarily guarantee the grant of bail just as the lack of such prospects should not necessarily mean that the applicant should not be granted bail. The same thing applies to the fact that the likelihood of the applicant not to abscond alone, does not necessarily mean that he should be released on bail. The discretion of the court as well the seriousness of the matter itself are weighty considerations as well. To illustrate this, Fieldsend CJ put it as follows at page 171 at Para.H of the **SV Williams (Supra) Judgement**:

> *"Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal.*

On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. *Such cases as* ***RV Milne and Eleigh (4) 1950 (4) SA 601 W and RV Mthembu 1961(3) SA 468 (D****) stress the discretion that lies with the Judge..”*

[11] Turning to the facts of the matter I am convinced that when applying the test referred to above, there are less prospects of success which when weighed against the likelihood of the applicant absconding make the latter a more likely reality. This means that I cannot exercise my discretion anyhow else than by refusing the application.

[12] I agree with counsel for the crown that the facts of the matter indicate that notwithstanding that a strong prima facie case had been made against the applicant on the bribery case and the inter connection between that charge and the fraud charges, she had not given any explanation as required of her in law. The only reasonable inference in my view is that she had been paid

the sum of E754 000.0 to facilitate the payment of the fraudulent amounts referred to in counts 5 and 6.

[13] I am therefore convinced that this is a matter where the weak prospects of success make it likely for her to abscond and that I should exercise my discretion against allowing her application on the merits of the matter.

[14] As regards the question of sentence, I agree with crown counsel that the standing principle of our law is that sentencing is a preserve of the trial court such that an appeal court will not interfere with same unless there is a material misdirection resulting in a miscarriage of justice. See the case of **Denzel Dunguzela Gamedze Vs Rex Criminal Appeal No. 41/2010**.

[15] The position is also now trite that a material misdirection resulting in miscarriage of justice will occur where the sentence is so harsh that it induces a sense of shock or that it results in a miscarriage. It has not been shown that the sentences in this matter are anywhere near these contentions.

I agree that if anything the sentences here are fair and reasonable if not on the low side.

[16] Accordingly I make the following order:

16.1. The applicant's application be and is hereby dismissed.