IN THE HIGH COURT **OF SWAZILAND**

JUDGMENT

Held in Mbabane Civil Appeal Case No. 134/2019

In the matter between:

SIPHO SHONGWE Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

Neutral Citation: ***Sipho Shongwe v The Director of Public Prosecutions (134/2019) [2019] SZHC 74 (23rd April, 2019)***

Coram: M. DLAMINI J

For Appellant: L. Howe

For Respondents: M. Nxumalo

Heard : 17th April, 2019

Delivered : 23rd April, 2019

Civil Appeal : Appeal or view – forms and procedures must be observed –

: interlocutory – definition – provisional order – not definitive of parties' rights –

: From court of committal – section 14 of the Supreme Court Act not applicable – section 64 of Magistrate Act applicable - section 64(b) expressly allows for appeal on definitive and final orders – express mention of one is an exclusion of another principle –

Costs order : corrected and set aside as based on misconceived information – court not functus officio as final pronouncement not yet made;

Order : Appeal dismissed – no order as to costs.

Summary: The appellant who is arraigned before a court of committal is challenging the court's decision to consider evidence that was adjudicated upon by this court under case No: 42/2018. The appeal is strenuously opposed on the ground that the ruling by the committal court is not appealable and further that on the merits, appellant's ground lacks support.

<u>The Parties</u>

[1] The appellant is an adult male Swazi, presently arraigned before the Court of Committal under a warrant of arrest for a charge of escaping from lawful custody while serving two life sentences on charges of robbery in the Republic of South Africa. The appellant is also currently facing a murder charge in our jurisdiction for a murder of a well-known businessman by the

name of **Victor Gamedze** which allegedly took place in broad day light in the presence of members of the public and by use of a firearm at a close range. He is charged under common purpose for this crime.

[2] The respondent is a creature of statute whose core function is to prosecute criminal and incidental matters in the Kingdom. Its principal offices are situate at Mbabane, region of Hhohho.

Synopsis

[3] The appellant's bail proceedings is characterised by unchequered history. From the pleadings serving before me, the appellant has been in and out of court, strenuously fighting for his liberty. He first moved a bail application for the murder charge under case number 42/2018. Before his bail application could be finalized, the respondent on 6th April 2018 noted an appeal in the Supreme Court on the ruling by my brother **Nkosi J** to the effect that there was no refutable evidence that the appellant had escaped from prison. This was said by the learned Judge after a previous comment that should he find that there was no evidence supporting respondent's submission that the appellant had escaped from the Barberton Prison, he would grant appellant bail. The respondent felt that the learned Judge had prejudged the matter before arguments could be finalized. The appeal noted was under case No: 5/2018.

[4] While appeal No: 5/2018 was pending, appellant moved an application before my brother **Fakudze J** demanding that the appeal together with the leave to appeal noted under case No: 5/2018 be dismissed, alternatively execution of

bail ruling which was the subject of the appeal under case No: 5/2018. **Fakudze J** ruled that it was the prerogative of the Supreme Court to decide on the merits and demerits of leave and appeal. He ordered that the appeal should run its full course and that the bail application before **Nkosi J** be stayed pending the appeal by respondents.

[5] Subsequently to the above by **Fakudze J**, **Nkosi J** ordered that the bail application be proceeded with on the 9th July, 2018 as the appeal noted was not permissible at law. The respondent reacted by filing an application before the Supreme Court in terms of section 148, calling upon the Supreme Court to exercise its supervisory powers over the bail application citing that it was in a state of confusion. **M.J. Dlamini JA** ruled that all orders staying the bail proceedings should be uplifted and the bail before **Nkosi J** be proceeded with forthwith. He lamented the failure by respondent to prosecute its appeal under case No: 5/2018 timeously.

[6] The bail application proceeded before **Nkosi J** as per the orders of the Supreme Court per **M.J. Dlamini JA**. On the 28th September, 2018, **Nkosi J** found in favour of the appellant by granting him bail with conditions. The learned Justice undertook to deliver written submission the following month. No judgement has been delivered up to date according to both Counsel's submissions. Respondent noted an appeal on the same day (28th September, 2019) under a certificate of urgency. Respondent obtained an *ex-parte* order staying the order of **Nkosi J**. This *ex parte* application was heard and granted in chambers. However, respondent failed to file its reply timeously. This necessitated an application for condonation. **M. J. Manzini AJA** wrote the unanimous decision on the condonation

application. Holding that respondent having brought the matter under a certificate of urgency, setting the ground on motion, was not entitled to be slack. He dismissed it. There was an application for leave to appeal as well. Again **M. J. Manzini AJA** was the scribe of the majority judgment. He dismissed the application for leave to appeal on the basis that the respondent had not stated the grounds of appeal despite stating that it was appealing on grounds stated therein. He further noted that respondent had failed to establish prospect of success. Respondent had failed to annex the court record. This was viewed by the Supreme Court as laxity on the part of the respondent which was fatal. It dismissed the application for leave to appeal and application for stay of execution pending appeal. This final blow against the respondent came on the 15th November, 2018 as under the hand of **M. Manzini AJA,** the dismissal of respondent's leave to appeal and stay of execution of **Nkosi J's** orders meant that **Nkosi J's** decision granting appellant bail had to be executed.

Court of committal

[7] Ordinarily, appellant ought to have been liberated from custody on 15th November, 2018 when the Supreme Court dismissed respondent's application for leave to appeal against orders by **Nkosi J** granting him bail. However, that was not to be. The reason was that when the appellant was busy arguing his bail application under case No: 42/2018 before my brother **Nkosi J**, the National Prosecuting Authority of the Republic of South Africa was busy preparing appellant's extradition application.

[8] When the extradition application was lodged, appellant on 12th March, 2018 filed an application for bail. By the time appellant's appeal emanating from case

No: 42/2018 under High Court bail application was concluded, his bail application was part heard before the court of committal.

Application for appellant's release before the court of committal

[9] On the return date at the court of committal for continuation of appellant's bail, a period after 15th November, 2018 (date when Supreme Court dismissed respondent's leave to appeal against grant of appellant's bail, thereby confirming his liberation), learned Counsel on behalf of appellant moved an application in the following terms as captured by the Presiding Officer in the *court a quo*:

"*1. That the High Court issued an order in favour of the Applicant granting him bail on the 28th September, 2018 and Respondent having made an application for leave to the Supreme Court under case No 14/2018 for leave to appeal the order of the 28th September 2018 and for stay of the said order:*

1.1 The Supreme Court having refused the leave to appeal the bail order of the 28th September, 2018 by the Respondent.

1.2 The Supreme Court having declined an order for a stay of execution of the order by Justice Nkosi dated 25th [sic] September 2018.

Thus Respondent attempts to set aside the bail having been denied by the Supreme Court, the matter is therefore ***res-judicata.***

2. That the above honourable court therefore is duty bound in terms of Section 146(4) of the Constitution to effect the said finding of the Supreme Court which section provides as follows:

2.1 That all decisions of the Supreme Court shall be enforced as far as they may be effective in such manner as if the order had been issued by this court.

2..2 The findings on bail by Justice Nkosi having been confirmed and reaffirmed by the Supreme Court cannot be altered and or changed both in common law and constitutionally by this court.

2.3 The above honourable court is duty bound to release the Applicant on bail as well the facts and elements before this court having been determined by a high court and confirmed by the Supreme Court.

3. That in law a lower court is obliged to follow the findings of a court of higher jurisdiction on issues between the same parties with the same principles as is the matter before the court for the determination of bail. Wherefore the above honourable court is obligated to uphold the findings by Justice Nkosi when determining the same question of law or issue of fact which is before the court in relation to bail.

4. Wherefore the Appellant prays that the points in Limine are upheld and that bail is granted to the Applicant in terms of the conditions issued in terms of the principles and maxim of stare decisis."

[10] The learned Presiding Magistrate adjudicated on the matter and finally dismissed the appellant's application to automatically admit him to bail on the basis that the High Court had done so under case No: 42/2018. The result was the present appeal serving before me.

Grounds of appeal

[11] The appellant tabulated the following as grounds for appeal:

"That the Court-a-quo erred in law in finding that:

1.1.1 The Respondents case in opposition to the Application for bail can not be different to that of a High Court which heard the evidence on bail, being the High Court which hear the evidence on bail, being the High Court and the Supreme Court, which upheld the decision of Justice Nkosi, SA,

1.1.2 That the decision of the Supreme Court shall be enforced as far it maybe effective by the Court on the bail hearing as it Supreme Court had endorsed the Judgment of the High Court and [sic] granting bail;

1.1.3 That the decision not to find that the provisions of section 95 and 96 of the Criminal Procedure and Evidence Act of 1938, had been met as the facts on which the Respondent was opposing the bail was identical with the same witnesses as the High Court , thus the evidence can not change and must be accepted by the Court aquo, as having been tested ad bail be granted, on the same conditions;

2. That the Court-a-quo erred in law in finding that doctrine of res juricata [sic] and stare decisis, were not applicable to the application for the bail before the court, in light of the circumstances of the matter to the extent that the Applicants case must fail.

3. That the Court-a-quo erred in law in failing to hold that effectively the facts proved before Justice Nkosi, in the bail hearing disposed of the facts required to be proved before the Court for bail to be granted, in the extradition hearing therefore bail should be granted.

4. That the Court-a-quo erred in law and in fact, by failing to uphold that, under the rules of evidence where the evidence is relevant as this was, the Court must admit it and grant bail, as it is a matter between the same parties on the same issue of bail and should he not, it would bring the justice system into question and one cannot in Law have two different conflicting decisions and conclusion on the same facts between the same parties.

5. That the Court-a-quo erred in law and in fact, by holding that the bail in the High Court was different from that in the Magistrate Court to the extent that the facts required to be proved by the Applicant were different than those in the High Court, thus the bail must not be granted and the application for bail must proceed regardless.

6. That the Court-a-quo erred in law by dismissing the Appellants points of Law and ordering that the matter proceed before the Court to determine the bail application and that in so doing, it was not violating the order of the High Court and the Supreme Court where bail was granted and the facts satisfying the bail requirements had been proved and met."

Nature of grounds for appeal

[12] I must hasten to point out firstly, that the manner in which the above cited grounds of appeal are couched, do not reflect that they are ground for appeal. On the contrary, they appear to be grounds for review. Secondly, from the total reading of the grounds for appeal, it is clear that the appellant contends that

the court of committal ought to accept the findings of the High Court by accepting the evidence as having tried and tested in favour of the appellant. Now, does this justify an appeal or a review of the proceedings? Obvious, the appellant is having a gripe with a procedural aspect of the proceedings before the court of committal. This is in respect of admitting evidence as favouring appellant. This is again a procedural aspect whose dismissal warrants a review and not an appeal. It is very disturbing that Counsel of such vast experience in the legal profession could not appreciate such a procedure. He chose the wrong form. What exacerbates appellant's learned Counsel's position in this regard is that it framed each and every ground by stating that the *court a quo* erred in law only. This phrase is associated with review applications. A litigant noting appeal would direct that the court below erred both in law and in facts. Needless for this court to point out that the total disregard of the appropriate form especially by Counsel of appellant's calibre would lead to distorted jurisprudence in our jurisdiction. It would be folly for young lawyers or new entrant into the legal profession to look up to senior legal practitioners. It does not assist Counsel to hide behind the *ratio decidendi* in **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors (23/2006) [2006] SZSC 11 (21 June, 2006).** by insisting that cases should be decided on merits rather than form. This case is not a license for litigant to treat laid down rules as to forms and procedures of our courts with disdain. Worse still, the respondent attended to the appeal without raising an issue on the form. This again is a clear indication that our jurisprudence is at stake. It is the duty of the court to protect its rules of procedure. The *orbiter dictum* in **Silence Gamedze and Two Others v Fakudze (14/20120 [2012] SZSC 52 (30th November, 2012)** to the effect that, "***Rules of court are not sacrosanct but meant to be observed***", is apposite.

Respondent's opposition

[13] The respondent raised a point of law which was that the ruling appealed against is interlocutory and therefore not appealable in terms of the law. In support of this point, the respondent referred this court to section 64 of the Magistrate's Court Act No: 66 of 1938 as amended.

[14] Alternatively on the merit, the respondent points out that the bail application under High Court case No: 42/2018 whose orders of 28th November, 2018 were in favour of the appellant was in respect of a murder charge serving within this court's jurisdiction. The bail application before the court of committal is in respect of extradition application against the appellant who faces three counts, namely, a) escaping and absconding from serving his two life sentences from Barberton Prison, b) forgery of a court order releasing the appellant and c) uttering the said document in order to secure his release. All these offences are serving in the Republic of South Africa. For this reason, the dichotomy between the two applications, albeit both bail, are not consistent with the *res judicata* principles.

Adjudication on *point in limine* – interlocutory ruling

[15 Learned Counsel on behalf of appellant took two views in addressing the court on the point of law raised on behalf of the respondent. Firstly, he pointed out that the ruling by the court of committal following appellant's application was final. It is incorrect that it was interlocutory. In support of this position, the court was referred to the following except of the court of committal's reasons:

"Finally, this court is obliged by the law to deal with the bail application in terms of Section 9 (2) of the Extradition Act of 1968 as shown above."[1]

[16] The second approach by appellant was in the alternative. Appellant submitted that in the event the court found that the ruling was not definitive of the parties' rights, it had in terms of section 14 of the Court of Appeal Act of 1974 filed an application for leave to appeal together with an application for condonation. This was done following respondent having raised the *point in limine*. Appellant tendered costs to the respondent for putting the cart before the horse as it were.

What is an interlocutory ruling?

[17] I need not re-invent the wheel on the answer to the above poser. **M.J. Dlamini JA** in the **Director of Public Prosecutions vs Sipho Shongwe (12/2018) SZSC 23 (22nd August, 2018)** making reference to **Herbstein and van Winsen**[2] had the following in defining an interlocutory judgment or decree:

"An interlocutory order is an order by a court at an intermediate stage in the course of litigation, settling or giving directions in regard to some preliminary or procedural question which has arisen in dispute between the parties. Such an order may be either purely interlocutory or it may be an interlocutory order having final or definitive effect".[3]

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[1] See page 17 para 2 of judgment (page 193 of book 2)
[2] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) 549-550
[3] See para 14 of the judgment

[18] The learned Judge proceeded to clarify further by making reference to **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) 870** that, "*it is settled that a decision or order 'is purely interlocutory' if it does not 'dispose of any issue or ay portion of the issue in the main action or suit' or does not irreparably anticipate or preclude some of the relief which would or might have been given at the hearing.'*"

[19] Applying the above characteristics of an interlocutory order or decree to the present judgement by the court of committal whose effect was to decline an application by the appellant compelling the trial court to accept findings of the High Court in a bail application, now the first call is to ascertain the main suit. It is common cause that the main suit before the court of committal was a bail application against an extradition application. Secondly, did the trial court's pronouncement that it shall not grant the appellant's application to accept the finding of the High Court dispose of the bail application which is the main suit? The answer is an emphatic "No." In brief, as correctly pointed out by the presiding officer of the committal court that the bail application was still pending and it ought to proceed, the main suit confronted the parties before it. The conclusion of all this is that the order or ruling issued by the court of committal pursuant to the application by appellant to admit findings of the High Court under case No.: 42/2018 is purely interlocutory. The point advanced on behalf of appellant that it is definitive of its rights stands to be dismissed.

Is the appellant entitled to appeal an interlocutory ruling?

[20] The learned Justices of the superior court in the same **Director of Public Prosecutions**' case (*supra*) further highlighted:

> *"It appears that in South Africa, a purely interlocutory order by a superior court is subject to appeal only with leave of the court that made the order. In eSwatini on the other hand appeal on an interlocutory order of the* ***High Court*** *lies to this Court with leave of this Court."*

[21] I guess the learned Justice was guided by section 14 of the Appeal Court Act No: 74 of 1954 as amended (the Act) as correctly pointed out by learned Counsel on behalf of the appellant. This section reads:

"CIVIL APPEALS

Rights of appeal in civil cases

14. (1) An appeal shall lie to the Court of Appeal-

(a) from all final judgements of the High Court; and

(b) ***by leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to the costs only.***

(2) The rights of appeal given by sub-section (1) shall apply only to judgments given in the exercise of the original jurisdiction of the High Court."

[22] From the above excerpt of the judgment by **M. J. Dlamini JA** and section 14 of the Act, the right to appeal a judgment of this Court on a pure interlocutory order is permissible by leave of Court (Appeal Court). This section does not address an appeal from the court of committal who has an original jurisdiction over extradition matters. We need to turn to the Magistrate Court Act No: 66 of 1938. Section 64 reads:

'*Appeals from magistrate's court*

64. Subject to section 63, a party to any civil suit or proceedings in a magistrate's court may appeal to the High Court against-

(a) any judgment of the nature described in section 31;

(b) ***any rule or order made in such suit or proceeding and having the effect of a final and definite sentence, including any order as to costs;***

(c) any decision overruling or upholding an exception, if the parties concerned consent to such appeal before proceeding further in an action, or if it is appealed from in conjunction with the principal case, or when it includes an order as to costs."

[23] From section 64(b), it is clear that a litigant may only appeal an interlocutory order that is definitive of its right. I have demonstrated above that the order of the *court a quo* is not final in that it is provisional. In terms of section 64(b) such an order is not appealable. Section 64(c) reinforce this position further by directing that a litigant may only appeal an interlocutory *strict sensu* order such as an exception where the parties consent. Where however, there is no consent of the other party, section 64 (c) provides that a pure interlocutory order is appealable together with the main suit. In brief, no appeal emanating from the *court a quo* lies on a purely provisional order alone as is in the present case.

[24] Learned Counsel **Mr. L. Howe** put up a somehow formidable submission on the position of the law in this regard. He referred the court to section 140 (2) and submitted that the Constitution is the supreme law in the land. Any Act

inconsistent with it must be set aside. He called upon this Court to uphold the provisions of the Constitution which gives him the right to liberty as pronounced by this Court on the 28th September 2018 and confirmed by the Supreme Court on the 14th November, 2018. He pointed out that section 64(b) is inconsistent as it infringes upon the right of the appellant to appeal.

[25] I must point out from the onset that section 64(b) does not in any way violate the appellant's right to appeal. All that the section regulates is the procedure as to when to appeal as clearly evident in section 64(c), namely that a litigant may appeal an interlocutory order on finality of the main order and may appeal both orders failing consent of the parties. The section merely postpones the right to appeal in the event the parties do not consent to an appeal of a pure interlocutory order. A postponed right is not akin to an infringed right. I guess the legislature was guided by the common law principle of our law that cases should not be decided on piece-meal basis. This has the added advantage of controlling and mitigating litigation costs which is beneficial to both litigants in a law suit.

[26] At the end of the day, it is my considered conclusion in light of section 64 (b) and (c) of the Magistrate Act that the appellant ought to have waited finality of his bail application before the court of committal instead of jumping the gun as it were. In brief, the appellant rushed to court prematurely, a procedure expressly prohibited under the Magistrate Court Act. His appeal stands to be dismissed in this regard.

Leave to appeal and condonation

[27] Section 64 of the Magistrate Court Act does not provide any room for leave to appeal a matter emanating from the Magistrate Court. **M.J. Dlamini JA** in the **Director of Public Prosecutions'** case (*supra)* was explicit that in eSwatini, the right to apply for leave to appeal a purely interlocutory order from a decision of the High Court lies in Supreme Court. He did not say that the right to appeal a decision of any Court. He was specific that the decision must emanate from the High Court. In the result the leave to appeal and its accompanied condonation application filed by appellant in these proceedings served no purpose. It was an exercise in futility.

[28] Having found that the appeal pending before me is not provided for in law by reason that it is based on a *strict sensu* interlocutory ruling of the court of committal and following the rules of interpretation of statute that the express mention of one excludes the other (as section 64 (b) states that the right lies in an order which is definitive and final of the right of an aggrieved party), it is unnecessary for me to deal with the merits of the appeal. I have mentioned that should the final judgment disfavor any of the parties, the losing party may raise grounds on the interlocutory order together with grounds for the main bail application in line with section 64 (c). To get to the merit of the appeal would be closing the door for both parties in the future in the event any party is inclined to appeal should the bail application in the court of committal disfavor any of the parties. I must be extra careful not to trade on ice water in that regard. In summary, my hands are tight in respect of the determination on the merits and demerits of the appeal.

Costs order

[29] When the matter was heard on the 17th instant, I understood that respondent's position was that the appellant was not entitled to appeal the court of committal's interlocutory order without first applying for leave to appeal. I enquired from respondent's Counsel, **Mr. M. Nxumalo** as to in terms of which law allowed the appellant to appeal an interlocutory order with leave to appeal. I further understood him to respond that it was in terms of common law. In fact **Mr. L. Howe** had submitted that the respondent challenged his appeal on the basis that he had failed to file an application for leave to appeal before filing his appeal. **Mr. L. Howe** pointed out that having noted this *point in limine*, appellant then rectified the error by filing the application for leave to appeal together with a condonation application. I then pointed out to **Mr. L. Howe** that he could not just rectify an error and hope that the court will accept his steps. As an officer of this court he should know better what ought to be done in order for the court to entertain his application for leave to appeal and condonation after such point was taken by the respondent. It is then that **Mr. L. Howe** wisely tendered cost for putting the cart before the horse. In that way the court allowed **Mr. L. Howe** to argue his applications and appeal holistically.

[30] However, the turn of events were that from respondent's written submissions and his further submission later, it maintained that the appellant has no right in law to appeal an interlocutory order of the Magistrate. **Mr. M. Nxumalo** pointed out that it never contended that appellant could only appeal by leave of court. On this basis, it became clear to this court that the cost tender was unnecessary as **Mr. Howe** was not remedying a defect raised by the respondent. In that regard, this court's order against appellant to pay cost is rectified and corrected. It was based on misconceived information and

therefore has no justification in law. It is hereby set aside. The court is not *functus officio* as it had not made a final pronouncement on the matter before it. In short, the court had not risen. It shall become *functus officio* upon delivery of the judgment.

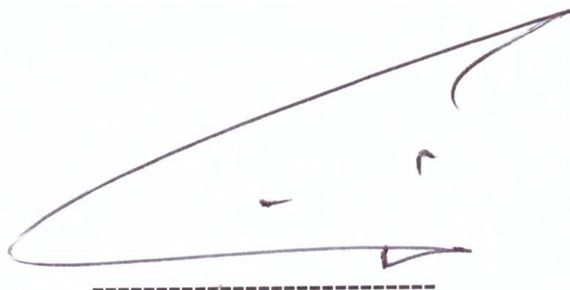
[31] For the entire appeal, I make no costs order even though appellant prayed for cost against the respondent in the event his appeal succeeds. I take leaf from the principle of our law that it is only in very exceptional circumstances that the court should mulct an unsuccessful party with costs in quasi criminal litigation. I say this much alive to the principle that a party who prays for costs where he ought not to, must be slapped with an order of costs in the event he loses for one cannot ask what he cannot give. I am not persuaded that a cost order is warranted in these proceedings.

Orders

[32] In the final analysis, I enter the following orders:

32.1 The appeal by the appellant is dismissed;

32.2 No order as to costs.



M. DLAMINI
JUDGE