

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 193/2023

In Matter between:

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

VS

FANA MBATHA

RESPONDENT

VS

IN RE:

FANA MBATHA

APPLICANT

VS

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Neutral citation: *Director of Public Prosecutions v Fana Mbatha (193/23) SZHC 220 [2023] (11.08.2023)*

CORUM: Magagula Z

Date heard: 28.07.23

Date delivered: 11.08.23

RULING ON LEAVE TO APPEAL

[1] This is an application for leave to appeal my judgement of the 26th June 2023.08.08

[2] The application is in terms of section 6 (1) of the court of appeal Act of 1954, which provides;

“6 Appeals by the Prosecution

(1) The attorney General or, in the case of a private prosecution, the prosecutor may appeal to the court of appeal any judgement of the High Court made in its Criminal original or appellate jurisdiction, with leave of the court of appeal or upon a certificate of the Judge who gave the judgement appealed against, on any ground of appeal which involves a question of law but not a question of fact, nor against the severity of sentence.”

[3] At paragraph 5 of the founding affidavit deposed to by the Director of Public Prosecutions, in her capacity as such, the Crown listed four (4) grounds on which it intends to appeal. It is not necessary to reproduce the grounds for purpose hereof.

[4] At paragraph 6 the Crown avers that there are questions of law which the Crown is entitled to appeal in terms of section 6 (1) of the court of appeal Act and she expresses her belief that there are reasonable prospects that another court would come to a different conclusion on those questions.

[5] The court was referred to annexure LH 2, being a copy of the Notice of appeal with a Supreme Court case number 14/2023 and a date stamp of Superior Court Registrar date 28th July 2023. To all intents and purposes, this indicates that an appeal against the impugned judgement has already been noted.

[6] Counsel for the Crown candidly conceded that an appeal had indeed been noted prior to the institution of the application for leave.

[7] In response to the application, the respondent raised the legal point of *lis pendens*. The Respondent argued that the same matter was pending in

the Supreme Court under Supreme Court Case no 14/23; that the Applicant or the Crown noted an appeal to the Supreme Court without obtaining or applying for leave to appeal or the certificate of the Judge who gave the Judgement appealed against and application was then filed in the Supreme Court by the Respondent to set aside the notice of appeal for failure to comply with the Section 6 (1) of the Act.

- [8] It was argued for the respondent that this application out to be declined by this court because this court was being asked to rubber stamp an action or act that had already been done by the Crown.
- [9] Section 6 (1) of the court of appeal Act seeks to restrict the right of the prosecution to appeal a judgement of this court made in its criminal or appellate jurisdiction. I say restrict because such judgement can only appealed with leave of the Supreme Court or certification from the Judge who gave the judgement.
- [10] The Act does not define what is meant by certificate nor does it lay down a procedure on how the said certificate may be obtained. It seems to me, logical that a litigant, or the Crown as in this case would have to make application to the court for the certificate which would have the same effect as applying for leave to appeal and the court would, apply the same considerations.
- [11] The Respondents argument that the Crown ought to have specifically prayed – in the Notice of Motion – for a certificate appears to be untenable.
- [12] Now leave to appeal may simply be defined as seeking permission to the court to bring an appeal. It seems to me that Section 6 (1) of the Act enjoins the Crown to seek and obtain leave or permission of the court to bring an appeal; the cororally being that the Crown cannot on appeal unless less leave of the Supreme Court or certificate from the Judge has been granted.
- [13] The requirement to seek leave of court is *inter alia* meant to ensure that the appeal process is not abused and that only meritorious cases proceed to appeal. In **Mec Health Eastern Cape v Mkhitha (1221/15) [2016] ZASCA 176 the Supreme Court of South Africa** pointed out.


“[16] Once again it is necessary to say leave to appeal especially to this court, must not be granted unless there truly

is a reasonable prospect of success. Section 17 (1) (a) of the Superior courts Acts 10 of 2013 makes it clear that leave to appeal may only be given where the Judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.

- [14] In this jurisdiction there may be no legislative enactment analogous to section 17 (1) (a) of the South African statute, but the common law would require no less of applicants for leave to appeal in this jurisdiction.
- [15] In this matter the Crown by-passed scrutiny by this court to determine whether or not there were prospects of success on appeal and filed the appeal.
- [16] The Applicant's argument that they were enjoined to file the Notice of Appeal within four (4) weeks in terms of Rule 8 (1) of the court of appeal rules cannot in the circumstances of this particular case override the need to first obtain leave of this or the Supreme Court to note such appeal.
- [17] The notion that this application was filed as a knee jerk reaction to the challenge of the appeal by the Respondent is very difficult to ignore. This court cannot rubber stamp what is a *fait accompli*.
- [18] In the circumstances, this matter is already pending before the Supreme Court. This applicant could, as is permitted by Section 6 (1) move application for leave to appeal in the Supreme Court.

[19] In the result, the application for leave to appeal is declined.


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Z. Magagula
Judge of the High Court

Appearances:

For the Applicant – Mr S. Mdluli

For the Respondent – Mr S. Mabuza