IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal case No: 26/2015

In the matter between:

SIBUSISO BONGINKHOSI SHONGWE **APPELLANT**

VS

REX **RESPONDENT**

Neutral citation: *Sibusiso Bonginkhosi Shongwe v Rex (26/2015) [2012] SZSC 04 (29th July 2015)*

CORAM: **M.C.B. MAPHALALA ACJ,**
DR. B.J. ODOKI JA,
M.D. MAMBA AJA.

Heard **30th June 2015**
Delivered **29th July 2015**

Summary

Criminal Appeal – bail – appellant charged with various counts under the Prevention of Corruption Act, defeating or obstructing the course of justice, fraud as well as theft – appellant denied bail in the court *a quo* and the court made a finding that appellant was a flight risk, would interfere with Crown witnesses and that investigations were still ongoing – appellant filed second bail application before another judge in the court *a quo* alleging new facts which had arisen and in particular ill-health – application also dismissed partly because the illness was not exceptional and partly because the court was *functus officio* with regard to the matter - on appeal held that there is no evidence that appellant is a flight risk and would abscond trial or that he would interfere with

Crown witnesses or with police investigations – held further that the police cannot arrest to investigate, hence, it was not competent to refuse bail on this ground – held further that the court *a quo* was *functus officio* in respect of the second bail application after the court had made a final judgment – held further that new circumstances can only be invoked where bail has been granted in terms of section 96 (18) and (19) of the Criminal Procedure and Evidence Act No. 67/1938 – bail accordingly granted.

JUDGMENT

M.C.B. MAPHALALA, ACJ

[1] The appellant was arrested on the 20th April 2015, allegedly on various counts under the Prevention of Corruption Act, defeating or obstructing the course of justice, fraud as well as theft. He lodged a bail application on the 21st April 2015 before the court *a quo*.

[2] Her Ladyship Mabuza J dismissed the application on four grounds: Firstly, that the appellant was a flight risk. In coming to this conclusion the court held that the harsh and severe sentences associated with offences under the Prevention of Corruption Act, 2006, were likely to induce the appellant to evade trial. The court further relied on the submission made by the Crown that the appellant had considerable means which would enable him to abscond trial as evidenced by the E2 million in one of his bank accounts.

However, other than this allegation, there was no evidence that the appellant had large sums of money. In his bail application, the appellant stated that the amount of E2 million was deposited by his client into a business trust account belonging to his Law firm Sibusiso B. Shongwe and Associates; and, this evidence was not disputed by the Crown. It is common cause that the appellant is an Attorney by profession with a law firm styled Sibusiso B. Shongwe & Associates.

[3] The second ground for dismissing the bail application was that there was a likelihood that the appellant would tamper with and interfere with Crown witnesses. In coming to this conclusion the court a quo relied on the evidence of the investigating officer that the appellant was likely to influence Crown witnesses by virtue of his former political position as a Cabinet Minister. It is not disputed that the appellant lost his ministerial position after his arrest; hence, he is not likely to influence Crown witnesses who are employees in his former ministry.

The concession made by the Crown that the appellant has lost his ministerial position is self-defeating to the Crown's case. The likelihood that the appellant could influence and interfere with Crown witnesses in his former ministry no longer exist. In addition the identities of the Crown witnesses have not been disclosed by the Crown, and, they remain a guided secret; hence, there is no likelihood that the appellant would interfere with Crown witnesses.

The third ground for dismissing the appeal was that the police had not completed their investigations, and, that the appellant was likely to interfere with police investigations if he was released on bail. Again the court *a quo* in coming to this conclusion relied on the evidence of the investigating officers.

[4] Subsequently, the appellant lodged a second bail application before Judge Hlophe in the court *a quo* contending that there was new evidence, and, in particular, the ill-health of the appellant. His Lordship Justice Hlophe correctly dismissed this application not so much on the alleged new evidence but most importantly because the application sought to review the earlier judgment of Justice Mabuza sitting in the court *a quo* which is a court of the same jurisdiction.

[5] The Supreme Court of Swaziland in the case of *Rodney Masoka Nxumalo and Two Others v Rex* Criminal Appeal No. 01/2014 at para 7 quoted with approval the South African case of *Rex v. Pinero* 1992 (1) SACR 577(NW) which dealt extensively with the question of bail. Justice M.C.B. Maphalala JA, as he then was, delivered a unanimous judgment of the Court, and, he had this to say:

> "**[7] Bail is a discretionary remedy. *Frank J* in *Rex v. Pinero* 1992 (1) SACR 577 (NW) at p. 580 said the following:**

"In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all embracing issue: will the interests of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced. Four subsidiary questions arise. If released on bail, will the accused stand trial? Will he interfere with State witnesses or the police investigations? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and the security of the State? At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release of bail."

[6] Section 96 (4) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended deals extensively with the general principles applicable to bail, and, it provides the following:

"96. (4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established:

(a) where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or

(b) where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;

(c) where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;

(d) where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or

(e) where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine the public peace or security."

[7] When dismissing the bail application, *Her Ladyship Mabuza J* made a finding that the appellant was a flight risk. However, such a finding is not supported by the evidence before Court. The appellant has a family and a home and is rooted in this country. He is still a Member of Senate, the upper House of Parliament. There is no evidence adduced by the Crown that the appellant has other financial means other than the alleged E2 million which is in the business trust account of Sibusiso B. Shongwe and Associates; hence, the Crown has not shown that the appellant has sufficient funds which could assist him to run away from this country and to live comfortably abroad.

Similarly, it is common cause that every person granted bail has to surrender his passport or travel document to the police and not apply for a new one pending finalisation of the criminal trial. The court is enjoined to impose such

bail conditions as necessary to ensure that the accused attend trial such as reporting to the police weekly or monthly depending on the circumstances. All bail conditions are enforceable at law.

In addition the strength of the case against the accused is not readily ascertainable on the basis that the Court has not been afforded the summary of evidence of Crown witnesses; hence, it cannot be assumed that the case against the appellant is so strong as to persuade him to evade trial.

[8] The nature and gravity of the punishment which is likely to be imposed should the accused be convicted is not very serious. The bail applications lodged in the court *a quo* as well as the Opposing Papers reflect that the appellant is charged with defeating or obstructing the course of justice, fraud, theft and corruption. However, the Crown concedes that there was no such an indictment presented to court during the bail application. The charge sheet presented to the court *a quo* had two counts of defeating or obstruction the course of justice as well as theft; and, this appears at pages 62 and 63 of the record of proceedings. Accordingly, the court *a quo* misdirected itself by relying on the non-existent charge of corruption and fraud. At paragraphs 3, 4 and 5 of the judgment, the court *a quo* had this to say:

> **"3. The applicant is facing two counts of contravening the Prevention of Corruption Act No. 3 of 2006 and one count of theft.**

4. **Submissions were made by the Crown that the applicant was facing very serious offences which were likely to attract very harsh custodial sentences.**
5. **Section 35 (1) of the Prevention of Corruption Act No. 3 of 2006 provides for a fine of up to E100 000.00 (one hundred thousand Emalangeni) or imprisonment not exceeding ten years or both. In my view such a sentence is likely to induce the applicant to evade trial."**

[9] Theft and defeating or obstructing the course of justice are common law offences which do not attract heavy sentences; hence, the finding by the court *a quo* that the appellant is likely to evade trial in light of the harsh and severe sentences if convicted is not justified.

[10] The finding of the court *a quo* that there is a likelihood that the appellant, if released on bail may attempt to influence or intimidate witnesses or to conceal or destroy evidence is misconceived. The Crown has not disclosed its witnesses as well as the nature of its evidence. To that extent the appellant is not aware of the Crown's witnesses.

[11] The finding by the court *a quo* that the appellant, if released on bail, may interfere with police investigations is misdirected. It is a trite principle of the law that the police cannot arrest and keep a person in custody for the purpose of investigation; and, to do so, is unlawful. The purpose of an arrest is to bring the accused before a court of law to answer to the allegations made against him by the prosecution. Bail is a discretionary remedy, and, in the exercise of that

discretion, the Court should balance the right of the accused to bail as well as the interests of justice.

Mahomed AJ in *S v Acheson* 1991 (2) SA 803 NHC at 822-823 had this to say:

> **"An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice. The considerations which the Court takes into account in deciding this issue include the following:**
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> **1. Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his trial? The determination of that issue involves a consideration of other sub-issues such as**
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> **(a) How deep are his emotional, occupational and family roots within the country where he is to stand trial;**
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> **(b) What are his assets in that country;**
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> **(c) What are the means that he has to flee from the country;**
>
> **(d) How much can he afford the forfeiture of the bail money;**
>
> **(e) What travel documents he has to enable him to leave the country;**
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> **(f) What arrangements exist or may later exist to extradite him if he flees to another country**
>
> **(g) How inherently serious is the offence in respect of which he is charged;**
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> **(h) How strong is the case against him and how much inducement there would therefore be for him to avoid standing trial;**
>
> **(i) How severe is the punishment likely to be if he is found guilty;**
>
> **(j) How stringent are the conditions of his bail and how difficult would it be for him to evade effective policing of his movements.**

2. The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again involves an examination of other factors such as:

(a) Whether or not he is aware of the identity of such witnesses or the nature of such evidence;

(b) Whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject-matter of continuing investigations;

(c) What the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;

(d) Whether or not any condition preventing communication between such witnesses and the accused can effectively be policed.

3. A third consideration to be taken into account is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. This would involve again an examination of other issues such as, for example,

(a) the duration of the period for which he has already been incarcerated, if any;

(b) the duration of the period during which he will have to be in custody before his trial is completed;

(c) the cause of any delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such a delay;

(d) the extent to which the accused needs to continue working in order to meet his financial obligations;

(e) the extent to which he might be prejudiced in engaging legal assistance for his defence and in effectively preparing for his defence if he remains in custody

(f) the health of the accused."

[12] Vos J in *S v Bennet* 1976 (3) SA 652 CPD at 655C had this to say:

> **". . . the State cannot merely arrest in order to complete the investigation. There must be a reasonable possibility that the accused will interfere with the investigation."**

[13] Miller J in *S v Essack* 1965 (2) SA 158 CPD at 162 dealt with bail, and, he had this to say:

> **"In dealing with an application of this nature it is necessary to strike a balance as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice . . . . The presumption of innocence operates in favour of the applicant even where it is said that there is a strong *prima facie* case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing to allow him bail. It seems to me, speaking generally, that before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade standing his trial, there should be some evidence or some indication which touches the applicant personally regard to such likelihood."**

[14] The appeal against the judgment of Justice Hlophe is both misconceived and misdirected. It is common cause that both Judge Mabuza and Judge Hlophe heard the bail applications in the court *a quo* as judges of the High Court. After Justice Mabuza had made findings against the appellant that he was a flight risk, likely to interfere with Crown witnesses as well as police investigations, the court *a quo* was *functus officio,* and, the bail application could not be heard

by another judge of the same jurisdiction. It is trite law that judges of the same jurisdiction are not competent to review each other. The remedy available to the appellant was lodging an appeal before the Supreme Court.

[15] Miller J in *S v Fourie* 1973 (1) SA (D) at p. 101G states explicitly the general principles governing bail, and, he had this to say:

> **"It is a fundamental requirement of the proper administration of justice that an accused person stand trial and if there is any cognizable indication that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence. . . . But if there are no indications that the accused will not stand trial if released on bail or that he will interfere with witnesses or otherwise hamper or hinder the proper course of justice, he is *prima facie* entitled to and will normally be granted bail. But it does not follow that no other factors than the due and proper administration of justice can ever be taken into account by the court when it considers whether bail should be granted or refused. Quite apart from certain statutory provisions. . . it has been held that bail may be refused, even where there are no indications that the accused is likely to abscond, in cases where public safety or national security might be endangered by his release."**

[16] Trollip JA in *Firestone South Africa (Pty) Ltd v Gienticuro* A.G. 1977 (4) SA 298 AD at 306-307 had this to say:

> **"The general principle, now well-established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it**

thereupon becomes *functus officio*; its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased. See *West Rand Estates Ltd v New Zealand Insurance Co. Ltd* 1926 AD 173 at pp 176, 178, 186-7 and 192; *Estate Garlick v. Commissioner of Inland Revenue* 1934 AD 499 at p. 502

There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this court. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter, or supplement it in one or more of the following cases:

(i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant . . . .

(ii) The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order . . . .

(iii) The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention . . . . This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance . . . .

(iv) Where Counsel has argued the merits and not the costs of a case, but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order. The reason is that in such a case the court is always regarded as having made its original order 'with the implied understanding' that it is open to the mulcted party (or perhaps any party aggrieved by the

> **order) to be subsequently heard on the appropriate order as to costs.**
>
> **But of course, if after having heard the parties on the question of costs, either at the original hearing or at a subsequent hearing, the court makes a final order for the costs, there can then be no such 'implied understanding'; and such an order is as immutable (subject to the preceding exceptions) as any other final judgment or order."**

The above principle as laid in the Firestone case has been adopted and applied in this country in the cases of *Lwazi Kubheka v Rex* Criminal Case No. 390/2009, *Bongani Sandile Zwane v Rex* Criminal Case No. 324/2008, *Sabelo David Sifundza v. Rex* Criminal Case No. 51/2010 as well as *Sipho Boy Dlamini v Rex* Criminal Case No. 214/2007.

[17] Where a court hearing a bail application has made specific findings refusing bail, an accused person is precluded from lodging a subsequent bail application before the same court on the pretext that new facts exist. The court is *functus officio* and has no jurisdiction to entertain the matter. The "new facts" or change of circumstances should be invoked in circumstances where bail has been granted and the application is only intended to vary the bail conditions. Otherwise the subsequent bail application would offend the general principle of our law that once a court has pronounced a final order or judgment, it becomes *functus officio* and cannot therefore alter, correct or supplement its judgment. Accordingly, and in light of the specific findings by Justice Mabuza refusing bail, it was not open to the appellant to lodge a fresh bail application before the court *a quo*.

[18] Section 96 (18) and (19) allows an accused who has been granted bail to lodge a subsequent application before a court of the same jurisdiction with a view to amend the amount of bail or supplement any of the bail conditions.

"96. (18) Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail-

(a) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority;

(b) with regard to any place to which the accused is forbidden to go;

(c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;

(d) with regard to the place at which any document may be served on him under this Act;

(e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused;

(f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.

(19) Subject to the provisions of this Act-

(a) Any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, subject to the provisions of

sections 95 (3) and 95 (4), increase or reduce the amount of bail so determined, or amend or supplement any condition imposed under subsection (15) or (18) whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application;

(b) If the court referred to in paragraph (*a*) is a superior court, an application under that paragraph may be made to any judge of that court if the court is not sitting at the time of the application."

[19] It is trite that bail is a discretionary remedy; however, the court is required to exercise that discretion judiciously having regard to legislative provisions applicable, the peculiar circumstances of the case as well as the bill of rights enshrined in the Constitution. The purpose of bail in every constitutional democracy is to protect and advance the liberty of the accused person to the extent that the interests of justice are not thereby prejudiced. The protection of the right to liberty is premised on the fundamental principle that an accused is presumed to be innocent until his guilt has been established in court. It is against this background that the court will always lean in favour of granting bail in the absence of evidence that doing so will prejudice the administration of justice.

[20] Consequently, the following order is made:

(1) The appeal is allowed in respect of the judgment of Mabuza J, and, the judgment is set aside and substituted with the following order:

(a) Bail is granted and fixed at E50 000.00 (fifty thousand emalangeni) subject to the following conditions:

(i) The appellant is required to pay E5 000.00 (five thousand Emalangeni) cash and provide surety for E45 000.00 (forty-five thousand Emalangeni).

(ii) The appellant is ordered to surrender his passport and travelling document to the police and not apply for a new passport and travelling document pending finalization of the criminal trial.

(iii) The appellant should not interfere with Crown witnesses.

(iv) The appellant should report to the nearest

police station on the last Friday of every month commencing in July 2015 between the hours of 8 am and 4 pm.

(2) The appeal against the judgment of Hlophe J is dismissed.

M.C.B. MAPHALALA
ACTING CHIEF JUSTICE

I agree:

DR. B.J. ODOKI
JUSTICE OF APPEAL

I agree:

M.D. MAMBA
ACTING JUSTICE OF APPEAL

FOR APPELLANT Attorney L.M. Dlamini

FOR RESPONDENT Senior Crown Counsel Mathunjwa

DELIVERED IN OPEN COURT ON 29th JULY 2015