IN THE

SUPREME COURT OF SWAZILAND

Held at Mbabane | Appeal Case No. 01/2016

In the matter between:

MATHIAS MOYO **Appellant**

And

REX **Respondent**

Neutral citation: *Mathias Moyo vs Rex (01/16) 2016 SZSC 01(12th February 2016)*

Coram: S. B. Maphalala AJA

M. D. Mamba AJA

N. J. Hlophe AJA

For Appellant: Mr. S. Jele

For Respondent: Mr. P. S. Dlamini

Date Heard: 01 February 2016

Date Handed Down: 12 February 2016

Summary

Application in terms of Section 149 (1) of the Constitution – How Court to hear application should be constituted in law – What the application entails – Determination of such application not expected to deal with the issue pending before the Supreme Court – Whether this application does meet the requirements of the said Section.

Application for Bail pending appeal – Proper court to hear such application – Whether Supreme Court has power to entertain such an application as a court of first instance – Whether appropriate in an appeal against a refusal to grant bail itself to apply for bail pending appeal to the court meant to hear the appeal.

Appeal – Appellant refused bail by the High Court on the ground that he was likely to evade trial as he was a person having no strong ties with Swaziland as he was a foreigner national with his family based in Zimbabwe – Whether any misdirection by the Court *a quo* established – Section 96 (4) (b) as read with Section 96 (6) of the Criminal Procedure and Evidence Act 1938, considered – Whether strength of the case against Appellant can be said to have been made in light of alleged hearsay

evidence by the Respondent – Whether evidence by the Crown can realistically be said to be hearsay – Who between the parties bears the onus of proof – Neither strength nor weakness of the case proved by either of the parties – Whether court *a quo* misdirected itself in any way – Appeal does not succeed and is dismissed.

JUDGMENT

[1] On the 18th December 2015, the High Court per Mlangeni J. handed down a judgment in a bail application moved by the current appellant who had sought to be released on bail following his having been arrested and kept in custody on a charge of rape. In its aforesaid judgment, the Court *a quo* refused the Appellant bail and dismissed his application.

[2] On the 13th January 2015, the Appellant noted an appeal to this court, contending in effect, that the court *a quo* erred in refusing Appellant's application on the grounds inter alia that he was a foreign national and therefore likely to escape or evade trial. He contended in the said notice that he had strong ties with this country even though he was a foreign national. He contended that the court *a quo* should have granted him bail and at the least. By refusing him bail on the grounds that he was a

foreign national he argued that the court *a quo* placed stringent conditions against him and had failed to consider that the world was now a global village where at he could still be arrested from his country of birth and brought back to Swaziland to stand his trial if he had escaped the jurisdiction of this country's courts.

[3] Soon after noting the said appeal, the Appellant, on the 14th January 2016, instituted an application supposedly in terms of Section 149 (1) of the Constitution of Swaziland, before the Supreme Court. The reliefs sought in terms of the said application were captured as follows:

3.1 Dispensing with the normal time limits, procedures and manner of service provided for in the Rules of Court and enrolling and hearing this matter as one of urgency and condoning the Applicants (sic) for non-compliance with the said Rules of Court.

3.2 Admitting the Applicant to bail upon such terms and conditions as the above Honourable Court may deem fit.

3.3 Further and/or alternative relief.

[4] It is worthy of note that the Applicant is for all intents and purposes applying for bail as he did in the Court *a quo* if one considers the prayers made. This merits comment from this court namely that it is highly irregular. The bail application moved as of right by the Appellant was dealt with by the court *a quo* and disposed off. The matter of a bail application became *res judicata* as a result, it having been dealt with earlier and finalized. It is strictly speaking no longer open to the Applicant to still institute a bail application on the Notice of Motion in somewhat total oblivion of the fact that his bail application has already been dealt with whereupon it was finalized when it got dismissed.

[5] It is true that whereas it would in law be opened to the Applicant to move a fresh bail application upon new facts or circumstances having come to the fore, those herein disclosed are not such circumstances. Of course such new facts must be realistic and not merely conjured so as to defeat the re judicata or the functus officio principles. See the case of ***Sibusiso Bonginkhosi Shongwe vs Rex High Court Case No. 191/15.*** A bail application could also be moved in instances where although the applicant was convicted, but because he contended among other things the existence of prospects of success in his appeal he be admitted to bail pending the outcome of the appeal he had noted. That notion is referring to as Bail Pending Appeal. However, for this to happen and be said to be

proper the Notice of Application or Motion should properly capture this fact on the face of it which is not what this application has done. It complicates it further that this application is moved before the Supreme Court and not the court that heard and refused the earlier bail application. It further does not capture this fact ex facie the Notice of Application. Instead it says the application concerned is in terms of Section 149 (1) of the Constitution.

[6] I have no hesitation that whether moved as an application for bail pending appeal or in terms of Section 149 (1) of the Constitution, the application is fundamentally wrong and or irregular. An application for bail pending appeal, should strictly speaking be moved before the court whose judgment is being appealed against which has an inherent power to control its processes and determine whether or not to grant the Applicant bail pending his appeal, taking into account the peculiar circumstances of the matter such as the existence of prospects of success.

[7] This court, the Supreme Court, has no original jurisdiction to hear applications except in those few instances set out either in the Constitution or the Court of Appeal Act or the rules of the Court of Appeal, which the current matter is none. A matter on whether or not to grant bail pending appeal by this court would in my view be entertained

where a judgment refusing same by the High Court either in its original or Appellate jurisdiction has been appealed against. On this ground alone it seems to me that there is a fundamental problem with the current application if it was really moved as one for bail pending appeal, at first instance before the Supreme Court. On the power the court has to control its proceedings see ***South Cape Corporation (PTY) LTD v Engineering Management Services (PTY) LTD 1977 (3) SA 534 (A).***

[8] As regards the application in terms of Section 149 (1) of the Constitution the relevant sub-section provides as follows:-

> **"149. (1) Subject to the provisions of sub-section (2) and (3) a single justice of the Supreme Court may exercise the power vested in the Supreme Court not involving the determination of the cause or matter before the Supreme Court.**
>
> **(2) In Criminal matters, where a single Justice refuses or grants an application in the exercise of power vesting in the Supreme Court, a person affected by such an exercise is entitled to have the application**

determined by the Supreme Court constituted by three justices.

(3) In Civil matters, any order direction or decision made by a single justice may be varied, discharged or reversed by the Supreme Court of three justices at the instance of either party to that matter".

[9] The starting point in this regard is the fact that other than the heading that the Notice of Application is one in terms of Section 149 of the Constitution Act, there is no indication on the prayers set out ex facie it, which indicates that it is for anything else other than an ordinary bail application. In essence it is couched in the same way as the earlier one (that is the one dismissed by the High Court and now appealed against).

[10] Besides the fact that Section 149 (1) of the Constitution makes it clear that an application moved in terms of that section ought to be moved before a single Justice of the Supreme Court, when the current court is constituted of three Justices, it is clear that the Applicant seeks an order granting him bail, which is the very relief the appeal admittedly pending

before the Supreme Court seeks to achieve. Section 149 (1) makes it clear that the relief sought in this application can only be granted if it did not involve the determination of the cause or matter before the Supreme Court. In these proceedings the matter pending before the Supreme Court is in effect the grant of bail to the Applicant which is the same cause the application brought in terms of Section 149 (1) seeks to achieve. There is no doubt in my view that this application could not succeed on this ground as well given that it conflicts with the provisions of the very section said to be relied upon in bringing it.

[11] I have had to comment on these issues in the manner set out above, in consideration of the fact that at the commencement of the matter, the Applicant's Counsel was asked as to what matter was before this court in view of the application aforesaid and the Notice of Appeal contained in the file or forming part of the record. In other words, was the matter for determination before this court the application in terms of Section 149 of the Constitution or the one for bail pending appeal or the appeal itself. The Applicant's Counsel's first response was that the matter before court was an application for bail pending appeal. When issues making it unsustainable for that relief were raised, counsel contended it was an application in terms of section 149 (1) of the Constitution that was being

dealt with. It transpired as the shortcomings of this relief as well were exposed, that both parties had actually filed their Heads of Argument on the pending appeal as well. This court was in any event, constituted as an Appeal Court in terms of the instrument constituting it from the Chief Justice. After having expressed his reservations on the confusion that came with the procedure adopted by the Applicant, Respondent's Counsel Mr. Dlamini, confirmed that the appeal could be proceeded with as he was, like the Appellant's Counsel ready for it. The appeal was then heard from this premise.

[12] According to the Appellant, as alleged in his initial application, he is an adult Zimbabwean male teacher, currently employed on a definite contract at Zakhali Private School in Manzini. He has been in Swaziland for ten years now having arrived in 2005 and he has 6 children in all; five in Zimbabwe and one in Swaziland. He is currently estranged with his wife as she deserted him but his preparations for marriage to his Swazi fiancé were allegedly at an advanced stage at the time of his arrest. He said he was arrested on the 31st October 2014 by the Manzini Police, who went on to charge him with rape.

[13] He denied having committed the said offence and contended that same came about because he was found in his flat at kaKhoza in the company of the complainant; his girlfriend, by a certain male person who he claims was the complainant's other boyfriend. This person, he alleged fought both of them upon forcefully gaining entry into his flat which resulted in him dislocating his shoulder. Thereafter he claims, the man went to the police to report that the complainant had been raped by him.

[14] He contended that there were exceptional circumstances in his matter. These could be seen, he argued, from the number of children he had for whom he said he was responsible. He submitted that he was not a flight risk because of his economic and emotional ties to this country. He feared losing his employment. He undertook to abide by all the bail conditions as could be imposed on him should the court grant him bail and he was not going to interfere with crown witnesses.

[15] The crown in opposition to the application filed the affidavit of one 6226 Detective Constable Sithembile Dlamini who identified herself as the Investigating Officer in the matter and went on to dispute the case put forward by the Applicant in the merits. She for instance denied that the complainant was Appellant's girlfriend. Instead she said complainant

used to work for Appellant sometime ago and had had to leave after the latter had made sexual advances to her. She had only gone back there on that day because she was allegedly accompanying a friend who said she was fetching something from Appellant's house only for her to leave the complainant thereat under a pretext she was going to come back later which she never did.

[16] She denied that the charges had not been laid by the complainant but by her alleged boyfriend, who she said was in reality, a brother to the complainant. She clarified that as a matter of fact it was the complainant herself who reported the rape to the police. She alleged further that the person who was allegedly a stranger who the accused says fought him was actually the brother to the complainant, who had forcefully entered the house in order to rescue his sister from the ordeal she was allegedly subjected to by the Appellant.

[17] She argued that releasing the Appellant on bail was not going to be in the interests of justice. She contended that the case faced by the Appellant was a very serious one. There was a likelihood, she contended, of the appellant evading trial if released on bail given the fact that he had five

children in Zimbabwe, and he has no assets in Swaziland other than his employment. The employment on the other hand could not stop him from evading trial considering the long imprisonment he was likely to suffer following a probable conviction considering his failure to deny sexual intercourse as well as to show how weak the case was against him. The seriousness of the offence including the sentencing trend of the local courts in such matters as borne out in the length of the sentences imposed upon conviction of an accused person, would make it more likely for him to escape. It was argued further that his chances of evading trial were exacerbated by the fact that there was no extradition treaty between Swaziland and Zimbabwe. It was further contended that it was easy for one to escape Swaziland through the borders which did not make the carrying of a passport necessary.

[18] In its reasons for the decision reached, the court *a quo* stated the following at paragraphs 7, 8, 9 and 10 of its judgment:-

> **"7. Clearly, the Applicant's contacts in Zimbabwe are very much alive. If he decides to leave Swaziland he knows exactly where to go. Presumably he has academic qualifications appropriate to teaching, which make him employable in his home country or elsewhere. If he is**

ordered to surrender his travel document that would not effectively stop him from absconding the country. The crown rightly pointed out that one does not need to have a travel document to leave this country. Ms. Ndlela was here referring to the many informal crossing points between Swaziland and South Africa. It is common knowledge that once in South Africa the Applicant would have only one border line to cross, should he wish to go back home.

8. So it would actually not be difficult for the Applicant to leave Swaziland for good. In this country rape carries a long term of imprisonment without the option of a fine. Given that the Applicant does not deny the act of intercourse, the prospects of a conviction are not slim. The Applicant is not likely to take the risk of conviction and imprisonment until his toddler child becomes a teenager. I therefore conclude that the Applicant is a flight risk; hence he cannot be admitted to bail for that reason. This would be the case even if he had succeeded

in establishing the existence of exceptional circumstances, which he hasn't.

9. The Applicant has made reference to the Botswana case of *Chiwayi vs The State [2007] 1BLR 46* where well known jurist Chinhengo J. is reported to have observed that "the mere fact that an accused person is not a national is not sufficient on its own to deny him bail. Suitable conditions can be imposed". I mention this dictum in order to underscore that I do not see nationality per se as an issue in this application. What is an adverse issue for the Applicant is that he is likely to be tempted to leave this jurisdiction, whether back to his home country or elsewhere. This is particularly so as there is no evidence of any long term investments by him in this country. So all that he needs to do is to pack up his bags and go, to avoid a likely prison term.

10. Other issues raised on behalf of the Applicant include the likelihood that continued incarceration will cost the Applicant his job, that while in custody he is hampered in his preparations for his defence at the trial, etc. These are unavoidable consequences of incarceration and virtually anyone who is inside can raise them. Regrettably there is nothing exceptional about them." (The underlinings and other emphasis made were added).

[19] In order for the Appellant to succeed on appeal against a judgment he needs to show among other things that the court *a quo* committed a misdirection or an error of fact or law in its judgment. At paragraph 8 of its judgment the court *a quo* made itself clear that its conclusion was that the Applicant was likely to evade the trial and was in that sense a flight risk and therefore that he could not be admitted to bail. The position of the law is settled that matters of bail are decided on a likelihood on the part of the Applicant. See ***R v Mark M. Shongwe 1982 SLR 194 H.***

[20] In concluding the matter in the manner it did, the court *a quo* it can be deciphered with ease, took into account the fact the he had strong family,

emotional and community ties in Zimbabwe, that he could easily start a professional life elsewhere as he was a teacher by profession; that he could easily abscond through our porous borders even if he were dispossessed of his passport, that the charge he was faced with was seriously viewed in Swaziland and attracted a long custodial sentence and the fact that the case against the Applicant had not been shown to be weak when considering that he did not deny sexual intercourse as having occurred. The onus to show that he should be granted bail lies with the Applicant in bail matters.

[21] According to Section 96 (4) (b) of the Criminal Procedure and Evidence act of 1938,

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

[22] According to Section 96 (b) a likelihood to evade trial will occur in instances where there are in existence all the grounds as were mentioned by the court *a quo* in its judgment such as the emotional, family and

community ties the accused has at a place; the gravity of the charges and the length of the possible sentence; whether the case against the accused has been shown to be weak or not and whether there is any motivation for the accused to stand trial when he could easily escape through the porous borders and go and start a professional life elsewhere. On the effect of the severity of the sentence likely to be visited on an accused person see ***S vs Acheon 1991 (2) SA 806***.

[23] It is patently clear that the court *a quo's* decision was supported by the provisions of Sections 96 (4) (b) and 96 (6) (a), (c), (f), (g) and (h) of the Criminal Procedure and Evidence Act. I did not hear Counsel for the Applicant pointing at a misdirection committed by the court *a quo*. In my considered view the grounds relied upon by the court *a quo* were supported by the evidence contained on record. It is therefore difficult to fault the High court in its decision.

[24] It was argued on behalf of the Applicant that the crown relied on hearsay evidence as the person who deposed to the Answering Affidavit was a police officer who was not present when the alleged offence occurred. There are in my view two fundamental problems with this assertion. Firstly not all the matters on which the court *a quo* based its decision

were founded on any evidence that could be said to be hearsay even assuming hearsay evidence was there. Instead most of the grounds on which the decision was based were founded on issues that were common cause between the parties, for example the nature of the ties the Applicant had with Zimbabwe; the porous nature of our borders and the fact that the Applicant's ability to leave this jurisdiction cannot be curbed by him surrendering his passport. The gravity of the offence of rape he was charged with as well as the length of the sentence he stood to serve in the event of a conviction, when considering his failure to show how weak the case was against him given that he bore the onus to do so, cannot be said to be based on any hearsay evidence and are in fact common knowldge. See ***Brian Mduduzi Qwabe v Rex Criminal Appeal Case No. 43/04.***

[25] Secondly, it is very doubtful if the evidence in the matter can realistically be said to be hearsay when considering that a bail application falls in the realm of an urgent application as it is often said. In such applications hearsay evidence is admissible on condition that the deponent to the affidavit alleging hearsay evidence disclosed the source of the information after having confirmed to verily believe that the information is true. See in this regard **Herbestein and Van Winsen's: The Civil Practice of the Supreme Court of South Africa 4th Edition, Juta at page 368 – 369**. See also ***Galp v Transley N. O. & Another 1966 (4) SA***

555; Mears v African Platinum Mines Ltd & Others 1922 WLD 48 and ***Southern Pride Foods (PTY) LTD v Mohidian 1982 (3) SA 1068.*** Whereas it is always neater and more appropriate for a deponent to expressly disclose the source of his information, it could be clear in appropriate instances like in the case of an investigating officer that he obtained such information in the course of his investigations. In the present matter it is not only clear that the deponent to the Founding Affidavit is the investigating officer, it is averred at paragraph 4 that the complainant was the one to have reported the matter to the police, which in my view does explain the source of the information by the Police Officer.

[26] I have no hesitation that the aspect of the matter supporting the conclusion reached by the court *a quo* which could in reality be said to be affected by what would arguably be hearsay is very minimal and would only concern partially the issue of the strength of the case against the Applicant from the point of the allegations on what transpired between the Applicant and the person who allegedly rescued the complainant from her alleged ordeal. Despite being charged with rape, the Applicant who in bail matters bears the onus, did not deny sexual intercourse as a fact nor did he say how the case was weak against him yet he had the onus to

prove he had to be released on bail. On who bears the onus see ***Brian Mduduzi Qwabe v Rex (Supra).***

[27] I am convinced that the court *a quo*, supported by the material before it and Section 96 (4) (b) as read with Section 96 (6) (a), (c), (f), (g) and (h) correctly came to the conclusion that the Applicant was a flight risk and therefore could not be granted bail. I have not been shown any error or misdirection in this finding by the court *a quo*. For these reasons the appeal cannot succeed.

[28] Other than to agree with the court *a quo* that no exceptional circumstances were stablished by the appellant, I have no hesitation to state that the court *a quo* has also correctly found in this regard when considering the material placed before court.

[29] Consequently, the Appellant's appeal cannot succeed and is dismissed.

N. J. HLOPHE AJA

ACTING JUSTICE OF APPEAL

I agree

S. B. MAPHALALA AJA

ACTING JUSTICE OF APPEAL

I also agree

M. D. MAMBA AJA

ACTING JUSTICE OF APPEAL