IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **APPEAL CASE NO. 01/2019**

In the matter between:

VUSANI MANCOBA MHLANGA **Appellant**

And

THE KING **Respondent**

Neutral Citation: Vusani Mancoba Mhlanga vs The King [01/2019] [2019] SZSC 44 (17 October 2019)

Coram: **MCB Maphalala CJ, S.B. Maphalala JA and SJK Matsebula AJA**

Heard: **5 August 2019**

Delivered: **24 October 2019**

Summary: *Criminal Appeal - Refusal to grant bail – Section 96 (12) of the Criminal Procedure and Evidence Act, 1938 as amended considered – an accused person charged under the Fifth Schedule to the Criminal Procedure and Evidence Act bears the onus to adduce evidence proving the existence of exceptional circumstances which in the*

interest of justice entitles that person to be released on bail. Appellant failed to discharge the onus as required by Section 96 (12 (a).

Appellant further lodged three applications for condonation being an application for the late filing of the Notice of Appeal, failure to file the record of proceedings timeously as well as the late filing of the bundle of authorities – the two basic requirements for condonation discussed - application for condonation for the late filing of the appeal granted, and applications for the failure to file the record of proceedings timeously as well as the late filing of the bundle of authorities dismissed - appeal accordingly dismissed.

JUDGMENT

SJK Matsebula AJA

Background

[1] This is an appeal against the judgment of the High Court delivered on 27 November 2018 by Justice M. Langwenya, wherein the Appellant was denied bail. The Appellant being dissatisfied with the judgment refusing him bail has now appealed to this Court.

The appeal is preceded by three (3) separate applications for condonation for the late filing of the Notice of Appeal, failure to file the record of proceedings and for the late filing of the bundle of authorities. The applications for condonation are not opposed by the Respondent.

[2] In the interest of justice and convenience, this Court sitting and hearing the matter on the 5th August 2019 allowed Counsel for the Appellant to address the Court on the applications for condonation and reserved judgment and further allowed both Counsel to address the Court on the merits of the appeal.

[3] The Court is now delivering its judgement on the applications for condonation and on the merits of the appeal.

[4] Applications for condonation are common in this Court such that almost all cases coming to this Court are preceded by one application or another for condonation for the failure to adhere to the Rules of this Court. Several warnings to attorneys have been given by this Court for the attorneys and litigants to follow the Rules of this Court but to no avail. Apart from the persistence of these applications, they further fail to adhere to the basic requirements for condonation applications as espoused by this Court and other courts of similar jurisprudence in other countries within the Commonwealth.

The Law on condonation applications

[5] Since the case is a little unique in that the judgment must cover the judgments on the three applications for condonation and the appeal itself, I find it fit to first summarise the case law on such applications. The principles applicable to applications for condonation are the same irrespective of whether it is late filing of an appeal, failure to file court record proceedings

or failure to file head of arguments. Hence it is important to first state the case law on the subject.

[6] The two basic requirements for the granting of an application for condonation are: firstly, reasonable explanation for the delay in complying with the Rules of Court and, secondly, details on the prospects of success on the merits of the case. This should not imply that these two requirements are exhaustive; other requirements or considerations may be considered in addition to these two basic requirements.

In **Swaziland Electricity Company vs Gideon Gwebu** and Municipal of Mbabane (36/2018) [2018] SZSC 25 (29th May 2019) where A.M. Lukhele AJA at paragraph 17 cited with approval the case of **Floyed Mlotshwa and Another vs Chairperson Elections and Boundaries Commission** – Civil case No. 96/2018 where M.C.B Maphalala CJ at page 10 at paragraph 12 stated:-

> *"It is trite law that there are two main legal requirements for the granting of an application for condonation. Firstly, the Applicant must present a reasonable explanation for the delay in complying with the Rules of Court. Secondly, he must satisfy the Court that he has prospects of success on the merits."*

[7] In **Johannes Hlatshwayo vs Swaziland Development and Savings Bank**, case No. 21/2006 at paragraph 17 Justice Ramodibedi CJ, said;-

> *"It requires to be stressed that the whole purpose behind Rule 17 of the Rules of this Court on condonation is to enable the Court to gauge*

such factors as (1) the degree of delay in the matter, (2) the adequacy of the reasons given for the delay, (3) the prospects of success on appeal and (4) the respondent's interest in the finality of the matter."

[8] In the matter between the **Pub and Grill (Pty) Ltd and Another v The Gables (Pty) Ltd civil appeal case No. 102/2018,** at paragraph 30 the Court cites the case of **O.K.H. Farms (Propriety) Limited v. Cecil John Littler N.O. and Others- Supreme Court case No. 56/2008** at p. 15 where A.M. Ebrahim J.A. stated:-

"As a rule, an applicant who seeks condonation will need to satisfy the Court that the appeal has some chance of success on the merits – See de Villiers vs. de Villiers (1) SA 635 AD. A Court will not exercise its power of condonation if it comes to the conclusion that on merits there are no prospects of success or are so slender that condonation would not be justified. See Penrise vs Dickinson 1945 AD 6; de Villiers vs de Villiers supra ad Van Wisen supra at page 902".

[9] The first application relates to condonation for the late filing of the Notice of Appeal. When dealing with the first requirement of condonation reasonable explanation for the delay, the Appellant contends that he instructed his attorney of record to file a Notice of Appeal on his behalf as he, the Appellant, was in gaol and he believed that his attorney had acted on his instructions. He says he only discovered when he made a follow up that his attorney had not implemented his instructions. The Court reluctantly

accepted this reason although it is not sufficiently good and cannot by itself alone be adequate. Attorneys, apart from being officers of the Court, are professionals who are expected to diligently do their work and in accordance with the Rules of Court. Shoddy work is not permissible and is not expected of them. This Court only needs to remind litigants what was said by Steyn, CJ in **Siloojee and Another vs Minister of Community Development** 1965 (2) at page 141 wherein it is stated -

> *"There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations and misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative who the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure."*

Counsel and litigants should take this dictum seriously and litigants, in particular, should be aware of the consequences that might follow their choices of attorneys.

> In **Kombayi vs Berkhout** 1988 (1) ZLR 53 (s) at page 56, Korsah JA stated:-

> *"Although this Court is reluctant to visit the errors of a legal practitioner on his client to whom no blame attaches, so as to deprive him a re-hearing, error on the part of a legal practitioner is not by itself a sufficient reason for condonation of a delay in all cases."*

[10] The second requirement for the grant of an application for condonation is the prospects of success on the merits. The Appellant states that the prospects of success exist because the Court erred in fact and in law in finding that –

(a) he had failed to establish his ancestral and family roots when there was no evidence he had any citizenship or ties with any other country when he had stated he was a Liswati of Fairview in Manzini:

(b) he had failed, on a balance of probabilities, to demonstrate that it would be in the interest of justice to release him on bail when he had stated that he was married and had two minor children who wholly depended on him for support and maintenance; and

(c) there was no guarantee that even stringent bail conditions would not provide adequate safeguard against the risk of him absconding trial when there was no evidence presented before Court a quo that he was likely to abscond trial.

The crucial question is whether the prospects of success on appeal are sufficient to justify the Court in granting the application.

[11] In the **Swazi Observer Newspapers (Pty) Ltd t/a Observer on Saturday and two Others vs Dr. Johannes Futhi Dlamini** (13/2018) [2018] SZSC 26 (19/09/2018) at paragraph 28, the Court had this to say:

> *"45 In my view whilst the standard required in showing prospects of success is lower than that applied where the main case is considered. The application for condonation needs to show more than just listing factors related to prospects of success. The Appellant needs to persuade the Court that there is a chance of the arbitration award being found when the review is considered in the main case to be irregular or unreasonable."*

[12] The Court observes that, under prospects of success, the Appellant has just listed the grounds of appeal but nonetheless the Court believes this is a good start to the right direction, hence it accepts them with the belief that the standard would be up-graded. The success of this application on its own cannot carry the day since there remains two more condonation applications for consideration. One relates to the failure to file the record of proceedings and the last one relates to the late filing of the bundle of authorities.

[13] In the second application, which is for condonation for the failure to file the record of proceedings, the Applicant states that the Court should note that since the Notice of Appeal was not filed timeously even the record of proceedings could not have been filed timeously. He goes on to say, at paragraph 5 of the application:

"I humbly submit further that had my Attorney duly noted the appeal timeously, the said record of proceedings would have also been filed within the stipulated time in terms of the Rules of the above Honourable Court".

I dare say, no Court could be persuaded to grant condonation based on such an explanation. It is not convincing to say the least and it does not follow that once an attorney notes an appeal on time he will also file the record on time or within the Rules of this Court. This Court has noted instances where a notice of appeal has been filed on time and followed by an application for an extension of time or condonation for late filing of the record of proceedings. This explanation for the delay, if it qualifies to be one, does not sustain the first requirement for condonation.

[14] On the question of prospects of success, the Appellant states the following at paragraphs 7, 8, and 9 of its Founding Affidavit:-

"AD Prospects of Success

7. I submit that, as <u>may be seen from the record of proceedings</u>, there are prospects of success.

8. I am advised and verily believe that the above Honourable Court, being the final Court in the Kingdom, should be slow in shutting the door on a litigant on technical grounds which do not go to the root of

the matter, more so because this is an issue that touches upon the liberty or otherwise of a litigant.

9. To that extent, I submit that there are prospects of success in the matter and <u>I humbly requests to refer to my application for the late filing of the appeal in the regard so not to be seen to be repeating one and the same thing</u>." **<u>(my underlining)</u>**

[15] The first thing to note is that there are no prospects of success detailed in any of the paragraphs 7,8, or 9 under the heading **"AD PROSPECTS OF SUCCESS.**

[16] Paragraph 7 boldly states that :-

"I submit that, as may be seen from the record of proceedings, there are prospects of success on appeal".

The prospects are not spelled out what they are, just a bold statement without anything to substantiate it.

[17] Paragraph 8 does not contribute anything to prospects of success on the merits but argues that the Court being a final Court should be slow in shutting the door on a litigant on technical grounds which do not go to the root of the matter because the issue touches upon the liberty of the Appellant.

[18] In paragraph 9, the Appellant tells the Court to glean the details of its prospects of success from the <u>condonation application for the late filing of the Notice of Appeal</u>. In her submission before this Court Counsel said she

could not elaborate much on the applications because they were not objected to. The irony of this is that the Notice of Appeal referred to, is not before Court but is also subject to an application seeking condonation to admit it before Court. The Appellant is relying on a documents that is not properly before Court but still subject to an applications seeking its admittance which the Court may or may not admit. Counsel for the Applicant seems to be perceiving an application for condonation as just a formality, being there to be given yet that is certainly not the case. The judgement in Saloojee and Another, NN.O. V. Minister of Community Development [1965] (2) 135 at138, per Steyn CJ –

> " *…the applicants mention some of the facts to which I have referred, but they hardly make any attempt to explain the inordinate delay in approaching this Court. They state that the respondent has no objection to the grant of the relief prayed, and apparently regarded the application as a mere formality. It is necessary once again to emphasise, as was done in* ***Meintjies v. H.D. Combrinck (Edms) Bpk****., 1961 (1) S.A. 6 (A.D.) at p. 64, that condonation of the non-observance of the Rules of this Court is by no means a mere formality. It is for the applicant to satisfy this Court that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration.*" (my underlining).

[19] Again, looking at its paragraph 9, the Appellant, by saying the prospects of success can be found in another application for condonation means that this application is not complete on its own and Appellant justifies this short-coming by stating that he does not want to repeat averments he has already

made in another document or application notwithstanding that such averments are crucial in this application. It is trite law that each application must be complete and be able to stand on its own. It is a sustainable proposition that one application must not be dependent on another because if one falls, they all fall.

[20] Since there are no detaied prospects of success in this applicatin it is bound to fail and it fails.

[21] The last application for condonation is in respect of the late filing of the bundle of authorities. In this applicatin there is no mention of prospects of success either directly or by reference. Prospects of success, as pointed out above, is one of the two requisites for the granting of an application for condonation. There is a plethora of cases stressing on this requirement. In **Melane vs Santam Insurance Company Limited,** 1962 (4) S.A 531 (A) the judgement of the Court was that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without the prospects of success, no matter how good the explanation of the delay, an appliacation should be refused. At page 532 of that case the Court stated;-

> "*Among the facts usually relavent are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal aproach incompatible with a true discretion, save of course that if there are no*

prospects of success there would be no point in granting condonation."

(my underlining).

This application must therefore fail as well.

The appeal on the merits

[22] The Appellant briefly states his appeal as follows:-

"INTRODUCTION

1. *The applicant is charged with the offence of robbery, it being alleged that on the 22nd September 2018 and at or near Limkokwing University, he, acting together with his co-accused, stole a sum of E600 000-00 (Six Hundred Thousand Emalangeni).*

2. *The Appellant's application was denied by the Court a quo and Appellant has filed a notice of appeal against the decision of the Court a quo dismissing such bail application.*

3. *The grounds of appeal may be summarized as follows;*

3.1 *The court a quo erred both in fact and in law by finding and holding adversely against the Appellant on the non-establishment of his ancestral and family roots to the country when there was no evidence that the Appellant had any citizenship or any ties with any other country.*

3.2 The court a quo erred both infact and in law by finding and holding that the Appellant has failed, on a balance of probabilities that it would be in the interest of justice to release him on bail.

3.3 The court a quo erred both in fact in law by finding and holding that there is no guarentee that even stringent bail conditions would provide an adequate safeguard against the risk of the Appellant absconding trial when there is no evidence presented before the court a quo that the Appellant is likely to abscond trial."

[23] On the first ground of appeal, the non-establishment of Applicant's ancestral and family roots to the country when there was no evidence that the Appellant had any citizenship or any ties with any other country the following facts are applicable:-

(a) At page 6 of the judgment of the court *a quo* it is stated as follows;-

"*In considering the Apllicant's evidence being a denial of guilt, against the strength or the apparent strength of the prosecutions's case there appears to be a real likelihood that the Crown will succeed in proving its case in respect of the count charged. Bearing in mind the kind of sentence that would probably follow the conviction, this certainly increases the risk of the Applicant deciding to abscond."*

The court *a quo* made a finding that there was overwhelming evidence against the accused (Appellant) and that he was likely to evade trial.

(b) The Affidavit of 4505 Assistant Inspector Bhekisisa Simelane is that Appellant committed the offence with his co-accused some of whom are still at large. The Inspector does not assume those at large to be having ties or citizenship with another country. Evading arrest does not in all cases involves taking refuge in another country. The Appellant was said to be the ring leader or master-mind of the `scheme to rob the university and further, one element of the case is that of common purpose. So some of his charges or co-accused have already evaded arrest and the police do not know whether they are hiding in or outside the country.

[24] In both paragraphs 3.1 and 3.2 above there is the allegation of the likelihood of the Appellant evading trial but not necessarily outside the Eswatini borders. As stated above, the co-accused who are said to be at large could still be in the country. Thefore there was no need for the Crown to bring evidence "that the Appellant had any citizenship or any ties with any other country." One can evade arrest or trial whilst hiding within the country. It was the view or finding of the trial judge that the affidavit of the appellant fell short of establishing his alleged ancestral family roots to the country. This finding is further re-inforced by the fact that the appellant after arrest decided to resign from his place of employment thus depriving himself one of the elements that could have worked in his favour under section 96 (6) (a) of the Criminal Procedure and Evidence Act, 1938 (CP & E). To

understand section 96 (6) (a), it is better to start reading from section 96 (4) which reads as follows:-

"96. (4) The refusal to grant bail and detention of an accused in custody shall be in the interest 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 11 of the First Schedule; or

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

(c) where there is 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 jeopardize 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 pleas or security.

(5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely:

(a) The degree of violence towards others implicit in the charge against the accused;

(b) any threat of violence which the accused may have made to any person;

(c) any resentment the accused is alleged to harbor against any person;

(d) any disposition to violence on the part of the accused, as is evident from past conduct;

(e) any disposition of the accused to commit offences refeed to in Part 11 of the First Schedule as is evident from the accused's past conduct;

(f) the prevalence of a particular type of offence;

(g) any evidence that the accused previously committed an offence referred to in Part 11 of the First Schedule while released on bail; or

(h) any other factor which in the opinion of the court should be taken into account.

(6) In considering whether the ground in subsection (4) (b) has been established, the Court may, where applicable, take into account the following factors, namely:

(a) The emotional, family, community, or <u>occupational</u> ties of the accused to the place at which the accused shall be tried;" (my underlining)

[25] The Court is enjoined to take into account any and not necessarily all of the four factors, namely, emotional, family, community or occupational factor.

The Court on the evidence presented to it found that the accused had resigned from his workplace and therefore no occupational ties existed any more. I find no merit in this ground of appeal and it must fail.

[26] The second ground of appeal is that the court *a quo* erred in law by finding and holding that the appellant has failed, on a balance of probabilities that it would be in the interests of justice to release him on bail. The appellant argued

that the onus is on the Crown to show that the detention of the accused in custody will be in the interest of justice. The appellant's argument is that the Crown must establish, through evidence, that it will be in the interest of justice to refuse an accused person bail and that his continued detention in custody will be in the interest of justice and further that it would be illogical to expect an accused person applying for bail to establish factors adversely mitigating against his release.

[27] This argument has no merit and must fail in the face of section 96 (12) (a) of the Criminal Procudure and Evidence Act provides as follows :-

> *"96. (12) Nothwithstanding any provision of this Act, where an accused is charged with an offence referred to:-*
>
> *(a) in the Fifth Shedule the Court shall order that the accused be detained in custody untill he or she is dealth with in accordance with the law, <u>unless the accused,</u> having been given reasonable opportunity to do so, <u>adduces evidence</u>*

which satisfies the Court <u>that exceptinal circumstances exist</u> which in the interest of justice permit his or her release".

(b) in the Fourth Schedule but not in the Fifth Schedule the court shall order that the accused be detained in custody until he or she is dealth with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

[28] The onus is on the accused to adduce evidence that exceptional circumstances exist which justify his release from custody and not the Crown as argued by the Appellant. A judgement of this Court, in **Themba Muzikayifani Mngometulu and Another vs Rex** (06/2017) [2017] SZSC 37 (10 November 2017) commenting on section 96 (12) (a) of the Criminal Procudure and Evidence Act Dr. B.J. Odoki JA held at paragraphs 22 and 23-

"[22] It is well settled that the onus lay on the Appellant (Accused) to show on a balance of probabilities, that exceptional circumstances exist which in the interest of justice favour his release from custody, See ***Shongwe Bheki vs R 2000 – S.L.R 380.***

[23] However, exceptional circumstances have not been defined by the statute or Courts, and it appears that each case must be decided on its own merits. Counsel for the Crown submitted

that exceptional circumstances must mean something "unique" or "one of its kind" and not merely "unusual."

[29] The onus was on the appellant and he failed to adduce evidence on a balance of probabilities showing that exceptional circumstances exist that fovoured his release from detention. Therefore this ground of appeal is dimissed.

[30] The last ground of appeal is that the Court erred in holding that there is no guarantee that even strigent bail conditions would provide an adequate safeguard against the risk of the appellant absconding trial when there is no evidence presented before the court *a quo* that the appellant is likely to abscond trial.

[31] This ground of appeal is related to the first as both relate to evading trial if released on bail. The following facts are not disputed and relevant in considering this ground of appeal. The appellant is charged with offences listed in the Fifth Schedule. These are serious and violet crimes. Dangerous weapons were carried by the accused persons to induce submisison in the event of opposition to the commission of the crimes. The trial has commenced and continuing and some witnesses have testified against the accused. The accuseds are charged on the basis of common purpose to have commited the offences and some of the accused have evaded arrest and are at large. Assistant Inspector Bhekisisa Simelane in his affidavit opposed the release on bail of the appellant on the ground that the appellant once granted bail would abscond trial. The court a quo made a

finding that there was overwhelming evidence against the appellant that he was likely to evade trial.

[32] In **Wonder Dlamini and Another vs Rex** Appeal Case No. 01/2013 at paragraph 9 Justice M. Ramodibedi CJ said the following:

> *"The offences listed in the Fifth Schedule consist of serious and violent offences, and which upon conviction are accompanied by severe penalties. It is apparent that when Parliament enacted this law, the purpose was to render the granting of bail in respect of these offences most stringent and difficult to abtain by placing onus on the accused to adduce evidence showing the existence of exceptional circumstances. The legislation seeks to protect law-abiding citizens against the upsurge in violent criminal activity. The legislation does not deprive the Courts of their descretion in determining bail applications in respect of the Firth Schedule offences but it requires evidence to be adduced showing the existence of exceptional circumstances. It further places the onus of proof upon the Applicant. Parliament enacted Section 96 (12) (a) in order to deter and control serious and violent crimes as well as to limit the right of an accused person to bail in the interest of justice".*

[33] I cannot find any fault on how the Court *a quo* exercised its descretion in refusisng bail when taking into account the evidence and surrounding circumstances as stated under paragraph [32] above.

Judgement

[34] **Accordingly the Court issues the following order;**

(a) The application for condonation for the late filing of the Notice of Appeal is granted.

(b) The appllication for condonation for failure to file the record of proceedings timeously is dismised.

(c) The application for condonation for the late filing of the bundle of authorities is dismissed.

(c) The appeal, on merits is dismissed, and the judgment of the Court *a quo* is upheld

S.J.K. MATSEBULA
ACTING JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

S.B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant: **N.S. Ndlangamandla of Mabila Attorneys**

For the Respondent: **B. Fakudze from the DPP's Chambers**