IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 03/2024**

In the matter between

MAKHOSONKHE DLAMINI **1ST APPLICANT**

GOODMAN MAGAGULA **2ND APPLICANT**

BONGINKHOSI DLAMINI **3RD APPLICANT**

AND

THE KING **RESPONDENT**

Neutral Citation: *MAKHOSONKHE DLAMINI AND 2 OTHERS v THE KING (03/2024) [2024] SZSC 75 (09 APRIL, 2024)*

Coram : MAMBA JA.

Heard : 28 MARCH, 2024

Delivered : 09 APRIL, 2024

[1] Civil law and Procedure- Application for Condonation of late filing of notice and grounds of appeal, Rule 22 of the Rules of Court. Applicant required to show good cause. Court has discretion to grant or refuse application.

[2] Civil law and Procedure- Application for Condonation of late filing of appeal- requirements thereof. Applicant to account for delay, extent and explanation for delay to be fully given. Reasonable prospects of success on appeal is but one of several factors to be established. Where delay and reasons thereof adequately explained and prospects of success stated, application granted.

[3] Civil law and Procedure/Criminal Procedure- Bail application pending appeal. Rule 28 of the Supreme Court Rules, 2023. Application for bail pending appeal to be filed at first instance before trial judge, and, if refused, to be heard by this Court.

MAMBA JA.

[1] On 14 December 2023 the applicants who had been jointly indicted, were convicted of the negligent killing of Sibusiso Hlawe and they were each sentenced to 9 years' of imprisonment without the option of paying a fine. This was a few days before the Supreme Court Rules 2023 came into force and therefore the applicants' right of appeal was regulated by the provisions of the Court of Appeal Rules, 1971.

[2] In terms of Rule 8(1) of the repealed Rules the applicants were entitled to file their notice of appeal within 4 weeks of the date of the judgment appealed against. This period expired around the 15th day of January, 2024. The applicants were unable to exercise their rights of appeal within this period. They have now filed this application or petition and state that it is in terms of Rule 14 and 15 of the new Rules whereby they seek leave to file their Notice of Appeal out of time. They also pray for an order that in the event they are granted leave to appeal, they be all admitted to bail pending finalization of their appeal.

[3] This application was filed and served on 04 March 2024 and is therefore regulated or governed by the new Rules of this court. This application was filed together with the intended notice of appeal. It is essentially one for Condonation of the late filing of the appeal.

[4] On 12 October 2023, the applicants were arraigned before the High Court on a charge of murder. They were all represented by one attorney and they pleaded not guilty to the charge of murder but guilty of Culpable Homicide. Their pleas were accepted by the crown. Both counsel successfully applied for the matter to be adjourned until the 18th day of October, 2023 to allow them to prepare a written statement of agreed facts. On resumption, a statement of agreed facts signed by both counsel was submitted to the court. This statement was very detailed and encompassed or incorporated specific statements of various witnesses as contained in the summary of the evidence prepared by the crown; such as confessions made by each of the applicants before three separate judicial officers.

[5] None of the applicants testified before the High Court. Submissions were, however, made on their behalf by their legal representative. Eventually the court found each of them guilty of the crime of Culpable Homicide. After mitigation by their legal representative, they were each sentenced to a term of 9 years of imprisonment.

[6] It is significant to note that the applicants were accused of having acted in the furtherance of a common or shared purpose in killing the deceased person. Indeed it was revealed in their respective confessions that they all

participated in one form or another in assaulting the deceased who was alleged to have stolen property belonging to the first applicant.

[7] The applicants state that after sentencing, they immediately indicated to their attorney that they wanted to challenge the sentence meted out to them. They believed that it was too harsh in the circumstances. Their attorney, however, advised them against it. He advised them that there was a possibility that the sentence might be increased by the Supreme Court. All the applicants state that this advice left them devastated and depressed and they did not know what they had to do to rectify the situation.

[8] The applicants complain further that:

8.1 Their pleas were ill-advised inasmuch as they firmly believed that the deceased had died as a result of injuries sustained by him when he fell 'against a rock and hit his chin.' These assertions by them needed to be clarified by the pathologist under cross examination.

8.2 The statements made to the judicial officers were inadmissible.

8.3 They did not authorize their attorney to sign the statement of agreed facts and these facts were never explained to them. The statement of agreed facts, authored by counsel was never read or explained to them either in court or before being handed in court as an exhibit. They assert that this was a gross failure of justice which vitiated the proceedings in the court *a quo*. As persons not *au fait* with court procedure and practice, they were unable to intervene in court to correct these irregular steps being committed by their legal representative.

[9] The applicants state that once they were committed to prison, and having been advised against noting an appeal by their legal representative, they did not know what avenues were available to them to remedy their legal predicament or situation. Their respective family members visited them in prison in February 2024 and it was at this time that a decision was taken by the applicants to instruct another legal representative. It was based on new counsel's advice that these proceedings were launched on 04 March 2024. The applicants aver that their delay in filing the Notice of Appeal was neither wilful nor negligent. It was due to want or lack of knowledge of the procedural rules and practices obtaining in this court. Their delay, they also argue, was not unduly long and would not occasion prejudice to the respondent or the administration of justice in general.

[10] The applicants have submitted that they have reasonable prospects of success in their appeal.

[11] There are five grounds of appeal noted by the applicants and they are as follows:

> '1. That the learned Judge misdirected Himself in law by not making further enquiries on the Statement of Agreed facts in order to determine whether or not the accused persons understood the meaning and effect of a statement of agreed facts and whether, having fully understood same, they fully understood the contents thereof in view of the fact that they were alleged to have acted in furtherance of a common purpose when the offence was committed particularly because the statement of agreed facts was not signed by the accused despite a provision made for them to sign but it was

signed by their Attorney coupled with the fact that it was not read into the record.

2. The learned Judge misdirected Himself in law by failing to take into account each accused persons degree of participation and/or negligence in the commission of the offence resulting in all of them being painted with the same brush when convicting them. This is further cemented by the findings at paragraph 21 page 8 of the judgement where the following is stated

'...Accused No.1 assaulted him whilst he was held by the other two accused persons...''

3. The Court *a quo* erred both in fact and in law by convicting the accused persons basing its finding on the confession of one accused person against the others when in terms of our law a confession is only admissible as evidence against the maker thereof.

4. That the learned Judge erred in making reference to the evidence in the summary of evidence of PW4 Gwalagwala Dlamini and PW5 Kenneth Mamba who did not form part of the evidence in the statement of agreed facts serving before the court. The only serving before the court was the statement of agreed facts.

5. That the learned Judge erred and misdirected Himself by failing to appreciate that the confessions by the accused contained exculpatory evidence pertaining to the deceased falling against a stone and hitting his chin, consequently, the accused persons are not in a position to understand the *novus actus interveniens* as stated in the statement of agreed facts in the absence of that being explained to them.'

[12] Rule 14 of the Supreme Court Rules, 2023 is in the following terms:

'14. (1) An application for leave to appeal shall be filed within twenty-five (25) days from the date of delivery of the judgment which it is sought to be appealed against and filed as specified in the First Schedule under Criminal Form 3 for criminal matters and Civil Form 3 for civil matters.

(2) An application for leave to appeal shall-

(a) be made by way of petition in criminal matters or motion in civil matters;

(b) set out in detail the grounds upon which the application is based which *prima facie* show good cause for leave to be granted: and

(c) set out reasonable prospects of success.

(3) where facts are alleged, those facts shall be verified by affidavit.

(4) the appellant shall deliver the petition or motion and its supporting documents to the registrar and serve a copy on the respondent.

(5) A Notice of Motion for leave to appeal and all supporting documents shall be accompanied by supporting affidavit which shall be delivered to the registrar and a copy of that notice and supporting documents including the draft Notice of Appeal shall be served by the appellant on the respondent.'

This is one of the rules that has been relied upon by Counsel for the applicants in support of his case. I am of the considered view that this rule is inapplicable in this case. This rule governs leave to appeal in situations or instances where the aggrieved litigant requires, as a matter of law, leave of court to note an appeal; eg where the impugned judgement of the High Court was given in the exercise of its appellate jurisdiction as provided in terms of Section 4(2)(b) of the Court of Appeal Act 74 of 1954. The period within which such leave to appeal must be made lends support to this view. In the repealed rule (9 (1)) the period was the same as in noting and filing a Notice of Appeal. In the new rule there is a difference of 5 days between the two issues. Generally, there is no time limit within which a party may apply for leave to file a Notice of Appeal out of time. This is covered, in my view, under Rule 22 of the present Rules under the heading Condonation in General: (See Rule 17 of the 1971 Rules and *Madvubadle Madvubadle Investments (Pty) Ltd v Heavy Plant Centre (Pty) Ltd (94/2022) [2023] SZSC 48 (27 November, 2023).*

[13] In *Madvubadle (supra),* the applicant had approached this court seeking leave of court to note an appeal against a judgement of the High Court dismissing its application for rescission of judgement. Rather inexplicably, it viewed such a judgement as not final and thus sought leave of this court to note an appeal against it. The application was not opposed and was granted by this court. The applicant waited for about three months before it attempted to file the Notice of Appeal out of time and thus sought Condonation for this. The application for Condonation failed because the applicant, amongst other things, failed to explain its delay or the causes thereof.

[14] The present application is not opposed by the respondent (Crown). Mr Phakathi, counsel for the respondent, indicated that the respondent would abide by the decision of this court and because of this view taken by the respondent, this court only heard submissions from the applicants' counsel.

[15] In *Madvubadle (supra)* this court had this to say:

> '[6] Rule 17 of the rules of this Court has been the subject of numerous judgments by this Court. All these judgments are consistent on the requirements and applicability of the provisions of the Rule. This is a procedural rule rather than one of substantive law. It is perhaps because of this characterisation that the Court is given a very wide discretion, to be exercised judiciously and judicially upon a consideration of the relevant facts in a given case. Ultimately, it is a discretion grounded on fairness and justice. In deciding whether to condone non-compliance with the rules, the Court would take into consideration issues including, the degree or extent of non-compliance, the excuse or explanation proffered for such lack of compliance, the importance of the case to the parties and to the general scheme of the law, the respondent's interest in having the matter finalised, the prospects of success on appeal, the avoidance of any unnecessary delay in the administration of justice and the functioning of the Court in general. The Courts have always emphasized that the list is not exhaustive and that these factors are interrelated and do not have to be considered and weighed individually. The Applicant must satisfy that Court that good cause exists to allow or permit the Court to grant the indulgence sought. Vide *The Prime Minister and 2 Others v Michael Vusane Masilela (100/2018) [2023] SZSC 38 (13 September, 2023) at para 6 and 14.*

> Thus the application is not a mere formality, as invariably applicants allege that where the application is not opposed, it must *ipso facto* be granted. (See *Feldman v Feldman, 1986 (1) SA 449 (T) United Plant Hire (Pty) Ltd v Hills 1976 (1) SA 71 (A) at 720.'*

These remarks are apposite in this application.

[16] On the procedure to be adopted for an application such as the instant one, *Du Toit et al, Commentary On The Criminal Procedure Act (Revision Service 15, 1995)* **31-8A** states as follows:

> 'The exact procedure which is to be followed in order to obtain Condonation for the late filing of a notice of appeal is by means of an application which is supported by an affidavit which contains the explanation for the failure. . . .
>
> > A reasonable prospect of success on appeal is by no means a *sine qua non* for Condonation (*Mofokeng v Prokureur – General (OUS) 1958 (4) SA 519 (O)512E).* The minor role played by reasonable prospects on appeal, in considering an application for amendment appears from the fact that an application for Condonation may succeed whilst an application for leave to appeal will be refused, precisely because of the absence of reasonable prospects on appeal *(R v Matsatebe 1949 (2)SA 105(O)108-9).* It is absolutely unnecessary in any case that an applicant should have to persuade the court that he has a reasonable prospect of success on appeal; his prospects of achieving success on appeal are not at this stage relevant nor does the court have to bring out a finding in that regard *(S v Kashire 1978 (4) SA 166 (SWA) 167. . . .*

> In *Mofokeng (Supra)* it was held that an applicant's prospect of achieving success on appeal is one of the factors which may be taken into account in viewing an application for Condonation'.

I am in respectful agreement with this exposition of the law save that I am of the view that the issue of reasonable prospects of success do and must form part of the inquiry, otherwise the court would find itself granting Condonation for the late filing of a Notice of Appeal for an unmeritorious or hopeless appeal. By considering the existence or otherwise of reasonable prospects of success on appeal, the court hearing the application is by no means making a finding on the merits of the intended appeal but merely enquiring on whether there is some reasonable issue to be adjudicated upon. Again, each case would be decided based on its own particular facts. It is not a one-rule-fits all approach.

[17] In the present application, the applicants have explained that immediately after being condemned to a prison term of 9 years they instructed their erstwhile attorney to note an appeal. Counsel advised them against such a step. Apparently that is the last consultation they had with him and that was in December 2023. They were only able to get further legal advice from their present legal representative in February 2024 and this was after consultation with their family members during the same month. The applicants have been in custody from the day they were sentenced and committed to prison: on 14 December 2023.

[18] I have no doubt that after consultation with the applicants in February, counsel also needed time to read the available court record and the relevant judgment before he could take further instructions from and give or offer an informed advice to the applicants. The application for Condonation or

leave to appeal out of time was filed and served at the beginning of March 2024. The delay is not too long in my view and its causes have been adequately explained by the applicants.

[19] The issues raised by the applicants pertaining to the conduct of their case by their erstwhile attorney are not insignificant. They allege that the said attorney had no mandate from them to do some of the things that resulted in them tendering a plea and also not objecting to some of the incriminating evidence against them. Applicants also allege that they did not authorize their attorney to sign the statement of agreed facts on their behalf. Additionally, they were not asked to comment, confirm or deny the contents of that document executed by their attorney. Again, these allegations are quite serious and if proven to be true, would constitute a serious or gross irregularity in the proceedings. For present purposes there is nothing to gainsay these allegations and they are admissible for purposes of this application. I have no doubt that some of these matters could be verified or clarified by or with reference to the digital or electronic court recordings and pre-trial conference minute compiled by the registrar.

[20] In the statement of agreed facts, which the court took into account in determining their guilt, the applicants allegedly admitted, *inter alia,* the following:

> '(a) They inflicted the fatal injuries to the deceased which eventually caused his death, as shown at page 1 of the post mortem report by the pathologist that death was due to multiple injuries.
>
> (b) They acted unlawfully in the circumstances.

(c) They also acted negligently when [they] inflicted the injuries on the deceased.

(d) There was no legal justification for their conduct.

(e) There was no *novus actus interveniens* between their unlawful conduct and the death of the deceased.'

This court observes that although the document provided a space or room for the applicants to append their respective signatures thereon, the document was only signed by the two counsel involved in the trial. Mr. S. Phakathi signed on behalf of the crown (respondent).

[21] The whole trial; not just the isolated yet significant issues complained of by the applicants is of grave importance to all the parties in this case and the administration of justice in general. Court trials or proceedings are and must always be rooted or grounded in fairness and justice. Any incident or issue that negates or threatens to derail the attainment of these goals must be avoided at all costs. The proposed grounds of appeal in this application and the allegations therein contained can best be ventilated or resolved in an appeal.

[22] Viewing this case holistically and objectively, I am of the considered view that the applicants have shown that there are reasonable prospects of success in their appeal; that is to say, another court may arrive at a different conclusion to that reached by the High Court. In *Smith v S 2012 (1) SACR 567 (SCA)* the court stated these requirements in the following terms:

'What the test of reasonable prospects of success postulates is a dispassionate decision based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound rational basis for the conclusion that there are prospects of success on appeal'.

[23] Just for the sake of completeness of this application. The applicants also sought an order that they be admitted to bail pending their appeal. This is a substantive application and cannot be heard by a single judge of this court. But perhaps more importantly, Rule 28 of the Supreme Court Rules, 2023 provides *inter alia* as follows;

'28. (1) An application for bail pending appeal shall be made in the first instance to the High Court and, where refused, the application may be brought before this court at anytime on the same or supplemented papers as specified in either Form 6, 7, or Form 8 of the First Schedule.

(2) In the event the original record mentioned in sub [rule] (1) above has not yet been transcribed, the record shall be made available to the court for the purposes of the bail application.

(3) An application for bail pending appeal in terms of these rules shall be brought on notice to the Director of Public

Prosecutions or the private prosecutor as the case may be, and shall be accompanied by an affidavit detailing the personal circumstances of the applicant, reasons why it is just, to grant the applicant bail as a convicted prisoner, the names and means of proposed sureties for the due appearance of applicant at the appeal, and proffered bail conditions as specified in Form 7 of the First Schedule.

(4) Upon receipt of a notice of application for bail pending appeal, the registrar or the Registrar of the High Court shall, after consulting the Chief Justice or the trial Judge, as the case may be, fix a date for the hearing of the application, and shall notify the parties in writing of that date.

(5) The Director of Public Prosecutions or the private prosecutor, as the case may be, shall, whether or not the Director of Public Prosecutions or the private prosecutor desires to oppose the application, file and serve by no later than the day preceding the hearing a notice of opposition or non-opposition accompanied by an affidavit sworn by the investigating officer, or some other person familiar with the case, setting out the reasons for the opposition or non-opposition of the applicant to bail being granted pending appeal, together, where applicable, with any proposed conditions of bail.'

The underlining is mine to emphasize the duties imposed on the respondent. The application for bail has to be moved in the court *a quo* in accordance with the dictates of this rule. I have not been urged or persuaded to condone the non-compliance with this rule in the instant case.

[24] For the foregoing reasons, I grant the following order:

(a) The applicants' failure to note and file their Notice of Appeal against the judgement of the High Court delivered on 14 December, 2023 is hereby condoned.

(b) The Notice Appeal filed and served by the applicants on the 04 March 2024 is hereby admitted as such Notice of Appeal.

(c) The bail application is to be filed and prosecuted before the High Court in compliance with Rule 28 of the Rules of this court.

M.D. MAMBA
JUSTICE OF APPEAL

FOR THE APPLICANTS: **MR. L. DLAMINI**

FOR THE RESPONDENT: **MR. S. PHAKATHI**