IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 120/14

In the matter between

BHEKI MAKHUBU **APPLICANT**

Versus

REX **RESPONDENT**

Neutral citation: *Bheki Makhubu v Rex (120/14*) [2014] SZHC 406 (5 December 2014)

Coram: **M. S. SIMELANE J**

Heard: **28 November 2014**

Delivered: **5 December 2014**

Summary: **Criminal Procedure – post conviction bail application – exceptional circumstances requisite to warrant bail – no exceptional circumstances shown – application lacking in merits and accordingly dismissed.**

Judgment

SIMELANE J

[1] The Applicant lodged an application before this Court seeking an order admitting him to bail pending appeal against his conviction and sentence imposed by this Honourable Court.

[2] The Respondent opposed the bail application through an opposing affidavit filed by one Hlelisizwe Magongo a prosecuting Counsel in the Directorate of Public Prosecutions.

[3] The parties also filed heads of argument and further made oral arguments based on their respective affidavits for which I am grateful.

[4] The Applicant states in his affidavit as well as heads of argument that he is not a flight risk which he demonstrates by submitting as follows:-

"I am a citizen of Swaziland and when not in prison I reside with my family and undertake to continue doing so until the appeal has been finalized. I have landed property at Dalrich West and have no reason to leave the jurisdiction of this Court. If the Court so orders I would be perfectly willing to surrender my passport and/or travel document and should it be necessary, I will comply faithfully with any directions requiring me to report my whereabouts to the Police on a weekly or other basis.

As for the sentence it is my genuine belief and submission that it was extremely harsh in view especially of the precedent that has already been set by the Supreme Court in the matter in which I was involved and in which even the 3 months custodial sentence was wholly suspended. This effectively means that I have now served my sentence regard being had to the fact that I have been in custody since the 18th March, 2014. It is highly unlikely that the Supreme Court in the present matter could mete out a severer sentence let alone a two (2) year custodial sentence without even an option of a fine.

10.1 This factor alone shows that there is absolutely nothing that could tempt me to abscond especially in the light of the fact that I was actually out of the country when I heard for the first time that the police were looking for me. Had I been a flight risk I would not have crossed the border into Swaziland".

[5] It is the Applicant's further contention that he has prospects of success on appeal against both his conviction and sentence.

[6] Having carefully considered the submissions advanced before this Court by both Counsel, I find it paramount to state the position of the law on post-conviction bail applications. This is that the Applicant must show exceptional circumstances to warrant his admission to bail pending appeal.

[7] In **Salvado V The State (2001) 2 BLR 411 at 413 Nganunu CJ** adumbrated the law as follows:-

> **"The presumption of innocence on the side of the accused falls by the way side when he is convicted at his trial. It becomes a fact that the law considers him a criminal, until perhaps he succeeds to upset the conviction in any appeal he may make. With the disappearance of innocence also disappears the tilt of the Court towards the liberty of that person in any bail application. The law expects the convict to serve any term of imprisonment decreed by the Court. To me this constitutes the fundamental divide between the approach of our Courts in pre-trial bail applications and those after a conviction and sentence of imprisonment. In my view, the principle followed by our Courts in post-conviction bail applications is that the applicant must show the existence of some exceptional circumstances in order to be granted bail, otherwise, he is expected to serve his sentence instead of being on the street as a free man."**

[8] Furthermore, in **S V WILLIAMS 1981 SA 1170**, the Court stated the law as follows:-

> **"Different considerations do of course arise in the granting of bail after conviction from those relevant in the granting of bail pending**

trial. On the authorities that I have been able to find it seems that is putting it too high to say that before bail can be granted to an Applicant on appeal against conviction, there must always be reasonable prospects of success on appeal. Such cases as Meline and Erleigh 1950 (4) SA 601 (W) and R V Mthembu 1947 (B) SA 468 (1) stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. It is necessary to put in the balance both the likelihood of Applicant absconding and the prospects of success. Clearly the two factors are inter-connected because the less likely the prospects of success are the more inducement there is on an Applicant to absond. In every case where bail after conviction is sought the onus is on the Applicant to show why justice requires that he should be granted bail."

[9] I fully align myself with the aforecited cases which demonstrate that an Applicant for bail pending appeal must prove that exceptional circumstances do exist in warranting his admission to bail.

[10] In my view what will constitute exceptional circumstances warranting the grant of bail pending appeal was exhaustively canvassed by **Ota J** in the case of **Leo Ndvuna Dlamini v The King Criminal Case No 12/13 paragraphs [28] - [32].**

"[28] What will constitute such exceptional circumstances warranting post- conviction bail were espoused by Hannah J in the case of State V Sephiri and Kgoroba 1982 IBLR 211, as follows:-

'The approach of the Court of Appeal in England when dealing with application for bail pending appeal is now clearly set out in R V Walton (supra). In that case the Court held that exceptional circumstances are the test and the two questions to be considered in determining whether exceptional circumstances exist are (1) whether it appears prima facie that the appeal is likely to be successful or (2) whether there is a risk that the sentence will have been served by the time the appeal is heard.'

[29] **Similarly, in R V Mthembu 1960 (3) SA 463 at 471 A-B, the Court declared as follows:-**

'As I see it, the effect of Section 368 is such that the grant of bail is in the discretion of the Court. I think that the law is that, if justice is not endangered, the Court favours liberty more particularly where there is a reasonable prospect of success.'

[30] **What can be extrapolated from the aforegoing authorities is that such exceptional circumstances are:**

(1) **whether there is *prima facie* prospects of success of the appeal.**

(2) **whether there is a risk that the sentence will have been served by the time the appeal is heard.**

[31] **I am persuaded by the aforegoing decisions. I have no wish or inclination to depart from them, save to add that the Court is still entitled in the judicial and judicious exercise of its**

discretion to consider other factors such as the likelihood of the Applicant absconding from the jurisdiction, the Applicant's health situation if any, etc, if the circumstances of the case warrant such a consideration and especially where there are prospects of success of the appeal.

[32] Adumbrating upon this discretion in the case of S V Williams 1981 SA 1170, the Court said the following:

> **'Different considerations do of course arise in the granting of bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that is putting it too high to say that before bail can be granted to an Applicant on appeal against conviction, there must always be reasonable prospects of success on appeal. Such cases as Meline and Erleigh (4) 1950 SA 601 (W) and R V Mthembu 1947 (B) SA 468 (I) stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. It is necessary to put in the balance both the likelihood of Applicant absconding and the prospects of success. Clearly the two factors are inter-connected because the less likely the prospects of success are the more inducement there is on an Applicant to abscond. In every case where bail after conviction is sought the onus is on the Applicant to show why justice requires that he should be granted bail."**

[11] The question for determination here is has the Applicant shown the requisite exceptional circumstances? I do not think so.

[12] This is so because, the fact that the Applicant is already a convict makes him a flight risk. His contention that he would have served his sentence by the time the appeal is heard does not automatically entitle him to be released on bail. This Court still has the discretion to decide whether to admit the Applicant to bail pending appeal or not.

[13] Speaking about this issue in the case of **Leo Ndvuna Dlamini v The King (supra), Ota J** made the following remarks with which I fully subscribe.

> **"Based on the aforegoing allegations of fact, Advocate Maziya contended, that since the Respondents did not controvert these facts, it is thus common cause that the Applicant is not a flight risk. There is no doubt that this is a consideration. However, speaking for myself, in an application for bail pending appeal after conviction and sentence, this factor cannot standing alone justify bail. This is because the fact of the conviction and sentence by itself, inherently makes the convict a flight risk. Since the Applicant has already been convicted and sentenced to 5 years imprisonment, this in itself makes him a flight risk, more so as he has not appealed against his conviction. He is thus not entitled to bail solely on the grounds he has advanced to show that he is not a flight risk. The Court may be minded to grant him bail on this ground if he shows other exceptional circumstances, such as the prospects of success of the appeal as well as the likelihood that he will have served his sentence before the appeal is heard. See S V Williams (supra). These factor are inter-connected and the Applicant has the duty to**

establish them convincingly (my emphasis). As I have already abundantly shown above, the Applicant has failed to do so. ”

[14] Furthermore, the Court is not legally bound to grant bail to the Applicant just because by the time the appeal is heard he would have served his sentence. The Applicant is a convict and as such expected to serve his sentence.

[15] Hannah J in **The State v Kennedy Saphire; Kehumile Kgoroba 1982 (1) BLR 211 (HC)** made the following apposite remarks with which I fully agree.

> **“In my opinion the principles to be followed are those stated in Watton’s case and I shall therefore deal with the present application on that basis. That is not to say that this court will grant bail in every case as a matter of right simply because a sentence will have been served before an appeal is heard. The power to grant bail is a discretionary one and all the circumstances will be looked at. For example, one important factor will be the risk of an appellant failing to answer to his bail.” (my emphasis).**

[16] The Applicant’s contention that he would have served his sentence when the appeal is heard in May 2015 is far fetched. He would still be serving his sentence which he is legally bound to serve. It is not factual that he would have served his sentence.

[17] It is the Applicant’s contention that the trial Judge’s entire approach to the common law crime of Contempt of Court is completely wrong since he served to believe that it is about the protection of the Judge’s reputation

instead of the protection of the authority and dignity of the Court as an institution. I find that this ground of appeal has no prospects of success on appeal.

[18] Similarly, the Applicant made a hue and cry on the sentence imposed by this Court arguing that it is severe and that the Supreme Court has set the sentencing regime in such matters. I find that the Supreme Court has not made it mandatory that the High Court should impose a three months sentence with an option of fine in all Contempt of Court cases The Supreme Court cannot wantonly take away the discretion of the trial Court. Contempt of Court is a common law offence and the Court has a discretion on sentencing as opposed to statutory offences with a penalty clause with which the Court is legally bound to comply. Each case has to be treated according to its peculiar facts and circumstances. Consequently, there would be a variance on the sentences to be imposed depending on the facts and circumstances of each case.

[19] It is not desirable to embark on a full blown consideration of the prospects of success because that would be tantamount to prejudging the appeal. Ota J had this to say in **Thembela Simelane v Rex Case No 234/2002 at para 35,** which I fully endorse.

> **"[35] The position is that the inquiry that I am expected to embark upon at this stage, is to determine whether the grounds of appeal disclose substantial issues of law and fact. Substantial because they are triable, they are not merely frivolous. The challenge in dealing with this requirement, is that the Court may find itself in a situation whereby it will be considered to be determining an appeal pending before a higher Court. The**

> **problem that arises then is how does the Court draw the line, when dealing with this question, in order to avoid determining the substantive appeal? It is difficult to know where to draw the line, as the Court at this stage is expected to come to a conclusion that the grounds of appeal disclose triable issues, or that there is a prospect of success in the appeal, before it can grant such an application. There is no doubt that this exercise will require a proper and considered view of the grounds of appeal vis a vis the impugned judgment. This Court will somehow by embarking on this exercise, pronounce on the merits of the appeal. This is the problem. This problem is further compounded by the way and manner, the application has been argued by both sides, as if the substantive appeal is being determined at this stage."**

[20] Suffice it to say thus that the grounds of appeal raised by the Applicant do not disclose any arguable or triable issues. They therefore have no prospects of success especially when one considers the gravity of the contempt and the fact that the Applicant is a repeat offender, which are factors I exhaustively considered in the impugned judgment. These factors take this case completely out of the realm of the previous case involving the Applicant which was dealt with by the Supreme Court and to which the Applicant has referred. Having said this, I say no more on this issue in order not to prejudge the appeal.

[21] I find that the Applicant has woefully failed to convincingly establish the requisite exceptional circumstances to warrant his release on bail pending appeal.

[22] In the result, for the aforegoing reasons the application for bail pending appeal is refused.

M. S. SIMELANE J.
JUDGE OF THE HIGH COURT

For the Applicant: **Advocate L. Maziya**
For the Respondent: **Mr. T. Dlamini**