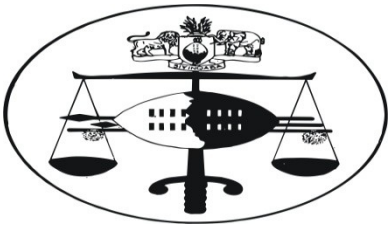

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal case No: 26/12

In the matter between:

JOHN ROLAND RUDD **APPELLANT**

VS

REX **RESPONDENT**

Neutral citation: *John Roland Rudd v Rex (26/12) [2012] SZSC44* (*30th November 2012)*

CORAM: M.M. RAMODIBEDI CJ, M.C.B. MAPHALALA JA, E.A. OTA JA.
Heard **7th November 2012**

Delivered **30th November 2012**

Summary

Criminal law – bail - appeal against cancellation of bail and discharge of surety in the absence of the appellant – sections 96 (19) (a) and 111 of the Criminal Procedure and Evidence Act, the principles of natural justice as well as section 33 of the Constitution applicable – appellant entitled to be heard before cancellation of bail and discharge of surety – matter remitted to Court *a quo* for a determination *"de novo"* before a different judge.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] This is an appeal against the judgment of the Court *a quo* for cancelling the appellant's bail and discharging his surety without being heard, and in his absence. Two grounds of appeal were advanced by the appellant: firstly, that the Honourable Judge in the Court *a quo* erred in law when cancelling his bail and discharging the surety without giving the appellant an opportunity to be heard. Secondly, that the honourable Court erred in law in cancelling the bail in the absence of the appellant in violation of section 96 (19) (a) and section 111 of the Criminal Procedure and Evidence Act.

[2] The facts in this matter are common cause. The appellant was indicted before the Court *a quo* on five counts. Firstly, he was charged of the crime of Attempted murder, it being alleged by the Crown that on the 27th April 2012 at KaDake area in the Hhohho region, he unlawfully and intentionally attempted to kill Thokozane Nkwanyane by shooting at him with a firearm causing a near fatal wound on the right arm from which he nearly died. Secondly, he was charged with the crime of attempted murder, it being alleged by the Crown that on the 27th April 2012 at KaDake area in the Hhohho region, he unlawfully and intentionally attempted to kill Mlondi Xaba by shooting at him with a firearm causing a near fatal wound on the chest from which he nearly died.

[3] Thirdly, the appellant was charged with the offence of contravening section 89 (2) as read with section 122 (6) (a) of the Road Traffic Act No. 6 of 2007 in

that on the 16th June 2012 at Bhunya Traffic circle, along MR18 public road, the appellant being the driver of motor vehicle DSD759AM, a VW Golf, unlawfully and wrongfully drove the said motor vehicle recklessly. The particulars of the offence are that he failed to drive on the left side of the road; furthermore, he failed to consider other road users.

[4] Fourthly, the appellant was charged with the offence of contravening section 91 (1) as read with section 122 (1) and (2) of the Road Traffic Act No. 6 of 2007, it being alleged by the Crown that on the 16th June 2012 at the Bhunya Traffic circle along the MR18 public road, the appellant being the driver of the motor vehicle registered DSD759AM, a VW Golf, wrongfully and unlawfully drove the aforesaid motor vehicle on the said public road whilst under the influence of intoxicating liquor or drugs thus contravening this Act.

[5] Fifthly, the appellant was charged with the offence of contravening section 91 (9) as read with section 122 (7) of the Road Traffic Act No. 6 of 2007 it being alleged by the Crown that on the 16th June 2012 at Bhunya Traffic Circle, the appellant being the driver of the motor vehicle DSD 795AM, a VW Golf, wrongfully and unlawfully refused to provide breath specimen when required to do so by Force No. 5508 Constable Nkomondze and Force No. 6211 Constable Zulu.

[6] The appellant was granted bail by the Court *a quo* on the 22nd June 2012 in the sum of E15 000.00 (fifteen thousand emalangeni) and to further provide surety

for the sum of E10 000.00 (ten thousand emalangeni). Zwelithini Dickson Masuku stood as surety for the appellant and further used his motor vehicle registered DSD75AM as bail bond.

[7] Three days later, on the 25th June 2012, the surety approached the Court, and under oath informed the court that earlier on that day, the appellant invited him to his residence at Bhunya and told him that he had been dismissed from his employment; furthermore, he confided to him that he was leaving the country for South Africa later that day because he was no longer employed. The appellant had also disclosed to him that he would use the informal structures to cross the borderline to South Africa. It was against this background that the surety applied to be released from suretiship

[8] It is not in dispute that the appellant was not present when the application for the discharge of suretiship was made. The Crown was duly represented; and, the Crown further applied for orders to revoke the appellant's bail as well as to issue a warrant for his immediate arrest. All the three orders sought were accordingly granted by the Court *a quo*.

[9] Pursuant to the granting of the above orders, the appellant was arrested. Attempts by the appellant to challenge the orders granted in the Court *a quo* proved futile. The appellant then lodged the present appeal; subsequently, he applied for bail pending the outcome of his appeal. The Court *a quo* took the

view that the appellant was wrong to note an appeal to the Supreme Court instead of a review on the basis that the appellant was challenging "the method of the trial". The trial judge went on to quote authorities dealing with the distinction between an appeal and a review in support of her judgment.

[10] It is apparent from section 14, 15 and 16 of the Court of Appeal Act No. 74 of 1954 as well as sections 146, 147 and 148 of the Constitution that the jurisdiction of the Supreme Court is wholly statutory and appellate in nature; it does not have jurisdiction to review the decisions of the High Court. See the Full Bench decision of this Court in *Kenneth B. Ngcamphalala v. The Principal Judge of the High Court and Others,* Civil Appeal Case No. 24/12. It is against this background that the trial judge misdirected herself when she held that the High Court decision was reviewable.

[11] Section 14 of the Court of Appeal Act provides as follows:

> **"14. (1) An appeal shall lie to the Court of Appeal-**
>
> **(a) from all final judgments of the High Court; and**
>
> **(b) by leave of the Court of Appeal from an interlocutory order, an order made *ex parte* or an order as to cots only.**

[12] Section 15 of the Court of Appeal Act provides the following:

> **"15. A person aggrieved by a judgment of the High Court in its civil appellate jurisdiction may appeal with the leave of the Court of Appeal or upon the certificate of the judge who heard the appeal,**

on any ground of appeal which involves a question of law but not a question of fact.

[13] Section 16 of the Court of Appeal Act provides as follows:

> **"16. An appeal shall lie to the Court of Appeal where provision is expressly made in an Act for such appeal."**

[14] Section 146 of the Constitution of 2005 provides the following:

> **"146. (1) The Supreme Court is the final court of Appeal. Accordingly, the Supreme Court has appellate jurisdiction and such other jurisdiction as may be conferred on it by the Constitution or any other law.**
>
> **(2) Without derogation from the generality of the foregoing subsection, the Supreme Court has-**
>
> **(a) Such jurisdiction to hear and determine appeals from the High Court of Swaziland and such powers and authority as the Court of Appeal possesses at the date of commencement of the Constitution; and**
>
> **(b) Such additional jurisdiction to hear and determine appeals from the High Court of Swaziland and such additional powers and authority, as may be prescribed by or under any law for the time being in force in Swaziland.**
>
> **(3) Subject to the provisions of subsection (2), the Supreme Court has for all purposes of and incidental to the hearing and determination of any appeal in its jurisdiction the power,**

authority and jurisdiction vested in the court from which the appeal is brought.

(4) A decision of the Supreme Court shall be enforced as far as that may be effective, in the manner as if it were a judgment of the Court from which the appeal was brought.

(5) While it is not bound to follow the decisions of other courts save its own, the Supreme Court may depart from its own previous decision when it appears to it that it was wrong. The decisions of the Supreme Court on questions of law are binding on other courts.

(6) Subject to the provisions of this Constitution or as may be prescribed by any other law, an appeal from the full bench of the High Court (or any other court) shall be heard and determined by a full bench of the Supreme Court."

[15] Section 147 further deals with the Appellate jurisdiction of the Supreme Court, and, it provides the following:

"147. (1) An appeal shall lie to the Supreme Court from a judgment, decree or order of the High Court-

(a) As of right in a civil or criminal cause or matter from a judgment of the High Court in the exercise of its original jurisdiction; or

(b) With the leave of the High Court, in any other cause or matter where the case was commenced in a court lower than the High Court and where the High Court is satisfied that the case involves a substantial question of law or is in the public interest.

(2) Where the High Court has denied leave to appeal, the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or matter, civil or criminal, and may grant or refuse leave accordingly."

[16] Section 148 deals with the supervisory and review jurisdiction of the Supreme Court, and provides the following:

"148. (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power.

(2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of Court.

(3) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench."

[17] The appellant further argued that the trial Court erred in cancelling his bail in his absence in violation of section 96 (19) (a) as well as section 111 of the Criminal Procedure and Evidence Act No. 67 of 1938. This section makes it clear that the accused must ultimately be present when his bail is cancelled. It provides the following:

"Any Court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused,

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

[18] Section 111 of the Criminal Procedure and Evidence Act no. 67 of 1938 provides the following:

"If an accused person has been released on bail under this part, any magistrate may, if he sees fit, upon the application of any peace officer and upon information being made in writing and upon oath by such officer or by some person on his behalf that there is reason to believe that such is about to abscond for the purpose of evading justice, issue his warrant for the arrest of such accused, and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, commit him, when so arrested, to gaol until his trial."

[19] I agree with the trial court that section 111 of the Criminal Procedure and Evidence Act applies equally to the Court *a quo*. However, the trial judge misdirected herself when she ruled that "this section does not call upon the court to hear the applicant". The Court *a quo* was obliged to hear the appellant before cancelling his bail and discharging the surety in accordance with the principle of natural justice, the *Audi Alteram Partem;* literally it means "hear the other party". It is implicit in this principle that no person shall be

condemned, punished or have any of his legal rights compromised by a court of law without being heard.

[20] The Supreme Court of India in the case of *Uma Nath Pandey v. State of U.P. Air* 2009 SC 2375 explained the principles in the following terms:

> **"6. Natural justice is another name for common sense justice. Rules of Natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.**
>
> **7. The expression "natural justice and legal justice do not present a water-tight classification. It is the substance of justice which is to be secured by both and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatically pedantry or logical prevarication. It supplies the omission of a formulated law as Lord Buckmaster said; no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.**
>
> **8. .... These principles are well settled. The first and foremost principle is what is commonly known as *audi alteram partem*. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the**

absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "*magna carta*". The classic exposition of Sir Edward Coke of natural justice requires to "vacate, interrogate and adjudicate". In the celebrated case of *Copper v Wandworth Board of Works* ((1863) 143 ER 414), the principle was thus stated:

"Even God did not pass a sentence upon Adam, before he was called upon to make his defence; "Adam" says God, "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat".

9. Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concepts, like polishing a diamond.

10. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary proceedings that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

[21] In the case of *Visagie v. The State President, the Minister of Law and Order and The Commissioner of the South African Police* (553/87) (1989) ZASCA 83; (1989) 2 All SA 460 (A) (1 June 1989) the appellant had been arrested and subsequently detained by the Police in terms of sub regulation 3 (1) made in

terms of the Public Safety Act No. 3 of 1953. On the 23rd June 1986 and in terms of regulation 3 (3), the second respondent ordered a further detention of the appellant by means of a signed written notice without prior notice or hearing.

[22] On the 12th June 1986, and by virtue of the powers vested in him by the Public Safety Act No.3 of 1953, the State President made regulations providing, inter alia, for the arrest, detention and release of certain persons. On the 4th August 1986 the second respondent issued another notice releasing the appellant upon very stringent and oppressive conditions.

[23] The appellant sought an order declaring the conditions of release to be invalid. On appeal it was argued inter alia, that the conditions were invalid because the second respondent had failed to observe the *audi alteram partem* rule prior to signing the Release Notice. It was argued on his behalf that the second respondent was legally obliged to afford the appellant an opportunity to be heard with regard to the conditions of release. The Court *a quo* held that the *audi alteram partem* rule was not applicable where the proposed act will not affect him prejudicially or adversely but would benefit or ameliorate his circumstances; and that even if it be held that the principle should apply, the applicant would always have the opportunity of making representations after his release with a view to ameliorate the conditions imposed.

[24] However, Hoexter JA who delivered the majority judgment of the full bench of five judges stated the following at para 9 and 10:

> **"It is no doubt true that the conditional release of a detainee in terms of subreg 3 (6) represents a lesser infraction of his right to liberty than that involved in his further detention under subreg 3 (3). I am unable to agree... that since an order for conditional release represents an amelioration in the condition of a person detained; such detainee may in fact have no right at all to be heard in regard to the conditions for his release. The subject's liberty is his supreme right; and true liberty is liberty unimpaired. In the instant case the conditions of release involved very serious invasions of the appellant's liberty. They drastically curtailed his right of freedom of movement; his rights of free association; and his right of free self-expression."**

[25] At para 12-16 His Lordship stated the following:

> **"The audi alteram partem principle is a malleable one. As has been stressed by H. Corder, "The content of the *audi alteram partem* rule in South African administrative law" 1980 THRHR 156 at 159:**
>
> **"It is well-nigh impossible to lay down any rigid rules as regards the content of *audi alteram partem*, as practical circumstances vary so much from case to case".**
>
> **In practice our courts have recognised that in certain situations the precepts of natural justice may have to be accommodated by giving an affected party a hearing only after the prejudicial order has already been made. In the case cited in the judgment of the court below, Everett v. Minister of Interior 1981 (2) SA 453 (C) Fagan J points out at 458 D/E**

that such a situation may arise where time is of the essence and prompt action is necessary:

"The more usual application of the rule in quasi-judicial decisions is for a hearing to take place, or representations to be received, prior to the decision being arrived at. But that is not always the position. Where expedition is required, it might be necessary not to give the affected person the opportunity of presenting his case prior to the decision, but only after. He thus obtains the opportunity of persuading the official to change his mind".

[26] His Lordship Justice Hoexter observed that in the instant case subreg 3 (6) created a procedural device for the release from prison of persons who have been summarily detained without trial, and, that the need for expedition was more pressing to have the detainee released from prison.

[27] In conclusion His Lordship stated the following at para 15-16:

"It follows in my judgment, that when the Minister orders the conditional release of a detained in terms of subreg 3 (6) the detainee cannot assert any legal right to a prior hearing. The requirements of fairness are sufficiently made by a hearing afforded the detainee after the notice in question has been delivered to him. In my view the Minister is at that stage legally obliged to give due consideration to such representations as the conditionally released detainee may wish to make in regard to the conditions of release imposed. In the instant case the appellant preferred not to avail himself of that right. In as much as the right to a hearing was thus circumscribed, it follows that the *audi alteram partem* argument was rightly rejected by the court *a quo*."

[28] Section 33 of the Constitution of 2005 reinforces the principles of natural justice and provides the following:

> **"33. (1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.**
>
> **(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority."**

[29] Section 111 of the Criminal Procedure and Evidence Act as well as the "*audi alteram partem*" rule were violated when the Court *a quo* issued a final order cancelling the bail and discharging the surety without hearing the appellant. It was incumbent upon the Court *a quo* to issue a warrant for the arrest of the appellant for the purpose of bringing him before Court to make representations to the allegations made by the surety. The issue of the surety would have featured during the said proceedings. The South African Supreme Court in the case of *Visagie v. State President and Others* (supra) held that the Courts have recognised that in certain situations the precepts of natural justice may have to be accommodated by giving an affected party a hearing only after the prejudicial order has already been made.

[30] Accordingly the appeal succeeds and the judgment of the Court *a quo* is set aside and substituted with the following order:

(a) The matter is hereby remitted to the Court *a quo* to be heard *de novo* before a different judge within fourteen days of this order.

(b) Issues relating to the cancellation of bail and the discharge of the surety will be determined by the Court *a quo*.

(c) The appellant shall be kept in custody pending the determination of the matter before the Court *a quo*.

_____

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

_____

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree:

_____

E.A. OTA
JUSTICE OF APPEAL

FOR APPELLANT Attorney Leo Gama

FOR RESPONDENT Senior Crown Counsel P. Dlamini

DELIVERED IN OPEN COURT ON 30th NOVEMBER 2012.