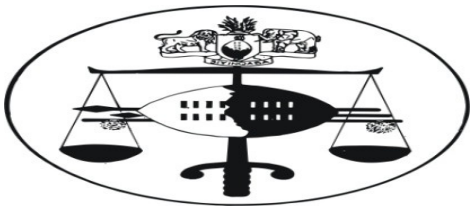


IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HOLDEN AT MBABANE Criminal Appeal No.14/2018

In the matter between:

The Director of Public Prosecutions **Applicant**

Versus

Sipho Shongwe **Respondent**

Neutral Citation: *The Director of Prosecutions versus Sipho Shongwe (14//2018) [2018] SZSC 50 (15th November, 2018)*

Coram: **JP ANNANDALE JA, SJK MATSEBULA AJA AND MJ MANZINI AJA**

Heard: 23rd October 2018
Judgment: 15th November 2018

Summary

Criminal Procedure – Petition for leave to appeal against High Court Order granting bail to accused person charged with Fifth schedule offence – interpretation of Section 96 (12) (a) of the Criminal Procedure and Evidence Act – Petitioner failing to annex record of bail application proceedings – Petitioner failing to establish that on the facts and the law a court of appeal could reasonably arrive at a different conclusion (prospects of success) – petition dismissed. Criminal Procedure – stay of execution – grounds for granting – failure to establish grounds – stay of execution refused.

JUDGMENT

MANZINI AJA

[1] On the 28th September, 2018 the Director of Public Prosecutions (DPP) launched an application before this court seeking the following relief:-

1 *Dispensing with the normal provisions of the rules of this Honourable court as relate to form, service and time limits and hearing this matter as urgent as it relates to bail;*

2 *Granting condonation for the short period of notice and filing of the application;*

3 *Granting the Petitioner leave to appeal against the order issued by the court a quo on the 28th September 2018;*

4 *Granting an order staying the execution of the order issued by Justice Nkosi on the 28th September, 2018.*

[2] Annexed to the Notice of Application is a Petition for leave to appeal and a Verifying Affidavit deposed to by one Bryan Magagula.

[3] On the same day of launching the petition, and of the granting of the Order by **Nkosi J**, the matter came before **Justice MCB Maphalala CJ** who granted an order staying the Order issued by the court *a quo* pending finalization of the petition for leave to appeal. The circumstances under which this Order was sought and granted in the absence of the Respondent and his legal representatives have been the subject of my comments in my earlier ruling in respect of the interlocutory application for condonation for late filing by the DPP. I do not intend to say anything more.

[4] Two substantive issues must be determined by this court, namely, whether the DPP has made out a case for leave to appeal against the Order issued by **Nkosi J** on the 28th September, 2018; and whether the DPP has made out a case for the granting of an Order staying the execution of the Order made by the court *a quo*.

LEAVE TO APPEAL

[5] The Order against which the DPP intends to appeal is not annexed to the petition for leave to appeal. The petitioner has not given any explanation why this is so. It seems quite anomalous that the Order against which leave to appeal is sought is not annexed to the petition for leave to appeal, yet it forms the very basis of the proceedings.

[6] This anomaly has led to an accusation by the Respondent to the effect that the DPP knew of the outcome of the bail application even before it was delivered by **Nkosi J** in open court. This could very well be true, and provide an answer as to why the Order was not annexed to the petition – it was simply not available at the time of launching the proceedings.

[7] In fairness, I do not intend to assess the failure by the DPP to annex the Order to the petition for leave to appeal in isolation, although it is arguable that the omission, on its own, constitutes a fatal irregularity. I intend to deal with the matter holistically, since, in any event, the Order was annexed to the Respondents' opposing affidavit. This affidavit, it must be said, contained largely irrelevant material, and dealt less with the real issues calling for determination by this court.

[8] In paragraph 2 of the Petition, the Petitioner avers that it is petitioning this court for leave to appeal against the judgment of the High Court *"on the grounds contained in this petition"*. However, there grounds are not explicitly laid out.

[9] In paragraph 3, the petitioner avers that –

3. On the 6th April, 2018 Justice S.A Nkosi ruled that-

(a) He has jurisdiction to pronounce upon the circumstances surrounding the release of the Respondent from Barberton Maximum Prison in 2008 yet it is only the trial court that could do so.

(*b*) *On the 28th September 2018 the Learned Judge ruled that the Respondent (Applicant in the court a quo) is entitled to bail regardless that the Crown submitted evidence proving that the respondent is a flight risk.*

(*c*) *Further the Learned Judge ruled that the Respondent was able to adduce evidence in terms of Section 96 (12) (a) of the Criminal Procedure and Evidence Act No.67 of 1938 as amended."*

[10] At paragraph 4, which is entitled "Prospects of Success", the petitioner averred as follows:

> *"Your Petitioner humbly showeth that there were errors on questions of law which the Crown is entitled to appeal on. This is in terms of Section 6 (1) of the Court of Appeal Act of 1954 as read together with Rule 9 (1) of the Court of Appeal Rules for determination by this Honourable Court. Your Petitioner believes that there are reasonable prospects that another court would come to a different conclusion on the questions of law raised by the Crown on the following reasons that:*

(i) The Learned Judge erred in law and misdirected himself in holding that he has jurisdiction to pronounce on the circumstances surrounding the release of the Respondent from Barberton Maximum Centre;

(a) The Learned Judge ought to have found that he has no jurisdiction to pronounce on the legality otherwise of the Respondents' release from lawful custody in a foreign state.

(b) The Learned Judge ought to have found that only a South African court with territorial jurisdiction over Barberton could make such a pronouncement.

(ii) The Learned Judge erred in law by failing to consider the applicability of the Doctrine of Common purpose.

(iii) The Learned Judge erred in law and misdirected himself by failing to take into account that there is an extradition request from Republic of South Africa pending before a court of committal.

(iv) The Learned Judge erred in law in finding that there were exceptional circumstances permitting the release of Respondent on bail.

(v) The Learned Judge erred in granting Applicant bail despite that the grounds refusing Applicant bail had been established in terms of Section 96 (4) of Act 67/1938.

(vi) The Learned Judge erred in law in finding that Respondent is not a flight risk."

[11] In the course of his submissions Mr. Makhanya, who appeared on behalf of the DPP, was asked to clarify whether the averments listed in paragraphs 4(i) to (vi) were the proposed or intended grounds of appeal, or were the reasons advanced as a basis for concluding that there are reasonable prospects of success on appeal. He emphatically stated that these were <u>not</u> the proposed grounds of appeal. This being the case, one has to look to paragraph 3 of the petition as being the proposed grounds for appeal.

[12] In my view, the biggest obstacle lying in the DPP's path to obtaining leave to appeal is the failure to annex the record of the proceedings in the court *a quo*. None of the pleadings with respect to the bail application and the opposition thereto have been availed to this court. On the face of the Order issued by **Nkosi J** it is apparent that the bail application commenced in February, 2018,

culminating in the Order of the 28th September, 2018. The matter was heard on about nine different dates, but there is not a single transcript on what transpired on each of these occasions. The 6th April, 2018 ruling referred in paragraph 3 of the petition is also not attached. And neither were the reasons for the ruling (if any exist) attached. The opening line of **Nkosi J's** 28 September Order reads that the *"order is issued pending written reasons to be delivered on Monday 1st October, 2018."* Mr Makhanya confirmed that the written reasons were never furnished by the Learned Judge, even on the date of the hearing of the petition for leave to appeal by this court they had still not been furnished.

[13] Worse still, it does not appear from the petition or verifying affidavit what charges have been preferred against the Respondent, as a copy of his Indictment has not been attached.

[14] Mr. Howe, who appeared for the Respondent, made heavy weather of the apparent defects in the DPP's petition. He emphasised that the petition did not adequately set out the reasons for claiming that there were reasonable prospects of success. That the reasons proffered by the DPP read more like the proposed or intended grounds of appeal. He submitted that overall the petition was bad

in law and the DPP should have withdrawn it upon realizing that it was seriously defective.

[15] The test to be applied in an application for leave to appeal in criminal matters was aptly postulated by **Plasket AJA** in ***S v Smith 2012 (10 SACR 567 (SCA)*** as follows.

> *"[7] 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 there prospects of success on appeal and that there 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".*
>
> [My own underlining]

[16] In ***S v Matshona [2008] ZASCA 58; [2008] 4 All SA 68 (SCA) para 4*** the Supreme Court held that the test to be applied is whether there is a reasonable prospect of success in the intended appeal, and not whether the appeal itself ought to succeed or not.

See: Greenwood v S (30075/14) [2015] ZASCA 56 (30 March 2015) and Essop v S (31/2016) [2016] ZASCA 114 (12 September, 2016).

[17] Recently, this court in the case of ***Director of Public Prosecutions vs Mduduzi Elliot Nkambule (08/2016) [2017] SZSC 03 (11 May 2017),*** in a unanimous judgment delivered by **SP Dlamini JA**, refused to accept an unsubstantiated and bald statement by the DPP to the effect that *"….. I believe that there are reasonable prospects that another court would come to conclusions on the questions of law raised by the Crown"*.

The court quoted with approval the case of ***Rustenberg Gearbox Centre v. Geldmaark Motors CC t/a MEJ Motors 2003 (5) SA 468(T)*** where the court held as follows-

> *"In para 14 at 419 the appellant simply submits that it has good prospects of success on appeal. (See also para. 4.2 at P21 of the notice of motion of 21 February 2003). That is not sufficient. What is required is that the deponent should*

set forth briefly and succinctly the essential information that may enable the court to assess the appellants' prospects of success A bald submission unsupported by any factual averments is not good enough to discern what the prospects of success are in this matter."

[My own underlining]

[18] Now this brings me to this fundamental question – how does this court dispassionately assess whether a court of appeal could reasonably arrive at a different conclusion when it is bereft of the facts on which the bail application was premised, the facts on which it was opposed, and the reasons why it was granted; that is, in the absence of the record of the bail applications proceedings? The Director of Public Prosecutions has not done itself any favour by making shallow allegations in the petition which do not give this court at least a glimpse of the factual background and circumstances under which bail was applied for and the grounds of opposition. No factual detail is given as to warrant a conclusion that a court of appeal would reasonably come to a decision that **Nkosi J** misdirected himself in finding that there were exceptional circumstances as provided for in Section 96 (12) (a) of the Criminal Procedure and Evidence Act.

[19] Notwithstanding these glaring defects in the petition for leave to appeal, Mr Makhanya was adamant that bail should not have been granted because the DPP had established the grounds which disentitle bail to an accused person charged with an offence listed in the Fourth and Fifth schedules of the Criminal Procedure and Evidence Act 67/1938 (as amended), as provided in Section 96 (4) of the said Act.

[20] In my view, this argument loses sight of Section 96 (12) (a) of the Act, which provides that:

"(12)Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) In the fifth schedule the court shall order that the accused be detained in custody until he or she is dealt 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 exceptional circumstances exist which in the interest of Justice permit his or her release."

[My own underlining]

[21] This court in the case of ***Director of Public Prosecutions v. Bhekokwakhe Meshack Dlamini & 2 Others (478/2015) [2016] SZSC 40 (30th June 2016) per*** **M.C.B Maphalala CJ**, quoted with approval the judgment of **Kriegler J** in the South African Constitutional Court case of ***S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC) at paragraph [74]*** where the Learned Judge said –

> *"Section 60 (11) (a) does not contain an outright ban on bail in relation to certain offences, but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provision. What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted."*

[22] At paragraph [23] **His Lordship MCB Maphalala CJ** stated the following:

> *"An accused indicted for an offence listed under the Fifth schedule of the Criminal Procedure and Evidence Act as amended who desires to be released on bail, should first adduce evidence which satisfies the court, on a balance of probabilities, that the interests of justice permit his release. In addition to the above requirements the accused is required to adduce evidence which satisfies the court on a balance of probabilities that exceptional circumstances exist which in the interest of justice permit his release."*

[23] Clearly, a judicial officer presiding over an application for bail in respect of a Fifth Schedule offence is empowered to grant bail to an accused, subject, of course, to the satisfaction of the requirements set out in Section 96 (12) (a). Thus, the granting of bail to an accused charged with a Fourth or Fifth schedule offence, in and of itself, without anything more, does not amount to a misdirection on the part of a judicial officer. In other words, it must be shown that there was a misdirection in the application of Section 96 (12) (a), or in some other respect.

[24] On the petition before this court there is no evidence that **Nkosi J** misdirected himself on the requirements of Section 96 (12) (a) of

the Criminal Procedure and Evidence Act as amended. Or in the application of Section 96 (4) for that matter. As earlier indicated, the DPP failed to furnish this court with the record of the bail application proceedings. The DPP has also failed to furnish this court with sufficient factual background to enable us to dispassionately assess if there is a reasonable prospect of success on appeal. Viewed holistically, I am not satisfied that the DPP has done enough in this case to create a probability of succeeding on appeal. In the result the petition for leave to appeal is dismissed.

STAY OF EXECUTION

[25] In the Notice of Application filed together with the petition the DPP prayed for *"an order staying the execution of the order issued by Justice Nkosi on the 28th September, 2018."* However, glaringly, not a word is said in the petition justifying the stay of execution. When confronted with this glaring deficiency, Mr Makhanya implored the court to "infer" from paragraph (4) of the petition that a stay of execution is justified.

[26] As a general rule a court will grant a stay of execution where real and substantial justice requires such a stay, or where, put otherwise, injustice will be done. It has a discretion which must be

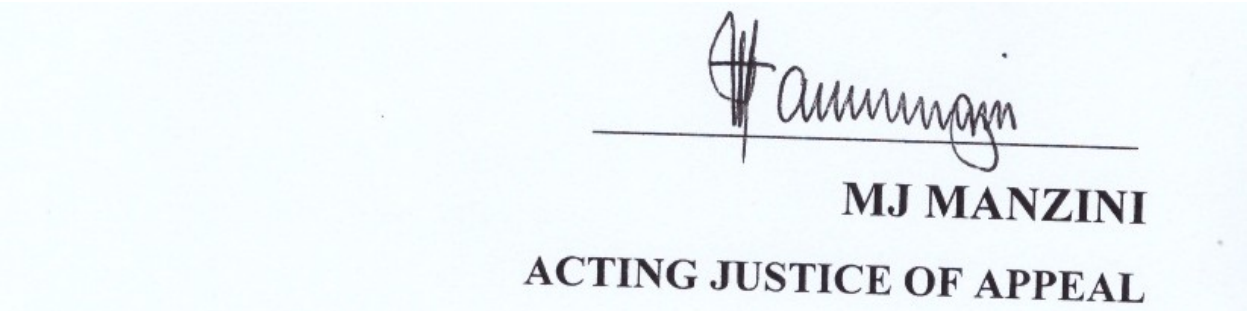
exercised judiciously. In the circumstances the prayer for a stay of execution of the Order granted by **Nkosi J** on the 28th September, 2018 is refused. For the avoidance of any doubt, the Order for a stay of execution pending finalisation of the petition for leave to appeal granted by this court on the 28th September, 2018, is set aside.

[27] In the circumstances the court makes the following Order:

1 Leave to appeal against the Order issued by Nkosi J on the 28th September, 2018 granting the Respondent bail is hereby refused.

2 The prayer for a stay of execution of the Order issued by Nkosi J on the 28th September, 2018 is hereby declined.

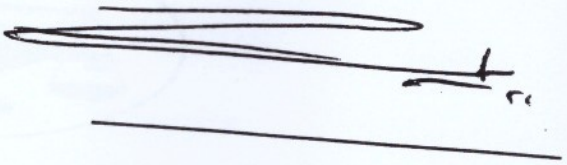
3 There is no order as to costs.



MJ MANZINI

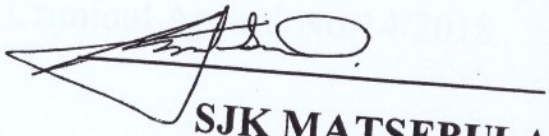
ACTING JUSTICE OF APPEAL

I agree



JP ANNANDALE
JUSTICE OF APPEAL

I agree



SJK MATSEBULA
ACTING JUSTICE OF APPEAL

Counsel for the Appellant: Mr Absalom Makhanya with Macebo Nxumalo

Counsel for the Respondent: Mr Lucky Howe.