



**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE**

**APPEAL CASE NO. 03/2019**

In the matter between:

**DUMISANI MAXWELL KUNENE**

**Appellant**

**Vs**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**Respondent**

*Neutral Citation: Dumisani Maxwell Kunene vs Director of Public Prosecutions  
(03/2019) [2019] SZSC 43 (09 October, 2019)*

**Coram: R. J. CLOETE JA, J.M. MAVUSO AJA, and M. J. MANZINI  
AJA**

**Heard: 9 September, 2019**

**Delivered: 09 October, 2019**

**Summary:** *Criminal Law - Extradition - Order for Committal to imprisonment issued by Court of Committal under Section 10 of Extradition Act 13/1968) - appeal to High Court in terms of Section 12 of Extradition Act 13/1968 - appeal upheld and Committal Order set aside -*

*application for leave to appeal against High Court Order – leave to appeal granted - purported appeal against High Court Order granting leave to appeal – whether High Court Order granting leave to appeal is interlocutory and only appealable with leave - Held that High Court Order interlocutory and not appealable without leave - purported appeal dismissed.*

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## JUDGMENT

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### **M.J. Manzini, AJA**

- [1] On the 28<sup>th</sup> September, 2018, the Pigg’s Peak Principal Magistrate, the Court of Committal, issued an Order committing the Appellant to imprisonment to await the Prime Minister’s decision with regard to his surrender to the Republic of Botswana in order to stand trial for offences relating to alleged possession of dagga. The Order was issued in terms of Section 10 of the Extradition Act 13/1968.
- [2] Thereafter, the Appellant filed an appeal to the High Court in terms of Section 12 of the same Act, which vests appellate jurisdiction and grants power to, the High Court, to make such order as it may deem fit in an appeal filed in terms of the Act.
- [3] On the 15<sup>th</sup> February, 2019 the High Court, exercising appellate jurisdiction as aforesaid, found the Committal Order to be unlawful, for want of compliance with Sections 7 and 8 of the Act. The Committal Order was thereby discharged and set aside, and the Appellant released from custody.

- [4] The setting aside of the Committal Order and subsequent release of the Appellant from custody, triggered an urgent application by the Director of Public Prosecution (the Respondent herein) to the High Court in terms of Section 6 (1) of the Court of Appeal Act, 1954 for a Certificate of Leave to Appeal to this Court. Naturally the application was opposed.
- [5] Subsequently the application for leave was heard by Maphanga J, who, on the 20<sup>th</sup> March, 2019, granted the application.
- [6] Hence, the purported appeal was filed on the 25<sup>th</sup> March, 2019, on the following grounds;
1. *The Court a quo erred in fact and in law by holding that appeal has reasonable prospects of success without taking into account the provisions of Section 7 and 8 of the Extradition Act 13 of 1968 are substantive law and not technicalities.*
    - 1.1 *The Court a quo erred in law and in fact by disregarding and not considering the prospects of success against the explanation given by the Respondent regarding the purported warrant which somewhat mushroomed ex post facto and pursuant to the court of record being functus officio.*
    - 1.2 *The Court a quo erred in law by not considering and or making a ruling on the points in limine raised by Appellant in its Answering*

*Affidavit yet that was the first determination to be embarked upon prior to considering and determining the merits.*

2. *The Court a quo erred in law by stating with certainty in its judgment that it would with respect differ in the event the Supreme Court were to reach a different conclusion from the one the Court a quo reached but despite the Court being convinced about its own decision as not being tainted by error it proceeded to grant leave to appeal thereby not exercising its discretion judiciously.*
3. *The Court a quo erred in law and in fact by granting the leave to appeal ignoring the fact that it is a Court of record and that it was functus officio but yet in the attempt by the Respondent to proffer prospects of success the Court was drawn to consider a document which was not on the record before it when it determined the matter to.*

[7] In its Heads of Argument the Respondent raised a preliminary point, arguing that the “Order of the Court *a quo* granting the Crown leave to appeal is purely interlocutory and not appealable”. On the basis that this point could very well be dispositive of the appeal, we invited both parties to address it.

[8] Counsel for Appellant argued that the Order was appealable as it was final in effect in the sense that the High Court had pronounced itself on the application for leave to appeal, effectively granting the Respondent the right to appeal, after full arguments were made before the Presiding Judge. He contended that the Order was not capable of alteration by the court *a quo* and was, in that sense, final. He further contended that the Order granted

definitive relief to the Respondent on the application for leave to appeal, which were the main proceedings.

[9] On the other hand, Counsel for the Respondent argued that the Order was merely a preparatory procedural step, and did not deal with the issues sought to be dealt with in the appeal, the latter being the main proceedings, as opposed to the application for leave to appeal. It was contended that the substantive or real dispute between the parties was whether the High Court was correct in setting aside the Order of the Court of Committal on the grounds that it did, was yet to be determined by this Court when the appeal is eventually heard. In other words, the final word on the substantive or real dispute was yet to be spoken.

[10] The debate as to whether a judicial pronouncement is appealable or not, or appealable with leave, has received considerable judicial scrutiny, and can be a vexed issue. In ***Zweni v Minister of Law and Order 1993 (1) SA 523 (AD)***, which has been cited and applied in this Court on countless instances, the Court stated that as a general rule, a judgment or order will be appealable if it has three attributes; it must be final in effect and not susceptible of alteration by the Court of first instance; it must be definitive of the rights of the parties and it must have the effect of disposing of at least, a substantial portion of the relief claimed in the main proceedings.

[11] However, these three attributes are not cast in stone nor exhaustive. As noted by Lewis JA in ***Health Professions Council v Emergency Medical***

Supplies and Training CC t/a EMS 2010 (6) SA 469 (SCA) 473 at paragraph [15]-

*“But the Court also stated that even if an order does not have all three attributes, it may be appealable if it disposes of any issue or part of an issue. Conversely, however, even if an order does have all three attributes it may not be appealable, because the determination of an issue in isolation from others in dispute may be undesirable and lead to a costly and inefficient proliferation of hearings”.*

[12] In a separate concurring judgment in National Director of Prosecutions v King 2010 (2) SACR 146 (SCA)

Nugent JA stated the following-

*“I pointed out in Liberty Life that while the classification of the order might at one time have been considered to be determinative of whether it is susceptible to an appeal the approach that has been taken by the Courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction, between orders that are appealable and those that are not, to one of principle”.*

(My emphasis)

- [13] In applying the above principles to the facts at hand, the most important and decisive consideration is determining the “main proceedings” or “main action”, and the effect of the Order granting leave thereto. As earlier indicated, the proceedings commenced in the Court of Committal where the Respondent claimed and was granted an Order committing the Appellant to prison in terms of the Extradition Act. The Order was successfully appealed against, and set aside by the High Court. The Respondent intends to challenge the setting aside of the Committal Order by noting an appeal to this Court. Thus, it is the appropriateness or otherwise of the High Court decision to set aside the Committal Order that is the real issue or dispute between the parties. This issue or dispute has not yet been determined, and it is this Court which will have the final word in respect thereof.
- [14] Whilst it may be true that the High Court may not revisit its decision to grant leave to appeal and, in this sense, it is final in effect and not susceptible to alteration, the real issue or dispute between the parties however remains untouched.
- [15] In view of the foregoing, the decision by the Court *a quo* to grant leave to appeal is not appealable without leave of this Court, and is interlocutory in nature in that it does not dispose of a substantial portion, or any portion for that matter, of the relief claimed in the main proceedings or main action.
- [16] In the circumstances, the purported appeal cannot be sustained. The following Order is hereby made:

**1. The purported appeal is dismissed.**

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**M. J. MANZINI**  
**ACTING JUSTICE OF APPEAL**

I agree

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**R. J. CLOETE**  
**JUSTICE OF APPEAL**

I agree

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**J. M. MAVUSO**  
**ACTING JUSTICE OF APPEAL**

**For the Appellant** : **M. Ndlangamandla**  
**For Respondent** : **S. Gama**