

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CRI) NO.04/2020**

In the matter between:

**BOKANG MALATALIANA**

**APPLICANT**

**And**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**CORAM:** K E MOSITO P

**HEARD:** 15 OCTOBER 2020

**DELIVERED:** 30 OCTOBER 2020

**SUMMARY**

*Criminal Procedure – Leave to appeal to the Court of Appeal – Appeal already noted – Application for release on bail pending determination of application for leave to appeal.*

## JUDGMENT

**K E MOSITO P**

### Introduction

[1] This is an application for an order in the following terms:

1. Granting Applicant leave to appeal the judgment/order in **CRI/A/14/2014** delivered by His Lordship Sakoane J on **5<sup>th</sup> August 2020** which was an appeal from the Magistrate Court in the Berea district.
2. Granting an order that Applicant's appeal in C of A (CRI) NO.[04] 2020 be heard in this session of October 2020 at any time convenient to this Honourable Court.
3. Granting Applicant costs of suit only in the event of opposition.
4. Granting Applicant such further and/or alternative relief as this Honourable Court may deem fit and expedient.

[2] At the hearing of the present application, the parties requested that, in addition to the above reliefs sought, the Court reinstate the applicant's bail pending appeal. This reminded me of the words of Kriegler J<sup>1</sup> that, indeed, not only the innocent are entitled to their release on bail pending trial. On the contrary, even those who have been convicted and sentenced to imprisonment can be and often are released on bail pending appeal.

[3] On 20 October 2020, I gave the following order:

“ BY CONSENT OF THE PARTIES

**IT IS ORDERED THAT:**

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<sup>1</sup> S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623.

- (a) The Applicant's application for leave to appeal the judgment/order in **CRI/A/14/2014** delivered by His Lordship Mr Justice Sakoane cannot be granted by reason of Applicant's failure to comply with section 8(1) of the Court of Appeal 1978.
- (b) The Applicant's appeal in C of A (CRI) NO.04 of 2020 is hereby enrolled for the October 2020 Session of this Court. However, the hearing of the appeal is hereby postponed to the April 2021 Session of this Court.
- (c) The Applicant's appeal in C of A (CRI) NO.04 of 2020 shall be heard by this Court exercising its review powers in terms of the decision of this Court in **Oscar Makakamela Leluma v Rex C. of A. (CRI) No. 5 of 1981.**
- (d) The decision of the Court a quo revoking Applicant's bail is hereby set aside and, the said bail is hereby reinstated with immediate effect on the identical bail condition on which he was admitted to bail by the High Court (Hlajoane J) on 3 July 2014.
- (e) Appellant is to be released from prison forthwith pending final determination of the appeal in C of A (CRI) NO.04 of 2020.
- (f) The full reasons for judgment for this order shall be furnished on 30 October 2020.

[4] I now proceed hereinbelow, to furnish the reasons for my order as promised.

### **Factual background**

[4] According to the unchallenged averments of the applicant in an affidavit in support of an application for leave to appeal to this Court, the history of this matter is summarised as follows. The applicant averred that in 2012 he was charged with attempted murder of a fellow officer in the National Security Services after he had shot his colleague after a night of drinking. He was convicted in 2014 by the Berea Magistrate Court. Upon conviction he immediately applied for bail pending appeal having lodged his grounds of appeal on the basis that the Crown had failed to prove any intention on his part to

commit murder and that at best the Crown had proven mere negligence on his part in handling his firearm and paying around with his colleague during a state of intoxication.

[5] His bail application was refused by the learned Magistrate but the Applicant immediately approached the matter the High Court in CRI/APN/0338/2014. On the 3 July 2014, the court having heard arguments and having decided that there were prospects of success, granted him bail pending appeal. He attach annexure “BM1” (a bail bond) for ease of reference. He further avers that he has been on bail since then until the 5<sup>th</sup> August 2020 when Sakoane J directed that he should be sent to jail to serve his sentence effectively dismissing my appeal.

[6] The applicant further avers that, in the afternoon of 3 August 2020, he received a telephone call from his superiors informing that their colleagues in the Police Service had a warrant of apprehension issued on the morning of the 3 August 2020. They requested the applicant to make arrangements to appear in court voluntarily and agreed with them he would appear on the 5 August 2020 to deal with the cancellation of the warrant of arrest which at that time he did not know why it was issued.

[7] The following day applicant proceeded to his legal representative to tell him that there was a warrant of apprehension. The legal representative was surprised to learn of the warrant. In the applicant's presence his lawyer immediately called the prosecutor Senior Crown Counsel S.V. Thaba with whom applicant's legal

representative had always been in liaison with regarding the matter to have it set-down for argument. Applicant's legal representative then registered his dismay on how the date of the 3<sup>rd</sup> day of August 2020 had been obtained without the legal representative's involvement.

[8] The Learned Senior Crown Counsel responded that the 3<sup>rd</sup> August 2020 was not a date for hearing. It was a date for mention and to obtain the date for hearing. The Learned Senior Crown Counsel went on to inform applicant's legal representative that, when he tried to inform the High Court of the position, the court which had the Magistrate Court record indicated that, applicant was a fugitive from justice who had escaped from prison as there was no indication on the record that applicant was ever released on bail. The report went on to further reveal that, the court therefore went ahead to issue the warrant of arrest as the Learned Senior Crown Counsel could not respond adequately.

[9] Applicant deposes therefore that, the Learned Senior Crown Counsel reported that, it was on this basis that on 5 August 2020 having made arrangements with the Learned Senior Crown Counsel and the Police that he (applicant) voluntarily appeared before court. Applicant deposes upon appearance before the Judge a quo, he explained to the court that the reason he was not before court on the 3<sup>rd</sup> day of August 2020 was that, he was not aware of the said date because the last time he was before court, the late Justice Hlajoane, the matter was postponed sine die on account of the Learned Judge's

illness. He avers that he told the court that he had not received any summons or set-down thenceforth.

[10] The applicant further avers that, he explained to the court (when referred to the issue that the Magistrate Court record revealed that he was denied bail) that, he had been released on bail by the High Court and that he was not a fugitive from justice. The court however could not take any of this and digressed from this point. He was taken to task as to why since 2014 he had not prosecuted his appeal. The applicant's lawyer ventured an explanation, "but at this time the court was extremely agitated and the court then immediately gave a ruling that I should go and serve my sentence effectively dismissing my appeal."

[11] The applicant goes on to depose that, "[in] vain my legal representative informed the court that I have to be given an opportunity to ventilate my appeal and address the court on the evidence and he suggested to the court that if the court is revoking my bail then the appeal must be set-down for argument on the merits of the appeal but the court could have none of that." The court pointed out in no uncertain terms it was not revoking any bail but was making an order that applicant should serve his sentence. Applicant then avers that, this clearly meant that his appeal to the High Court was thereby dismissed. The two Learned Counsel who appeared both in the court *a quo* and this Court, confirmed to this Court that the account of events as narrated by the applicant what actually transpired in the court *a quo*.

[12] If the foregoing allegations are correct, and there is no evidence to contradict them, the applicant was treated in a deplorable manner. I find this to be rather unfortunate.

[13] The applicant appealed against his conviction and sentence to the High Court. An application for bail pending appeal made on his behalf came before the High Court (Sakoane J) on 05 August 2020.

[14] The grounds upon which the applicant sought to be released on bail pending appeal were set out in his founding affidavit and supporting annexures.

### **The legal principles**

[15] Section 8(1) of the Court of Appeal Act No. 10 of 1978 reads:

"Any party to an appeal to the High Court may appeal to the Court against the High Court judgment, with leave of the judge of the High Court, or, when such leave is refused, with the leave of the Court on any ground of appeal which involves a question of law but not on a question of fact nor against severity of sentence."

[16] In **Oscar Makakamela Leluma v Rex**<sup>2</sup>, this Court pointed out that, the correct construction to be placed upon section 8(1) of the Court of Appeal Act is that, there is no appeal to this Court on a question of fact, or against severity of sentence, where an appeal has already been heard by the High Court. It is clear from the grounds of appeal which have been filed in support of the application for leave to appeal, that the issues which the applicant would canvas in the

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<sup>2</sup> Oscar Makakamela Leluma v REX C. of A. (CRI) No. 5 of 1981.

appeal are all questions of law.as they hinge on the fairness of the trial before the court a quo.

[17] Section 12(1) of the Constitution of Lesotho provides that, if any person is charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. Section 12(2) of the Constitution goes further to provide that, every person who is charged with a criminal offence shall be given adequate time and facilities for the preparation of his defence.

[18] the legal principles which this court considered in respect of bail pending appeal were also likewise considered and dealt with in the written judgment. The legal principles applicable are the personal circumstances of the applicant, the facts considered and the applicant's prospects of success on appeal.

[19] In **State v Tengende**<sup>3</sup>, quoted with approval by Gwaunza JA in **Russel Wayne Labuschagne v the State**<sup>4</sup>, the court had this to say:-

“But bail pending appeal involves a new and important factor; the appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused.”

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<sup>3</sup> State v Tengende 1981 ZLR 445 at 448.

<sup>4</sup> Russel Wayne Labuschagne v the State SC 21-03.

[20] The presumption of innocence no longer applies in *casu*.<sup>5</sup> Thus, the fact court must consider in an application for bail pending appeal are:-

- a) The likelihood of the accused absconding in the light of the sentence imposed.
- b) The prospects of success
- c) The right of the individual to liberty.
- d) The likely delay before the appeal can be heard.

[21] In ***State v Hudson***<sup>6</sup>, the court stated that where a convicted person applies for bail pending appeal and there is no reason to be concerned about whether or not he will abscond, the question is not whether there is a reasonable prospect of success on appeal. If the appeal is reasonably arguable and not manifestly doomed to failure the lack of merit in the appeal should not be the cause of a refusal of bail.

[22] Furthermore, if the conclusion that the appeal is manifestly doomed to failure can be reached only after what is tantamount to or approximates a full hearing, the appeal should ordinarily for purposes of considering bail be treated as an appeal which is arguable. The question is not whether the appeal “will succeed” but, on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment.<sup>7</sup>

### **Issus for determination**

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<sup>5</sup> State v Kilpin 1978 RLR 282, State v Mangange HH 01-03, State v Poshai HH 89-03, State v Ncube and Another HB 04-03.

<sup>6</sup> State v Hudson 1996 (1) SA CR 431 (W).

<sup>7</sup> See 1996 Bulletin of Zimbabwean Law No. 2 at p 48.

[23] The question I have to decide is whether this is a proper case for granting bail pending appeal regard being had to the relief sought in the notice of motion as well as what transpired in the court a quo.

### **Application of the principles to the case**

[24] As indicated above, at the hearing of this application, the parties unanimously asked this Court to consider reinstating the applicant's bail pending finalisation of the appeal itself. However, the issue is not as straightforward as that. The applicant filed this application asking, inter alia, leave to appeal. The state did not file any affidavit in answer to the applicant's application for leave to appeal in this Court. The State made common cause with the applicant. Section 8(1) of the **Court of Appeal Act**<sup>8</sup> reads:

"Any party to an appeal to the High Court may appeal to the Court against the High Court judgment, with leave of the judge of the High Court, or, when such leave is refused, with the leave of the Court on any ground of appeal which involves a question of law but not on a question of fact nor against severity of sentence"

[25] It is clear therefore that, even after an application for leave to appeal is dismissed by the High Court, the applicant can still approach this Court with an application for leave to appeal. It is another bite at the cherry for an unsuccessful litigant to have the refusal of its application for leave to appeal reconsidered by the Court of Appeal.

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<sup>8</sup> Court of Appeal Act No. 10 of 1978..

[26] For a single judge of this Court to sit and consider whether to reinstate the applicant's bail pending appeal, there must be a pending appeal filed before this Court. The applicant launched an application to this Court for leave to appeal. The applicant's leave to appeal is sought against the order in CRI/A/14/2014 delivered by His Lordship Sakoane J on 5 August 2020. The applicant deposes that, although he was not given an opportunity in the High Court to explain the delay in prosecuting his appeal, having lodged an appeal in the Berea Magistrate Court the clerk of court who in terms of the law was mandated to prepare the record and the clerk of court took two years to prepare the said record by typing it. which was an appeal from the Magistrate Court in the Berea district.

[27] In **Lira Motlomelo C. OF A. (CRI)NO.9 OF 1990** this Court held that only in the event of the High Court refusing leave to appeal could the Court of Appeal entertain an applicant's application for leave to appeal. In '**Malejone Mokemane v The Director of Public Prosecutions C. OF A. (CIV).NO.4/93**, this Court held that where it has a concern as to whether a miscarriage of justice has or has not occurred, it would be prepared to consider the matter under its powers of review. The appeal in this matter will be exercised by this Court under its powers of review.

[28] It is common cause that no hearing ever took place in respect of this appeal. This is a basis enough for this Court to entertain a concern as to whether a miscarriage of justice has or has not occurred. I have to not only consider the judgment and reasons for

divesting the applicant of his bail, but also consider the grounds of appeal advanced. The following are the grounds of appeal advanced:

Appellant attaches the following grounds of appeal to the Notice of Appeal.

-1-

The learned Judge erred and misdirected himself by ordering that the Appellant should immediately start serving sentence immediately dismissing his appeal without affording him a hearing on the merits of the appeal.

-2-

In the event this honourable court finds that the appeal was not dismissed the Learned Judge erred and misdirected himself in revoking the appellant's bail yet he was no in breach of any of the conditions of bail.

-3-

The Appellant reserves the right to file further grounds of appeal once there is written judgement.

[29] This application must thus consider all the factors alluded to by the applicant and determine whether there are reasonable prospects another court would find individually or cumulatively that he had shown exceptional circumstances which in the interests of justice warranted his release on bail pending appeal and whether it was in the interests of justice that he be released on bail pending appeal.

[30] In addition, if one considers the order of the Court a quo in its entirety and the unanimous explanation by the two Counsel who appeared before me representing both sides, as well as the uncontroverted averments contained in the applicant's founding affidavit, the personal circumstances of the applicant and his reasons

for seeking to be admitted to bail were considered holistically when determining whether or not he discharged the onus. This court was at pains to indicate that there is no “universal definition” applicable to the definition of “exceptional circumstances” and that the court exercises a discretion based on the facts of each individual matter.

[31] I find no negative grounds for not granting bail pending appeal as this matter is not determinative of the appeal itself. *in casu*. This is a case which calls for the applicant to prosecute his appeal whilst on bail as he had already been granted such bail pending the hearing of his appeal by the High Court. His right to liberty must be looked at in light of all the other factors, the most important factor being the prospects of success in the appeal as well as its ultimate finalisation by this Court or High Court.

[32] From the foregoing I am of the view that a case has been made for reinstatement of the applicant’s bail, hence my order aforementioned.



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**DR K E MOSITO**

**PRESIDENT OF THE COURT OF APPEAL**

**FOR THE APPLICANT:** ADV L D MOLAPO

**FOR THE RESPONDENT:** ADV S V THABA