

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

Reportable

CASE NO: 267/04

In the matter between:

BUYELEKHAYA DALINDYEBO

Applicant

And

THE STATE

Respondent

JUDGMENT

PAKADE J:-

[1] The applicant is the King of the AbaThembu Tribe, having a Great Place at Bumbane Royal Place in Tyalarha Farm, Mthatha.

[2] On 21 October 2009 he was convicted by this Court on charges of: One count of Culpable Homicide; Three counts of Arson; Three counts of Assault with intent to do grievous bodily harm; one count of defeating the ends of Justice and One count of Kidnapping. He was sentenced to an effective total term of (15) fifteen years Imprisonment for all the counts.

[3] With the leave of this Court he appealed against his conviction and sentence to the Supreme Court of Appeal and was granted bail pending appeal. The Appeal was prosecuted on 21 August 2015 and judgment delivered on 1 October 2015 in terms whereof the applicant was partly successful in that the appeal was allowed against conviction and sentence on the count of Culpable Homicide and both conviction and sentence thereon were set aside . The Appeal against conviction and sentence in respect of the rest of the charges was dismissed and sentences were confirmed. The confirmed sentences have the inevitably effect that the applicant should serve a term of (12) twelve years imprisonment.

[4] It was one of the conditions of bail he was granted pending appeal that he had to surrender himself to the SAPS Liaison Officer at the Director of Public Prosecutions, Mthatha within (14) fourteen days of the judgment by the Supreme Court of Appeal . The Judgment of the Supreme Court of Appeal, having been delivered on 1 October 2015, the fourteen day period expires on 21 October 2015.

[5] The applicant has now approached this Court on Notice of Motion to which he has attached a founding affidavit informing the Court that he intends to appeal against the judgment delivered by the Supreme Court of Appeal and that he had already given instructions to his legal team to prepare an application for leave to appeal and for direct access to the Constitutional Court. He further stated, under oath , that the application for leave to appeal will be filed with the Registrar of the Constitutional Court within (15) fifteen days, that is, on 22 October 2015 .

[6] In essence there is no appeal pending in the Constitutional Court as at the time the applicant seeks the extension of bail. Instead an application for leave to

appeal was filed in the Supreme Court of Appeal on 12 October 2015. Mr Cilliers SC, counsel for the applicant has informed me during the hearing of this matter that the Registrar of the Supreme Court of Appeal had informed the applicant's Attorney to file an application for leave to appeal directly in the Constitutional Court. In terms of Rule 19 of the Constitutional Court Rules Leave to Appeal has to be filed with the Registrar of the Constitutional Court within (15) fifteen days from the date of judgment, hence the applicant has instructed his legal team to file it on 22 October 2015. He now seeks the following relief pending appeal:

“1. That the bail of the applicant be extended pending the finalisation of an appeal by the applicant to the Constitutional Court of South Africa.

2. The following conditions will apply:

2.1 The same terms and conditions that applied with reference to the bail of the applicant pending the outcome of the appeal to the Supreme Court of Appeal will apply;

2.2 The applicant is further ordered to surrender himself to the SAPS Liaison Officer , at the offices of the Director of Public Prosecutions , Mthatha within 14 days of the judgment by the Constitutional Court on the appeal and /or the date on which the appeal is struck from the roll of the Constitutional Court and/ or in the event that leave to appeal to the Constitutional Court is refused by the Constitutional Court whichever event occurs first in order that effect may be given to any sentence in respect of these proceedings;

2.3 In the event that the applicant intends to leave the borders of South Africa , he shall first obtain the written permission from the Investigating officer, Superintendent Ndokwenu (telephone 082778503) [wrong no.] not less than 14 days before he is due to leave which permission will not unreasonably be withheld ;

2.4 The applicant is further ordered to file an application for leave to appeal against both his conviction and sentence to the Constitutional Court on or before 22nd of October 2015;

2.5 The bail is cancelled and a warrant for the arrest of the accused is issued immediately upon the latter failing to adhere to any of his bail conditions ".

[6] As already alluded to above, there is no application for leave to appeal launched and pending in the Constitutional Court. Mr Carpenter, together with Mrs Majova, counsel for the state has submitted that on this basis this court has no jurisdiction to entertain bail application. In developing his argument on this point, Mr Carpenter submitted that by operation of the precedent system this Court is bound by the judgment of the Supreme Court of Appeal and for this reason it cannot suspend the judgment of the Appeal Court by granting bail to the applicant when the Appeal Court had directed that the applicant should serve the sentences. Further this Court is *functus officio*, so goes the submission of Mr Carpenter.

[7] I have already alluded above to the fact that the applicant has stated under oath that he has made a decision to appeal against the judgment of the Supreme Court of Appeal. The applicant has stated in his founding affidavit that in compliance with Rule 19 of the Constitutional Court Rules he has given

instruction to his legal team to prepare and file an application for leave to appeal to the Constitutional Court and his application for direct access to that Court will be filed within the prescribed period of (15) fifteen days from 1 October 2015. He still has time to file the application for leave to appeal and as long as the time prescribed by the Rules of the Constitutional Court has not prescribed he has a right to launch an application for the Extension of his bail pending appeal to that Court.

[8] The submission relating to *functus officio* has a bearing on the facts of the case which are not before me. Those facts served before the trial court at the time it made an order releasing the applicant on bail pending appeal to the Supreme Court of Appeal. The trial court found that those facts constitute prospect of success on appeal and granted leave to appeal and bail pending appeal. This Court is not *functus officio* on those facts and is entitled to take them into consideration in deciding whether to extend bail or not. In having resort to them , this Court will not either be traversing on the judgment of the Supreme Court of Appeal because that Court did not consider the prospects of success if the applicant were to wish to appeal further to the Constitutional Court. To the extent that the Supreme Court of Appeal did not consider the prospects of success and extension of bail pending appeal, this Court must consider them. The finding of the trial court on prospects of success has not been affected by the judgment of the Supreme Court of Appeal. They remain intact and are as valid and relevant now in the same way they were when the appellant was granted leave to appeal and bail pending appeal to the Supreme Court of Appeal. The State has not produced new facts which change would enable me to decide differently on prospects of success. The answering affidavit opposing bail has not brought about any new material such as that, the applicant is a flight risk, has committed other offences while on bail or is threatening the witnesses who testified against him in the trial. The answering affidavit deposed

to by one of the Deputy Directors of Public Prosecutions merely regurgitates certain legal provisions, in particular the provisions of the Criminal Procedure Act, 51 of 1977 and is to a very large extent argumentative. It does not raise essential material issues but a duplication of the State's heads of argument.

[9] The next point on this issue is whether this Court does not have jurisdiction to entertain this application as further contended for by the State. Mr Carpenter has referred to section 321(1) (b) of the Criminal Procedure Act, 51 of 1977 and submitted that this Court is not the Superior Court from which the appeal is made as envisaged in this subsection, which can order the release of the accused on bail pending appeal. The section needs reproduction in order to comprehend the submission made by Mr Carpenter. It reads as follows:

“321 When execution of sentence may be suspended.

(1) The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal , unless -

(a)

(b) The superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused be released on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided :".

[10] This submission of the state is framed as though bail pending appeal can only be considered in terms of the Criminal Procedure Act, 51 of 1977. It overlooks the fact that it may also be considered outside the perimeters of the

Criminal Procedure Act. It overlooks the trite law that the High Court has an inherent jurisdiction to deal with any matter including bail application even if it is not brought within the ambit of the Criminal Procedure Act (**Veenendal v Minister of Justice**¹. Mohamed J's dictum is instructive in this respect . He clarified to me what has been bothering me until Mr Cilliers referred to this judgment. Mohamed J said and I agree with him:

" Dealing first with the question of jurisdiction, I had initially questioned whether this Court did indeed have the jurisdiction to grant bail where there were no statutory provisions authorizing such a course . Whatever the validity of my initial doubts might have been counsel for the applicant has drawn my attention to a judgment of the Full Court of this Division in the case of S v Hlongwane 1989(4)SA 19 (T) as authority for the proposition that the Court does indeed have an inherent jurisdiction to grant bail in appropriate circumstances . More particularly in Hlongwane ' s case the court expressly approved a previous judgment by my Brother Harms where he had held that a court indeed had an inherent jurisdiction to grant bail i circumstances substantially similar and not identical because there was indeed an appeal pending in the case before Harms J to which reference is made i Hlongwane's case. I do not think , however , that that distinction affects the principle behind the Court's finding i Hlongwane's case and I am accordingly of the view that , notwithstanding the fact that no appeal is presently pending in the case of the applicant , I have an inherent jurisdiction to grant bail " .

This judgment was approved and applied by Madlanga AJ (as he then was) in **Zaire v Minister of Home Affairs**² where he found that the applicants were entitled to release , even in the absence of an empowering statutory provision ,

¹ 1993(2)SA 137 (T)

² 2012(3)SA 90

but only pending the finalisation of the applications and on condition of payment of bail . Madlanga AJ upheld the principle that in the absence of empowering statutory provision justifying the release of a person from detention, the court can invoke its inherent power to release him or her. This becomes clear from page 93 of his judgment when he said:

“Even though the instant matters relate to arrest and detention in the context of pending deportations in terms of the Immigration Act, I do not find that to be a basis for distinction. The plain point made in other cases is that the court exercises its power in terms of its inherent jurisdiction. That is an inherent power that I too surely have ”.

[11] This is the power that I surely have too in the present application, to use inherent jurisdiction of this Court to extend bail of the applicant pending appeal to the Constitutional Court.

[12] I cannot disturb the finding of the trial court on the prospects of success on appeal to the Supreme Court of Appeal. The applicant has partially succeeded on appeal to the Supreme Court of Appeal in the most serious count of culpable homicide and a sentence of ten years imprisonment imposed by the trial court was set aside. I can only, without further ado, merely extend the finding on prospects of success to be prospects of success of appeal to the Constitutional Court. There is, in my view, a real likelihood that the Constitutional Court may interfere with the sentence on the basis of the delay in bringing the applicant to justice coupled with the undue delay in finalising the matter. A period of twenty years has elapsed since the commission of the offences in 1995. The applicant has been saddled with this case for about ten years after his arrest. The interest of justice will not have been best served if the applicant is refused bail , serves his sentence and thereafter the Constitutional Court interferes with the sentence

either by suspending the sentence or granting him an option of a fine . Anything is possible in Court.

[13] Mr Carpenter further submitted that although there are no grounds of appeal placed before this Court the aspects on which the applicant desires to appeal to the Constitutional Court, as gleaned from his founding affidavit fall out of the scope of matters the Constitutional Court is enjoined to hear by section 167(3) (b) of the Seventeenth Amendment Act of 2012 and on this basis leave to appeal will not be entertained by the Constitutional Court.

[14] Section 167(3) (b) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) gives jurisdiction to the Constitutional Court. Section 3 thereof provides that the Constitutional Court –

“(b) may decide -

(i) constitutional matters ; and

(ii) any matter , if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court ; and

(c) make a final decision whether a matter is within its jurisdiction”.

[15] The applicant has attached to his founding affidavit, a copy of his application for leave to appeal to the Constitutional Court which embodies some of the grounds of appeal. One of those grounds is that the Supreme Court of Appeal erred in not finding that his right to a fair trial , in particular his Constitutional right to be tried within a reasonable time (in terms of s.35(3)(d) of the Constitution of the Republic of South Africa , Act 108 of 1996) had not been infringed . In my view there is no doubt that this is a constitutional ground because, as I have already alluded to above, a considerable time of about twenty

years has elapsed before the matter was finalised. It cannot be reasonably envisaged that the Constitutional Court may reject this ground as not being a constitutional ground. This is a special Court on constitutional matters and there is a real likelihood that it may take a completely different view on this ground from that taken by the Supreme Court of Appeal.

The other grounds are of a general nature and the Constitutional Court may find that they raise an arguable point of law of general public importance which ought to be considered by it. The application for leave to appeal with exhaustive ground of appeal is still being prepared and Mr Cilliers had so informed me in the hearing of this matter.

[16] There is no danger that the applicant may evade justice and not serve his sentence if the Constitutional Court does not grant him leave to appeal to it or having granted him leave to appeal, dismisses the appeal. For twenty years or over the applicant stood trial. In fact he is a permanent resident of Bumbane Great Place and a King over the Aba Thembu tribe. It would be naive to think that a King can abandon his Kingdom under whatever circumstances.

[17] In the circumstances, the application succeeds and the following order is made:

1. That the bail granted to the applicant by the trial Court pending Appeal to the Supreme Court of Appeal is hereby extended pending the finalisation of appeal by the applicant to the Constitutional Court ;
2. That the extension of bail is subject to the following conditions:

2.1 The same terms and conditions that prevailed to the bail of the applicant pending the outcome of appeal to the Supreme Court of Appeal shall apply;

2.2 The applicant is further ordered to surrender himself to the Head of Mthatha Correctional Service within 14 days of the judgment by the Constitutional Court appeal and/or the date of which the appeal is struck from the roll of the Constitutional Court and/or in the event that leave to appeal to the Constitutional Court is refused by the Constitutional Court, whichever occurs first, in order that effect may be given to any sentence in respect of these proceedings;

2.3 In the event that the applicant intends to leave the borders of South Africa, he shall first obtain the written permission from the Investigating Officer, Superintendent Ndokwenu, (who must furnish the applicant forthwith with his contact telephone numbers) not less than 14 days before he is due to leave, which permission will not be unreasonably withheld;

2.4 The applicant is further ordered to file an application for leave to appeal against both his conviction and sentence to the Constitutional Court, on or before 22 October 2015;

2.5 The bail is cancelled and a warrant for the arrest of the applicant is issued immediately upon him failing to adhere to any of his bail conditions.

L.P. Pakade

JUDGE OF THE HIGH COURT

For the Applicant : **Adv Cilliers**
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For the Respondent : **Adv Carpenter with Adv Majova**
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Date Heard : **14 October 2015**
Date Delivered : **16 October 2015**