IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case Number: AR507/13

In the review matter of:-

THE STATE

Vs

MFANAFUTHI HEZEKIA HLONGWANE Accused 1

PHILLIP LUCKY VILAKAZI Accused 2

NTOMBIZODWA HLONGWANE Accused 3

JUDGMENT

VAN ZÿL, J.:-

1. This is a matter which was referred by the Regional Magistrate, Ladysmith as a special review to the High Court. It concerns the jurisdiction of the regional court to consider and if appropriate, to grant bail to a convicted offender after having refused leave to appeal and pending petition to the Judge President for leave to appeal.

2. The Regional Magistrate is of the view that an appeal can only be noted in terms of s309(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) once leave to appeal has been granted upon petition by the Judge President in terms of s309C. Once leave to appeal is granted, then only do the provisions of s307(1), read with section 309(4)(b), permit consideration of the release of the appellant on bail pending adjudication of the appeal.

3. In the opinion of the Regional Magistrate the accused cannot note an appeal for purposes of section 309(4)(b) before leave to appeal is granted, as contemplated in section 309(1)(a) of the CPA. Until such time as the appeal is noted, the only possibility for an application for bail to be brought pending the outcome of the petition proceedings is to apply to the High Court, but only after the petition has been lodged with the Registrar of the High Court. In this regard the Regional Magistrate disagreed with the reported decision of S v Potgieter 2000 (1) SACR 578(W) which, in his view, was incorrectly decided.

4. Upon the approach contended for by the Regional Magistrate a convicted offender therefore has no right to apply for his release on bail between the time when the Regional Magistrate refuses leave to appeal and until such time as the petition for leave is lodged with the Registrar of the High Court. One gathers that in the view of the Regional Magistrate, once the petition has been lodged, the High Court would be able to exercise jurisdiction to consider any

application for bail, whether in terms of section 60(1)(b) of the CPA or in terms of its common law powers more fully referred to below.

5. When the matter first came before me as a special review it appeared to me the jurisdiction of the magistrates' courts to consider bail pending petition was in issue and that the matter was of sufficient importance for it to be argued in open court, as was directed by the Deputy Judge President in S v Mzatho and Others 2007 (2) SACR 309 (T) at Para 8 of the reported judgment. I accordingly wrote to the Deputy Judge President of this Division, who thereupon issued a direction in similar terms.

6. At the outset of his address Mr Sankar, who appeared for the State, questioned whether the matter was properly before the Court by way of special review. Counsel submitted in effect the Regional Magistrate was merely seeking advice or an opinion and that this Court should refuse to entertain the matter on that basis because, by considering the matter on the merits, an unfortunate precedent might be created. Counsel submitted that the accused have a remedy in that they may seek to appeal the Regional Magistrate's decision not to entertain his application for bail.

7. It seems to me that the High Courts, in matters of review, have a wide discretion. Section 304(4) of the CPA provides that;

> "*(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.*"

8. The powers conferred upon the High Court in terms of section 302(4)(c) include to confirm, alter or quash the conviction, or to confirm, reduce, alter or set aside the sentence or any order of the magistrate's court, to set aside or to correct the proceedings of the magistrate's court and generally to give such judgment or to impose such a sentence or make such an order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question. It may also remit the case to the magistrate's court with instructions to deal with the matter in such manner as may be directed. The High Court may also order the suspension of any sentence against the person convicted or the admission of such person to bail. Generally the High Court is empowered, with regard to any matter or thing connected with such proceedings, to make such an order as to the court seems likely to promote the ends of justice.

9. In my view, once the Regional Magistrate had referred the matter to the High Court for consideration and it had come to the knowledge of the latter, then the jurisdictional requirements for its consideration

have been satisfied, should the High Court consider it in the interests of justice to do so. To arrive at a decision in this regard it is necessary to give consideration to the merits.

10. It appears that the difficulty has its origins in the legislative amendments imposing the requirement of leave to appeal upon the lower courts. Previously a convicted accused person in the magistrates' courts could as of right forthwith note an appeal with the Clerk of the Court of first instance. The position finally changed with the amending provisions of the Criminal Amendment Act 42 of 2003, which commenced with effect from 1 January 2004. These provisions, relevant to the requirement for leave to appeal a conviction or sentence from the lower courts to the High Court, survived a constitutional challenge and was confirmed by the Constitutional Court in S v Shinga (Society of Advocates (Pietermaritzburg) as Amicus Curiae) , S v O'Connell and Others 2007 (2) SACR 28 (CC).

11. In the result a convicted accused person is only able to pursue his or her appeal once leave to appeal has been obtained, either from the trial court in terms of section 309B or, failing that, then upon petition from the Judge President in terms of section 309C. Having obtained leave, the appellant is then able to pursue the appeal and such appellant is also able to apply for bail pending the outcome of the appeal.

12. However, a difficulty arose where leave to appeal was refused. In S v Hlongwane 1989 (4) SA 79 (T) it was held that section 60 of the CPA regulates the granting of bail pending finalisation of a trial in the High Court. In respect of bail pending a petition to the Supreme Court of Appeal it held that the High Court has the common law power to release a would-be appellant on bail pending the outcome thereof. That approach has since been consistently followed (See: Crossberg v S [2007] SCA 93 at para 14; S v Tsotsi 2004 (2) SACR 273 (E) at para 5).

13. It is interesting to note that subsequent to Hlongwane (supra) section 309(5) was introduced by section 13 of Act 75 of 1995. In terms thereof a provincial or local division of the High Court which gives a decision on appeal to it against a decision of the magistrate's court and where the former decision is then appealed against, such division of the High Court is conferred with the same powers in respect of the granting of bail pending such further appeal which a magistrate's court has in terms of section 307 of the CPA.

14. The difficulty in the present matter arises from the fact that the conviction and sentence sought to be appealed against is that of the Regional Court, as opposed to the High Court. The Regional Magistrate took the view that the provisions of section 309(4)(b), activating as they do the provisions of section 307, only applied once leave to appeal had been granted. In this regard he relied upon the

wording of section 309(1)(a) which requires the granting of leave in order to appeal the conviction and/or sentence.

15. Counsel for the State submitted that insofar as the introduction of the requirement of leave to appeal has resulted in a *lacuna* in the CPA, whereby a convicted offender is deprived of the ability to apply for bail between the time of the refusal by the Magistrate of leave to appeal and the time by when he is able to lodge a petition to the Judge President for leave, this was a matter for legislative intervention.

16. Mr Barnard, who appeared at the request of the Court as *amicus curiae* and to whom we are greatly indebted for his assistance, as well as for his comprehensive written argument, submitted that it was eminently more practical to have the court of first instance deliberate and decide upon the issue of bail pending petition. This was so because such court would be more familiar with the circumstances of the case, including the personal circumstances of the petitioner for leave to appeal and it would thus be best suited to determine whether bail pending petition should be granted or refused.

17. Conversely, so counsel submitted, the organisational structure of the High Courts was not well suited to accommodate the potential volume of petitioners applying for bail at the time of lodging their petitions for leave to appeal. Unlike the trial magistrate the judges dealing with the petition would not be familiar with the background of the matter and

would first need to read and consider the record of the trial proceedings before dealing with the application for bail pending the outcome of the petition. This would unduly burden the High Court and cause unnecessary delays in processing matters of this nature.

18. Mr Barnard quite correctly conceded that the Magistrates' Courts, as creatures of statute, did not have the same inherent or common law powers as the High Courts and that the CPA does not expressly appear to deal with the issue of bail pending petition to the Judge President.

19. Against this backdrop counsel stressed that the provisions of the CPA also did not prohibit the consideration of such bail applications by the trial magistrate. Consequently, so counsel submitted, if the CPA did not provide for the consideration of bail pending presentation of a petition, then the Regional Magistrate should have considered the wider ambit of the constitutional protection of personal liberty, as contained in section 12 of the Bill of Rights.

20. However, before embarking upon an analysis of the constitutional imperatives relevant to the issue of bail pending presentation of the petition, it seems to me necessary to consider whether the Regional Magistrate is indeed correct in his view (as set out in para 3 above) that the CPA, properly construed, does not provide for the consideration of such bail by the trial magistrate.

21. In Nedbank Limited and Others v National Credit Regulator and Another 2011 (3) SA 581 (SCA), Malan JA in para 38 at page 601 I – 602 C and in relation to the interpretation of provisions of the National Credit Act 34 of 2005, remarked that:-

> "*The rule of interpretation is that a statutory provision should not be interpreted so as to alter the common law more than is necessary unless the intention to do so is clearly reflected in the enactment, whether expressly or by necessary implication: '[I]t is a sound rule to construe a statute in conformity with the common-law, save where and insofar as the statute itself evidences a plain intention on the part of the Legislature to alter the common-law. In the latter case the presumption is that the Legislature did not intend to modify the common-law to any extent greater than is provided in express terms or is a necessary inference from the provisions of the enactment.' (80)*"
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> (Footnotes omitted)

22. In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18, Wallis JA summarised the proper approach to statutory interpretation as follows:-

> "*The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.*[1] *The process is objective not*

[1] Described by Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98 as an iterative process. The expression has been approved by Lord Mance SCJ in the appeal *Re Sigma Finance Corp*

subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',[2] read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

(Footnotes reflected below)

23. Effectively, what counsel for the State contends for amounts to the following. There exists an omission from the CPA, as amended by the inclusion of the requirement for leave to appeal first to be obtained before the appeal of the petitioner can be prosecuted. Such omission comprises the lack of any provision for bail to be granted, from the point where the trial court refuses leave to appeal and until the petitioner is able to lodge his or her petition at the High Court. Such omission should however be tolerated until and unless there is legislative intervention.

24. If indeed there exists such an omission, then the courts are required, in terms of section 36(2) of the Constitution, 1996, to develop the common law and also to promote the spirit, purport and objects of the Bill of Rights. In Carmichele v Minister of Safety & Security (Centre for

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(in administrative receivership) Re the Insolvency Act 1986 [2010] 1 All ER 571 (SC) para 12 and by Lord Clarke SCJ in *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50; [2012] Lloyds Rep 34 (SC) para 28. See the article by Lord Grabiner QC 'The Iterative Process of Contractual Interpretation' (2012) 128 *LQR* 41.

[2] Per Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98. The importance of the words used was stressed by this court in *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* 2011 (3) SA 148 (SCA) paras 25 to 30.

Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) at para 39 the Constitutional Court held that:-

> "*It needs to be stressed that the obligation of Courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the Courts are under a general obligation to develop it appropriately.*"

25. In the present matter, accepting that there exists a *lacuna* or a *casus omissus,* as it was put in S v Hlongwane (supra) at page 84D, in the CPA, then it appears that the matter needs to be resolved by resort to interpretation and failing that, then to either a declaration of constitutional invalidity or leaving it to the legislature to remedy. The starting point would be to resolve, if possible, the difficulty through appropriate interpretation, in preference to the more drastic alternatives referred to above.

26. The Regional Magistrate stated that in his view the provisions of section 309(1) should be used as the "*point of departure*", as opposed to the provisions of section 309(4)(b) and on that approach his reasoning should be sustained. However, the Regional Magistrate's approach appears to be based upon his view that "*The granting of such an application* (for leave to appeal)*, in my opinion, is a prerequisite and*

can the provisions of section 309(4)(b) not find application until such time as the High Court has granted an application for leave to appeal."

27. In his reasons the Regional Magistrate refers to the passage from S v Potgieter (supra) where at page 584 C-D Cloete J observed that:-

> "*Furthermore, s 309(4)(b) does not provide that the application must be successful before the magistrate is empowered to grant bail pending appeal - all that is required is that the application for leave to appeal against conviction and/or sentence must be 'noted', which is a quite different concept.*"

The Regional Magistrate then criticises this approach as using section 309(4)(b), as opposed to section 309(1), at the point of departure.

28. When comparing the two subsections it immediately becomes apparent that the Legislature referred in section 309(1) to the ability to proceed with the appeal as being conditional upon or subject to leave to appeal having been obtained, whether from the trial court in terms of section 309B, or from the Judge President upon petition in terms of section 309C. The subsection is by no means exhaustive because notionally, if the petition to the Judge President were to fail, the petitioner could with the requisite leave still obtain leave from the Supreme Court of Appeal. What the subsection conveys, to my mind, is that the procedure of processing the appeal itself cannot proceed

unless and until leave has been obtained. In principle that proposition is constitutionally unassailable (See: S v Shinga (supra) at para 51).

29. If reference is had to the provisions of section 309B(3)(b) it is apparent that the section contemplates, as one of the possible approaches, the making of an oral application for leave to appeal immediately after the passing of sentence. It would not be unusual for such an application then to be adjourned to a suitable future date for argument. In such an event the procedure may conveniently be described as the application having been noted and then adjourned for argument. What the "noting" establishes is that an application for leave to appeal has commenced, to be completed at a later stage. But the appeal itself remains suspended pending the requirement of leave to appeal being satisfied.

30. Whereas section 309(1)(a) uses the words "*appeal against …*", section 309(4)(b) uses the words "*When an appeal under this section is noted, …*". Arguably the appeal process commences with notice that the appellant intends to appeal. Such notice is in the form of advising that leave will be sought, thus initiating the appeal procedure. That procedure may terminate prior to the appeal being heard for a variety of reasons, including the appellant changing his or her mind and later deciding to abide by the conviction and/or sentence, or the failure of the application for leave, or the petition for leave, as the case may be.

31. In my view the Legislature advisedly in section 309(4)(b) used the word "*noted"* to distinguish its effects from the situation postulated by the Regional Magistrate, namely that the appeal first had to be "*authorised*", "*approved*" or "*permitted*" by the granting of leave to appeal. The language is arguably consistent with the intention to bring the enabling provisions of section 309(4)(b) into play as soon as the appeal process has been initiated.

32. I am of the opinion that such an approach to the interpretation of section 309(4)(b) would avoid the *lacuna* in the CPA earlier referred to, would present a practical way of dealing with the issue of the entitlement of a sentenced offender to be able forthwith to approach the trial court for the consideration of bail pending the final outcome of the appeal process thus initiated, including the process of petitioning for leave.

33. In my view such an approach would have the further advantage that the trial court is already familiar with most of the facts and circumstances relevant to the determination of the application for bail. In the process it would further satisfy a number of constitutional imperatives, such as not being deprived of freedom without just cause and not being detained without trial (section 12(1) of the Constitution); the right of having access to a court (section 34); the right to be to be released from detention, if the interests of justice

permit and subject to reasonable conditions (section 35(1)(f)) and the right of appeal to, or review by, a higher court (Section 35(3)(o).

34. It should also be remembered that the Constitution provides in section 36(2) that, except as provided in subsection 36(1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights and that in section 39(2) it provides that when interpreting any legislation and when developing the common law or customary law every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

35. It is also not without significance that section 309(5), read with section 321 of the CPA, confer largely similar powers upon the High Court, in addition to its common law powers, to control events following the noting of an appeal.

36. A different approach, but which would equally be consistent with the issues under consideration in the present matter, was taken in S v Mzatho and Others 2007 (2) SACR 309 (T). Under consideration in that matter was the ability of a Regional Magistrate to refer an accused person to the Magistrate for the hearing of a bail application pending trial, but after the matter had been transferred from the district court to the regional court for trial.

37. Section 60(1)(b) of the CPA provides that:-

> "*(b) Subject to the provisions of section 50 (6) (c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.*"

38. The "*predicament*" which the court had to resolve was that if the section had the effect of barring a higher Court (being a court above a magistrate's court) from referring a bail application to a lower court for consideration, certain difficulties arose. The court in Mzatho held in para 22 that there was no clear provision in the CPA prohibiting a regional court from referring a bail application to a magistrate's court for hearing, but equally that there was no clear provision authorising such a procedure.

39. The Court expressed itself as follows on the topic of the constitutional need to grant appropriate relief in circumstances where no clear remedy presented itself. Thus the court in Mzatho at para 32 said that:-

> "*In Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) (1997 (7) BCLR 851) the following was said about 'appropriate relief' at 799F - H:*
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> *'Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'*
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> *And at 836B - D the following is stated:*
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> *'Once the object of the relief in s 7(4)(a)* (of the Interim Constitution) *has been determined, the meaning of "appropriate relief" follows as a matter of*

course. When something is appropriate it is "specially fitted or suitable". Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in ch 3. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate.'

40. In the result the court issued a declaratory order that a regional court, confronted with a bail application which in the opinion of the presiding regional magistrate it could not entertain, had the power to refer the bail application to a lower court if such referral would, in the opinion of the presiding regional magistrate, be in the interests of justice and serve to protect the fundamental rights of the applicant for bail as entrenched in the Constitution. (at page 321 H).

41. In my view similar considerations apply in the present matter for the protection of the rights of sentenced applicants for leave to appeal from the magistrates' and regional courts in terms of section 309B, as well as petitioners for leave to appeal in terms of section 309C.

42. The provisions of section 309(4)(b), insofar as they may be ambiguous, should be read so as to apply as soon as the application for leave to appeal and the grounds therefore have been orally noted before the trial magistrate immediately after the passing of sentence (as per section 309B(3)(b) of the CPA). If not so orally noted, then the provisions of section 309(4)(b) should be read as applying as soon as the grounds of appeal have been filed, thus noting the application for

leave to appeal in terms of section 309B (See: S v Potgieter (supra) at page 584C).

43. Where the trial court refuses leave to appeal and the petitioner formally records, or subsequently files a notice to the effect that he or she intends pursuing the issue of leave to appeal by way of petition to the Judge President in terms of section 309C, the appeal remains pending and the provisions of section 309(4)(b) continue to apply, at least for the time period, or extended time periods, contemplated in section 309C(2)(b).

44. It follows that I respectfully disagree with the views expressed by the Regional Magistrate and that I consider that he should have interpreted section 309(4)(b) of the CPA in the light of the constitutional imperatives to which I have referred above.

45. In the circumstances I would propose that a declaratory order issue as is set out here below, namely that:-

It is declared that the provisions of section 309(4)(b) of the Criminal Procedure Act 51 of 1977 (the Act), properly construed:-

a. Come into operation as soon as;

i. an application in terms of section 309B for leave to appeal and the grounds therefore have been orally noted before

the trial magistrate immediately after the passing of sentence; or

ii. if not so orally noted, then as soon as the grounds of appeal have been filed, thus noting the application for leave to appeal.

b. Remain in operation;

i. where the trial court in terms of section 309B refuses leave to appeal; and

ii. the petitioner formally records, or subsequently files a formal notice to the effect that he or she intends pursuing the issue of leave to appeal by way of petition to the Judge President in terms of section 309C;

iii. the appeal thus remains pending;

aa. until the delivery of the petition within the time period, or extended time period(s) contemplated in section 309C(2)(b); and

bb. once delivered, until the final determination of the petition for leave to appeal and if successful, then the appeal itself.

c. While the provisions of section 309(4)(b) of the Act are in operation the Magistrate, or Regional Magistrate in the trial court is competent to hear and decide any application for bail pending the final outcome of the application for leave to appeal;

i. by the applicant for leave to appeal in terms of section 309B; and

ii. the petitioner for leave to appeal in terms of section 309C of the Act.

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VAN ZYL, J.

I agree.

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SEEGOBIN, J.

CASE INFORMATION

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As Amicus Curiae:	Adv L Barnard Pietermaritzburg Bar Pietermaritzburg.
Date of Hearing:	11 December 2013
Date of Judgment:	28 January 2015