



**N THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A332/13

In the matter between

FAZLIN ABDURADUGHMAN

APPLICANT

AND

THE STATE

RESPONDENT

Date of Hearing: 08 June 2022

Date of Judgment: 19 July May 2022 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is an opposed application in which the applicant seeks an order wherein an order made on 14 May 2020, in which she was granted bail, be extended, alternatively that she be granted bail in the amount of R2500-00 pending the outcome of her application for special leave to appeal to the Supreme Court of Appeal (SCA) and an order that any warrant that may have been issued against her be cancelled. The bail pending petition follows a pending warrant of surrender issued by the Regional Court for the immediate arrest of the applicant due to her failure to prosecute the appeal to the SCA.

[2] The respondent's case was that the applicant's bail extension lapsed and that the applicant was in contempt of the order to surrender herself immediately after failing to prosecute the appeal timeously. In the alternative, the respondent's case was that the applicant engineered the delay in prosecuting the appeal since 2013 and must surrender herself immediately whilst prosecuting the appeal to the SCA. In the further alternative the respondent's case was that there was a likelihood that the applicant if continued to be released on bail will attempt to evade her trial as envisaged in section 60(4)(b) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA).

[3] The issue is whether the applicant's bail should be further extended pending her petition.

[4] The applicant was convicted in 2013, of murder committed in 2008, and was sentenced to 6 years imprisonment in 2013. On appeal against both conviction and sentence in 2016, the Western Cape High Court confirmed the conviction and altered the sentence and imposed 10 years imprisonment. The applicant was twice previously granted bail by the Western Cape High Court pending the outcome of her application to the SCA for special leave to appeal. The applicant first filed her application for condonation and special leave to appeal to the SCA on 7 February 2017 and in May that year the respondent filed its Notice to oppose the applications. The first bail was granted on 22 November 2016 and the bail was extended on 14 May 2020.

[5] The applicant served copies of the applications to the SCA on the respondent and the Registrar of this Court on both occasions, and on both occasions the applications were forwarded to her correspondent attorneys in Bloemfontein. On both occasions, the Registrar of the SCA refused to accept the applicant's papers due to some technical non-compliance with the Rules or Practice Directives of that court. On each of those occasions, when the problems were identified, the applicant attended to the problem and attempted to serve and file at the SCA.

[6] The period between May 2017 and November 2019 there was a delay in the prosecution of the appeal after the first bail. The respondent applied for the

surrender of the applicant on 28 November 2019 as a result of the inaction. The warrant was issued, which caused the applicant to file a notice of motion for bail on 13 May 2020 which led to the second decision which extended the bail. The respondent filed its notice to oppose the petition leave then sought, on 6 May 2021. In January 2022 the respondent learned from the SCA that no application was received and issued, which led to the application on 29 March 2022 for the notice to surrender warrant for the immediate arrest of the applicant, which led to this application. The main difference between the two previous applications and this application, is that the application was accepted by the SCA on 4 May 2022.

[7] In *Pharmaceutical Society of SA v Tshabalala-Msimang and Another* NNO 2005 (3) SA 238 (SCA) at para 31 it was said:

“The Supreme Court Act assumes that the judicial system will operate properly and that a ruling of either aye or nay will follow within a reasonable time.”

The failure of the applicant to prosecute her appeal within a reasonable time interferes with the administration of justice, in particular it frustrates the execution of a sentence already imposed on her. It is against this background that there is a need for an appellant or a prospective appellant to explain the delay. The Court said further in para 31:

“Courts have a constitutional duty to protect their processes and to ensure that parties who in principle have the right to approach it, should not be prevented by an unreasonable delay ...”

[8] On the other hand, where the conduct of an appellant or a prospective appellant suggests that the right to appeal is abused and amounts to a deliberate obstructionism through inexplicable inaction, the court may be compelled to intervene in its obligation to do justice. It follows that where the court finds that there was undue delay and the lack of explanation, the delay may be so unreasonable to be interpreted as a constructive disinterest in pursuing the appeal [*Pharmaceutical* para 38]. This is moreso because judicial management reveals that the filing of an appeal against the conviction and sentence, and the failure to pursue same once bail has been granted, has become one of the inadequacies in the law through which a number of criminals escape serving their sentences.

[9] A long delay in dealing with an application for leave to appeal against a conviction and sentence may result in the miscarriage of justice [*Minister of Health v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 68]. At para 69 it was said:

“The delay need not be deliberate. The fact that there has been an unreasonable delay is sufficient in itself to entitle an appeal Court to make such a finding.”

The finding referred to, is that of interpreting the delay constructively. The Constitutional Court however cautioned that such constructive interpretation should be the last resort [at para 71]. What constitutes an unreasonable delay depends on the circumstances [the end of para 71]

[10] At para 72 it was said:

“[72] Superior Courts have an inherent right to regulate and protect their own process. In the exercise of this power they can decide whether or not to grant an application based on a constructive refusal of leave to appeal, and to penalize a litigant by a costs order where such an application is wrongly brought.”

It is not clear to me whether blame can be laid at the feet of the applicant alone or at the failure of her legal representatives, or both, to see to the proper and timeous filing of her application for special leave to appeal to the SCA. She relied on the professional services of her attorneys and their correspondents. Under the circumstances it is difficult to assess the extent of the contribution of her own conduct, as regards the delay. I am unable to conclude, as a last resort, that her motive was not to pursue the appeal.

[11] For these reasons I make the following order:

1. The applicant's bail is extended on the same conditions as that set out in the order of Parker J dated 22 November 2016.
2. The date of the issue of the warrant in clause 2.5 of the order of 22 November 2016 shall read 29 March 2022.
3. The further condition added to the conditions of 22 November 2016, is that the applicant is ordered to report, in writing to the respondent, every three months from the date of this order, the status and progress of her pending application, and if successful, the appeal.

DM THULARE
JUDGE OF THE HIGH COURT