

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 08389/2018

DATE: 2018-03-09

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

DATE

SIGNATURE

10 In the matter between

PATRICK GARY PORRIT

1ST Applicant

Versus

THE STATE

Respondent

20 **Summary:** Criminal Procedure – Bail. The cancellation of bail is appealable. Once leave to appeal is granted, an accused is not entitled to approach the civil courts for his release pending appeal. The criminal justice system is distinct from the civil justice system and release from custody must be dealt with under the Criminal Law and Procedure provisions.

JUDGMENT

WEPENER, J:

[1] The applicant launched an urgent application in which he sought a declaration that an order issued by Spilg J be suspended pending the hearing of his appeal against that order.

[2] The effect of the order will be to allow the applicant's bail to be
10 reinstated prior to it being ordered by Spilg J, that the bail of the applicant be cancelled and that he be held in custody, unless a court decides to grant him bail under a fresh application. The applicant brought such a fresh application before Monama J, but the application was refused. In the meantime the applicant was granted leave, by the Supreme Court of Appeal, to appeal the order issued by Spilg J.

[3] Counsel for the applicant submitted that the common law rule that an appeal suspends an order, should apply and that due to the leave to appeal granted by the Supreme Court of Appeal, the order of Spilg J is suspended and that the applicant should be placed in the same position
20 as prior to the order of Spilg J, *i.e.* that his bail be reinstated on the same terms and conditions as were applicable before his bail was cancelled.

[4] I indicated to counsel during argument that the case had all the hallmarks of a bail matter, in particular a bail appeal. The application is aimed at securing the release of the applicant on bail. Although counsel for the applicant distanced himself from such terminology, I remain of

the view that the matter has all the hallmarks of a bail application or bail appeal.

[5] In this regard a reference to the dictum of Trollip JA by Vivier AJA in *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) at 224e, whilst referring to a bail appeal, is apposite:

10 “[I]t would seem at the first blush that the proceedings are civil. In that event the decision of the WLD thereon would be appealable to the Full Court of the Transvaal Provincial Division (“TPD”) and not direct to this Court, unless the parties consent thereto in writing (see s 20(1)(a) and (3) of the Supreme Court Act). However, the proceedings under s 97 of the Code originate in and are closely associated with the accused arrest, detention and prosecution for a criminal offence. Hence, although they are civil in form, they are criminal in substance, and must be so regarded for purposes of the relevant sections of the Supreme Court Act.”

20 [6] The applicant seeks relief from an order which originates in the criminal court before Spilg J. In this regard it was held in *Sita and Another v Olivier NO and Another* 1967 (2) SA 442 (A) at 449D as follows:

 “That leave sought was, despite the form in which it was sought, in effect an appeal against the regional magistrate’s decision on a question of law given in

criminal proceedings. The subject matter in dispute in the proceedings in the Court *a quo* unquestionably first arose in the regional court. I should here observe that it is highly questionable whether relief by way of a declaratory order is appropriate in relation to a matter in regard to which criminal proceedings have been instituted. (See the remarks of Ogilvie Thompson JA in the Wahlhauss case, *supra* at pp118-9)."

10 [7] Also, at 448E to 449E the court said:

20 "There can be no doubt that the appellants by their petition to the Court *a quo* sought a correction of what they considered was a wrong decision by the regional magistrate on the question of law raised, namely, whether they were entitled to demand, in terms of section 190(1) of the Criminal Procedure Act, that their case be tried before the Superior Court having jurisdiction. Notwithstanding the procedure adopted by the appellants, it was therefore in effect nothing but an appeal against the magistrate's decision on a question of law. (*Cf Lawrance v A.R.M. of Johannesburg*, 1908 T.S. 525 at p526). That being so, and having regard to the object to the relevant provisions of sec 21(2)(a) of the Supreme Court Act, namely:

‘To limit the matter of higher resort to this Court from a Superior Court in cases becoming before the latter and which have originated in the magistrate courts’, it seems clear that the decision given by the Court *a quo* on the appellant’s petition, in regard to a matter which originated in the regional court, was a decision given “on appeal to it” within the meaning of the expression of s 21(2)(a), and that the provisions of that section therefore apply in relation to the further appeal to this court.

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That would, in my view, dispose of the question raised, but counsel for the appellants contended that the matter which came before the Court *a quo* was a civil matter which as such could only have originated in that Court, and not in the regional court, and that s 21(2)(a) therefore does not apply in relation to the appeal to this court. I cannot agree. The mere fact that the proceedings in the Court *a quo* were fresh proceedings instituted by way of notice of motion does not give those proceedings the character of a civil matter. In terms of Rule 53 all proceedings to bring under the view the decisions or proceedings, whether civil or criminal, of any inferior court must be by way of notice of motion. Such proceedings are always fresh proceedings, but it

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cannot possibly contended that ordinary proceedings to bring under review criminal proceedings in an inferior court after conviction and sentence, on any of the grounds mentioned in sec 24 of the Supreme Court Act, for example, constitute a civil matter which originated in the court of review.”

[8] In *S v Absalom* 1989 (3) SA 154 (SCA) the Supreme Court of Appeal held at 161I that an application for condonation for the late filing
10 of an appeal too, is not a matter of a civil nature. The court adopted the statement that “. . . it is not the form of the procedure adopted, but the subject-matter of the proceedings which determines their character as either a civil or a criminal matter.” (See *Sita* at 449B-C). The court found that an application for condonation is so closely related to the accused criminal case, that it remains a criminal matter.

[9] I am of the view that the reinstatement of bail in a criminal case is also too closely related to the criminal case itself that it must be dealt with in terms of the Criminal Procedure Act, 51 of 1977. This is more so by virtue of the finding in *Rex v McLinnis* 1946 WLD 386 at p387 where it
20 was held that the cancellation of bail amounts to a refusal of bail and is therefore appealable. Such a refusal of bail is appealable as is now the case in this matter after leave to appeal has been granted by the Supreme Court of Appeal, but during such period an accused remains in custody until the court of appeal otherwise finds that he is indeed entitled to bail.

[10] To allow an accused out on bail prior to an appeal for that very purpose to be heard, would be to frustrate the entire criminal justice system. This is so by virtue of the fact that the application before this court does not deal with the merits of the applicant's entitlement to bail or otherwise.

[11] Counsel for the applicant criticised the *McInnis* case as being 'old' and pre-constitutional. However, many principles from the precedents of our law find their basis in older cases without being in conflict with the Constitution. It is not the age of the principle, but its
10 validity that is relevant. I am of the view that the Criminal Procedure Act regulates all matters relating to criminal procedure, including bail, and that the accused persons are to exercise their rights according to the provisions of that Act.

[12] The invocation of civil relief to release accused persons on bail may set a dangerous precedent for the criminal justice system.

[13] Having come to this conclusion, it is unnecessary to deal with the arguments of counsel for the applicant, based on civil law remedies.

[14] I need to add one further matter. Section 18 of the Superior Courts Act, 10 of 2013 codified the common law regarding the
20 suspension of court decisions pending on appeal. See Erasmus, *Superior Court Practice*, Volume 1, 2nd edition, page A2-64:

"The purpose of the rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of

execution or by execution of the judgment in any other matter appropriate to the nature of the judgment appealed from.” See *Reid and Another v Godart and Another* 1938 AD 511 at 513. These considerations do not apply to criminal cases and that is made clear by the definition of “appeal” in the Superior Courts Act:

10 “appeal in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977) or in terms of any other criminal procedure law.”

[15] The liberty or otherwise of an accused person is a matter regulated in terms of the Criminal Procedure Act. The release of an accused person from custody must, in my view, be dealt with in terms of the provisions of the criminal law legislation.

[16] Both parties were represented by senior counsel. I am of the view that the costs of senior counsel are justified.

20 [17] The application is dismissed with costs, such costs to include the costs of a senior counsel for the respondent.

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