IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case no: **1173/2023**
Case no: Court a quo RC 34/2022 (Welkom)

In the matter between:

SELLO LUCAS SELLO Applicant

and

THE STATE Respondent

CORAM: JP DAFFUE, J

HEARD ON: 10 March 2023

DELIVERED ON: 10 March 2023

These reasons were handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 April 2023.

REASONS

[1] On 10 March 2023 the applicant applied for bail pending his appeal to this court.

After considering the submissions by both parties I granted the following orders:

'1. Bail in the amount of R10 000.00 (Ten Thousand Rand) is granted to the applicant, Sello Lucas Sello, pending his appeal to this court under appeal number A19/2023 against his conviction and sentence in the Regional Court under case number: RC34/2021 (Welkom).

2. The following bail conditions shall apply:

2.1 the applicant shall not visit the district of Welkom, including the township Thabong, at any time pending the finalisation of this appeal;

2.2 the applicant shall refrain from making any contact whatsoever, whether personal, by telephone, email, facebook or any other social media, with any relatives of the deceased person pending the finalisation of this appeal;

2.3 the applicant shall report to the main police station in Kempton Park once every week between 06h00 and 18h00;

2.4 the applicant shall ensure that his appeal does not lapse and is proceeded with to finality;

2.5 in the event of the lapsing of applicant's appeal, or an unsuccessful appeal to this court in terms whereof the applicant has to undergo a custodial sentence, he shall within 48 hours of such occurrence report for further incarceration at the Groenpunt Correctional Centre.

3. Reasons for this order will follow in due course.'

REASONS FOR THE ORDER

[2] As a precursor to the evaluation of the evidence and submissions presented to me, it is appropriate to consider the rationale for considering bail applications on an urgent basis. It is trite that these applications should in principle be heard as a matter of urgency. In *Magistrate Stutterheim v Mashiya*[1] the Supreme Court of Appeal emphasised that 'the right to a prompt decision is thus a procedural right independent of whether the right to liberty actually entitles the accused to bail.' It is also not strange to find that an appellant has the right to appeal the refusal of bail without prior leave of the court refusing bail.[2] Furthermore, the right to freedom and security of a person is contained in s 12(1) of the Constitution. The rights to human dignity, equality and freedom are referred to in conjunction with each other in four sections of the Constitution,[3] emphasising the value attached to freedom of the individual. Therefore, I believe that it is of paramount importance that matters of personal freedom should be dealt with on an urgent basis.

[1] 2003 (2) SACR 106 (SCA) at 113 c – d.
[2] See s 65 of the Criminal Procedure Act 51 of 1977; also S v Van Wyk 2005 (1) SACR 41 (SCA) para 1 in respect of the right to appeal against refusal of bail by the high court.
[3] Sections 1, 7(1), 36(1) and 39(1)(a)

[3] On 26 August 2022 the applicant was convicted in the regional court, Welkom on a charge of murder. On 2 September 2022 he was sentenced to 15 years' imprisonment. The honourable regional magistrate dismissed his application for leave to appeal the conviction and sentence. The applicant sought leave to appeal from this court. On 27 January 2023 two judges of this division granted him leave to appeal in respect of his conviction and sentence. There is no guarantee that the appeal will succeed, but reasonable prospects of success on appeal have been found.

[4] On 15 February 2023 the appellant filed his notice of appeal. It also appears from the appeal file that the full record of the proceedings in the regional court has been prepared and filed with this court. Consequently, the applicant is now merely awaiting the allocation of a date for the appeal hearing. I have ascertained from the appeals clerk that this appeal will in all probability only be heard during the third term of 2023.

[5] The bail application was set down as an urgent application. Adv GSJ van Rensburg who appeared for the applicant had filed detailed heads of argument prior to the matter being called. Adv NM Tshefutsa appeared for the Director of Public Prosecutions (the DPP). Neither a notice of opposition, nor an answering affidavit was filed by the DPP, but Ms Tshefutsa indicated that the DPP was opposing the application. Having been confronted with an unusual application, I requested the parties at the outset to address me on the jurisdiction of this court to hear the bail application. Both parties were not in a position to make meaningful submissions. Consequently, I adjourned for an hour to allow them an opportunity to obtain instructions, consider the legal position and present me with their submissions.

[6] I mentioned above that Mr Van Rensburg had filed detailed heads of argument. He attached thereto two judgments of the Supreme Court of Appeal, to wit *Rohde v The State*[4] and *S v Crossberg.*[5] I pointed out to Mr Van Rensburg before I adjourned the matter that these two judgments did not support the case he sought to advance. In both instances the Supreme Court of Appeal granted leave to appeal against the convictions and sentences whereupon the accused persons returned to the high court to apply for bail pending appeal which applications were dismissed.

[4] [2019] ZASCA 193; 2020 (1) SACR 329 (SCA).
[5] (439/2007) [2007] ZASCA 93 (22 August 2007).

Both of them successfully appealed to the Supreme Court of Appeal against the judgments refusing bail. In both matters the Supreme Court of Appeal did not entertain the bail applications as a court of first instance notwithstanding the fact that that court granted leave to appeal the convictions and sentences. More about this later.

[7] When the court reconvened Ms Tshefuta did not have any objection to either the jurisdiction of the court to consider bail, or granting of bail on the conditions suggested by me. Thus, the application became unopposed. In an endeavour to persuade me of the court's jurisdiction Mr Van Rensburg referred me to subsec 309(5) read with s 307 of the Criminal Procedure Act 51 of 1977 (the CPA) as well as the summary of the high court's statutory and common law powers set out in *S v Hlongwane*[6]. I shall return to his submissions, but first, it is deemed necessary to consider s 60 of the CPA and some authorities in that regard.

[8] Section 60 reads as follows:

'**60 Bail application of accused in court**

(1)*(a)* An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

(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.

(c) If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court. (Emphasis added)

Cognisance should be taken that subsec 60(1)(b) has been amended with effect from 1 August 1998. Prior thereto subsec 60(1) read as follows:

'An accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are **pending** in a superior Court, to that Court, to be released on bail in respect of such offence, and any such court may, subject to the provisions of s 61, release the accused on bail in respect of such offence on condition that the accused deposits with the clerk of the court or, as the case may be, the

[6] 1989 (4) SA 79 (T) at 95 E – 97 E

Registrar of the Court, or with a member of the prisons service at the prison where the accused is in custody, or with any police official at the place where the accused is in custody, the sum of money determined by the court in question.' (Emphasis added)

Contrary to the reference to pending proceedings, the amended subsection refers to the stage when 'the accused appears in such other court for the first time.' Until such time the magistrate's court as the transferring court retains jurisdiction in respect of bail applications. The question to be answered is whether this section applies in casu, bearing in mind that it may be argued that the applicant has not yet appeared in this court for the first time. As mentioned he has already been convicted and sentenced in the regional court.

[9] I came across two judgments that are not directly applicable, but indicate a possible lack of jurisdiction by the high court to determine bail applications in the present circumstances, to wit *Director of Public Prosecutions, Eastern Cape, and Another v Louw NO: In re S v Makinana*[7] *(Makinana)* and *S v Seroka.*[8] The facts in *Makinana* differ from the matter in casu. In that case there was a dispute as to whether the magistrate's court or the regional court had jurisdiction to hear a bail application once the matter had been transferred to the regional court for trial. The accused's bail application was dismissed by the magistrate's court before the transfer and after transfer to the regional court he again applied for bail, alleging new facts. The regional magistrate refused to hear the application on the basis that he had no jurisdiction. The high court made the following order:[9]

'It is declared that, in terms of s 50(6)*(c)* of the Criminal Procedure Act 51 of 1977, read with s 60(1) of the Act, a magistrate's court has exclusive jurisdiction to hear a bail application in respect of any case in which an accused person is charged with a Schedule 6 offence (provided that the Director of Public Prosecutions does not direct otherwise in terms of the proviso to s 50(6)*(c)*) from the first appearance of the accused until he or she appears in any other court to which his or her matter may be transferred, whereupon such other court shall enjoy jurisdiction to entertain a bail application (whether or not it is the accused's bail application).' (Emphasis added)

[7] 2004 (2) SACR 46 (E).
[8] 2021 (2) SACR 622 (LP).
[9] *Makinana loc cit* para 33.

[10] The presiding judges in *Makinana* also referred with approval to *S v Makola*[10] where the court held as follows pertaining to a part-heard matter in the Supreme Court (now the high court):[11] 'My interpretation above is fortified by the further consideration that where the matter is pending before the Supreme Court, such Court will in any event be the appropriate Court at that stage of the proceedings to deal with any bail application. Counsel prosecuting on behalf of the State would certainly be in a better position than a prosecutor in the magistrate's court to assist the Court and to deal with the latest facts and circumstances relevant to a bail application. It would indeed lead to an anomalous situation if the present case against the appellant was to proceed in the Witwatersrand Local Division while his second bail application had to be dealt with in the magistrate's court at Boksburg.' (Emphasis added)

[11] The facts in *Seroka* also differ from the facts in casu. In that case the matter had been transferred to the regional court for trial whereupon the accused applied to that court for bail. There was only one regional magistrate at the seat of the court and he decided to refer the matter back to the magistrate's court for the bail application. The magistrate refused to hear the application, but the high court held that the decision was invalid and set it aside. It held that once an accused person has appeared in another court pursuant to a transfer of such person from the transferring court for sentencing or trial purposes, such receiving court shall be vested, to the exclusion of the transferring court, with exclusive jurisdiction in respect of bail application proceedings, unless the receiving court refers the matter back to the transferring court for a bail application.[12]

[12] Grosskopff JA, the scribe of a unanimous court, stated the following in *S v Makola*[13]:

'In my judgment s 60(1) gives both the 'lower court' and the 'superior Court' jurisdiction to release an accused on bail. As far as the lower court is concerned the section provides that '[a]n accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court . . . to be released on bail in respect of such offence. . . .' The Supreme Court, on the other hand, will have the jurisdiction to entertain an original application for bail, as opposed to an appeal, at any stage, provided 'the proceedings against the accused are pending' in such Court.' (Emphasis added)

Consequently, the matter was remitted to the Supreme Court (now the high court) to reconsider the appellant's application for bail. It is emphasised that the appellant in

[10] 1994 (2) SACR 32 (A).
[11] *Makinana loc cit* para 30.
[12] *Seroka loc cit* par 19.
[13] *Makola loc cit* pp 33 & 34.

Makola was an accused person and not a convicted and sentenced person. His criminal trial in the high court was still pending. In my view the court was with respect correct to consider the applicability of s 60.

[13] The heading of chapter 9 of the CPA is 'Bail.' This whole chapter – from s 58 to s 70 - is not applicable to convicted and sentenced persons. Its apparent purpose is to make arrangements for the release of accused persons on bail during the period from their arrest until finalisation of their criminal trials, ie upon acquittal or sentence. In support of my contention it is apposite to quote the first section of the chapter, to wit s 58:

'58 Effect of bail

The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed.' (Emphasis added)

[14] In *Hlongwane* the court presented a history pertaining to bail applications over a period in excess of a century, quoting various statutory provisions and judgments from this country and abroad. The dicta[14] in *Hlongwane* that may point to the high court's jurisdiction to deal with a bail application as in casu, translated into English, reads as follows:

'(7) After sentence in an inferior court, the Supreme Court has a common law power to release on bail pending further proceedings in a superior Court. Where the Court is asked to exercise that common law power, the statutory power of the inferior court has to be borne in mind.

(8) A part of the area covered by the common law power referred to in (7) above, is also governed by s 304(2)*(c)* (vi) (release on bail by a reviewing Court) and by s 309(3) read with s 304(2)(vi) (release on bail by a Provincial Division as a Court of appeal). Where this occurs the statutory power replaces the common law power.'

[15] The apparent purpose of the legislature as expressed in subsec 60(1)(b) is to ensure that the magistrate's court retains jurisdiction in respect of bail applications until the accused person appears in such other court, ie the regional court or the high court, for the first time. The appeal in this court is yet to be heard, although leave to

[14] Fn 6 *supra,* paras 7 & 8, p 96 and the translation by Juta in the heading of the reported judgment.

appeal was already granted on 23 January 2023. The rhetoric question to be asked is whether this means that the high court can only deal with the bail application on the day when the appeal is actually heard in this court, the effect being that this court's jurisdiction is ousted in the meantime so that the applicant has to return to the regional court to apply for bail pending appeal. That court has already dismissed the application for leave to appeal against conviction and sentence. If a bail application pending appeal in that court is also dismissed, the applicant will have to return to this court in order to appeal such unsuccessful bail application. Such a procedure is not called for in casu. Unlike in a criminal trial, the applicant does not have to appear before the high court who adjudicates his appeal. His legal representative will argue the appeal. When the two judges of this division entertained the application for leave to appeal in chambers in accordance with the normal practice, the appearance of the applicant was obviously also not required.

[16] I am satisfied that s 60 is inapplicable. Consequently, it needs to be considered whether the high court is at all entitled to adjudicate a bail application in the present instance, ie whether it has the required statutory, alternatively common law powers. Mr Van Rensburg's reliance on subsec 309(5) is misplaced. This subsection deals with appeals against decisions of the high court given on appeal to it. It reads as follows:

'(5) When a provincial or local division of the Supreme Court gives a decision on appeal against a decision of the magistrate's court and the former decision is appealed against, such division of the Supreme Court has the powers in respect of the granting of bail which a magistrate's court has in terms of section 307.'

Unlike as Mr Van Rensburg submitted, s 307 is not relevant for the reason that it is merely referred to in subsec 309(5) which I indicated is not applicable.

[17] The subsection that is indeed applicable is subsec 309(3) which reads as follows:

'(3) The provincial or local division concerned shall thereupon (ie the noting and prosecution of an appeal when there is an automatic right of appeal or when leave to appeal has been granted as provided for in subsecs (1) and (2)) have the powers referred to in section 304 (2), and, unless the appeal is based solely upon a question of law, the provincial or local division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided

that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect.' Emphasis added)

[18] Section 304 deals with the procedure on review. The review court's powers are set out in subsec 304(2). In subsec 309(3) the legislature afforded the high court adjudicating appeals to it the same powers as contained in subsection 304(2). One such power is applicable in casu, to wit as described in subsec 304(2)(c)(vi) which reads as follows:

'(c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312-

(i) …

(ii) …

(iii) …

(iv) …

(v) …

(vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.' (Emphasis added)

[19] I referred to the *Rhode* and *Crossberg* judgments of the Supreme Court of Appeal above.[15] At first glance, and considering that the Supreme Court of Appeal was not asked in either case that bail be granted pending the appeals to it, it might be argued that these cases are excellent examples of the state of the law, ie that the trial court must always deal with bail pending appeal. I mentioned earlier that I was confronted with this application on an urgent basis and whilst having concerns as to whether this court may entertain the application. It was the first time that I was confronted with such an application during a stint of more than 11 years on the high court bench.

[20] There is good reason why the high court should be entitled to hear bail applications as in casu, whilst the Supreme Court of Appeal should not do so. In petitions to the Supreme Court of Appeal the trial record is not provided to that court, unless the accused was not represented during the trial in which case the justices

[15] Par 6 of this judgment.

considering the petition usually request to be provided with the trial record. Rule 6 of that court's rules sets out which documents are to be provided to the court.[16] The position is different in the high court. All applications for leave to appeal must be accompanied by the full trial record,[17] allowing the judges not only to rely on the judgment of the court a quo and written representations thereto, but to consider the evidence presented.

[21] The applicant was released on bail during the entire period of his trial. He was granted bail in the amount of R1 000.00 in the absence of opposition by the State. He is employed by the City of Johannesburg as a firefighter and emergency responder, is married with two children and is also the owner of immovable property in the estimated value of R1.4 million over which a mortgage bond is registered. As mentioned, the present bail application is not opposed by the State. There is no

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[16] SCA rule 6 reads as follows:
'Application for leave to appeal
Filing of application
(1) In every matter where leave to appeal is by law required of the Court, an application therefor shall be lodged in triplicate with the registrar within the time limits prescribed by that law.
Annexures required
(2) Every such application shall be accompanied by —
(a) a copy of the order of the court a *quo* appealed against;
(b) where leave to appeal has been refused by that court, a copy of that order;
(c) a copy of the judgment delivered by the court a *quo*; and
(d) where leave to appeal has been refused by that court, a copy of the judgment refusing such leave:
Provided that the registrar may, on written request, extend the period for the filing of a copy of the judgment or judgments for a period not exceeding one month.
Answer
(3) Every affidavit in answer to an application for leave to appeal shall be lodged in triplicate within one month after service of the application on the respondent.
Reply
(4) An applicant who applied for leave to appeal shall, within 10 days after an affidavit referred to in subrule (3) has been received, be entitled to lodge an affidavit in reply dealing strictly only with new matters raised in the answer.
Format of application, answer and reply
(5) Every application, answer and reply —
(a) shall —
(i) be clear and succinct and to the point;
(ii) furnish fairly all such information as may be necessary to enable the Court to decide the application;
(iii) deal with the merits of the case only in so far as is necessary for the purpose of explaining and supporting the particular grounds upon which leave to appeal is sought or opposed;
(iv) be properly and separately paginated; and
(b) shall not —
(i) be accompanied by the record;
(ii) traverse extraneous matters; or
(iii) exceed, for the founding affidavit and answer 30 pages each and for the reply 10 pages.
Request for further documents
(6) The judges considering the application may call for —
(a) submissions or further affidavits;
(b) the record or portions of it; and
(c) additional copies of the application.'

[17] Section 309C(4) of the CPA.

reason to doubt any of the allegations contained in the founding affidavit in support of the application. All these allegations are indicative of the fact that the applicant will not abscond. He is not a flight risk and not even in possession of a passport. He was also prepared to offer an increased amount of R10 000 in respect of bail. The bail conditions set by the court were accepted to be in order by both parties. Although some of those conditions may seem to be irrelevant, bearing in mind that the criminal trial has been finalised, I decided to impose them in order to prevent the applicant as a convicted person to get in contact with the deceased's family pending the appeal.

[22] I am satisfied that at the moment when the application for leave to appeal against conviction and sentence was considered and granted by my colleagues, this court became vested with jurisdiction in respect of the bail application proceedings. I am comfortable that, although I was confronted with an unusual application, the dictum in *Hlongwane* supra in respect of subsec 309(3), read with subsec 304 (2)(c)(vi), is a correct exposition of the law and should be followed. If I were to refuse to hear the application and/or dismiss it for lack of jurisdiction, the applicant would have to return to the regional court, uncertain when such application would be heard. In the event of an unsuccessful application, he would have to return to this court on appeal. Such a cumbersome and time-wasting procedure can never be in the interest of justice. Consequently, I was prepared to hear and adjudicate the bail application which I did.

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J P DAFFUE, J

On behalf of the Applicant:	Adv GSJ van Rensburg
Instructed by:	Finger Attorneys BLOEMFONTEIN
On behalf of the Respondent:	Adv NNM Ntshefuta
Instructed by:	Director of Public Prosecutions BLOEMFONTEIN