

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: A11/2022

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
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DATE	SIGNATURE

In the matter between:

KHATHUTSHELO MASHAU

APPLICANT

And

THE STATE

RESPONDENT

JUDGMENT

THUPAATLASE AJ

Introduction

[1] The applicant was convicted on 24 March 2021 in the Boksburg regional court on Income Tax fraud charges and contravention of the provisions of section 6(a)¹ of the Prevention of Organised Crime Act 121 of 1998 and was sentenced to effective imprisonment term of 48 years.

[2] It will be convenient to give a brief background of this matter. This will assist to give perspective in understanding how this matter came to serve before this court.

[3] After the applicant was convicted and sentenced as stated above, he applied for leave to appeal. The court a quo granted him leave to appeal against conviction in respect of count twenty-two and granted leave to appeal the sentences imposed in respect of all charges. In addition, his application for bail pending appeal was refused. He suffered the same fate. The judgment dismissing the appeal against refusal to grant him bail pending appeal was handed on 22 March 2022.

[4] The applicant has again approach the high court for relief. He contends that because leave to appeal has been lodged, the matter is deemed to be pending before the high court. Before this court, the applicant has argued that there are new facts and that he is entitled to approach this court for a relief. I was informed from the bar that the regional magistrate holds the same view. As it will be shown below this view is misplaced.

New application

[5] The applicant alleges new facts. He submitted an affidavit to substantiate his assertions. In particular the applicant states that he was granted leave to appeal his conviction and sentence on 07 December 2021 and that as at the time of this

¹ Acquisition, possession, or use of proceeds of unlawful activities- Any person who-

- (a) acquires;
- (b) uses; or
- (c) has possession of,

Property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.

hearing, the clerk of court has failed to comply with rule 67(5)² by failing to prepare a record of proceedings.

[6] The applicant states that despite numerous attempts to follow up by his attorneys of record, he has been unsuccessful to receive the transcribed records of the proceedings. This has hindered his attempts to prosecute the appeal.

Whether the matter is pending before the high court?

[7] The question is important for the outcome of this application. In the event that it is found that the appeal proceedings are pending before the high court, then the court would proceed to consider whether the applicant is entitled to be released on bail. In the case of *S v Makola* 1994 (2) SACR 32 (A) the court concluded as follows: *'It is the court 'before which a charge is pending' which has jurisdiction to act in terms of these two sections. If bail had been granted in the present matter by the magistrate, Boksburg, the Witwatersrand Local Division would have been the only court which has jurisdiction at this stage to add further conditions of bail, or increase or reduce the amount of bail, or amend or supplement any conditions imposed by the magistrate. In my view it could never have been the intention of the Legislature on the one hand to authorise the Supreme Court before which a charge is pending to amend conditions of bail, yet on the other hand to disallow that same Court to hear a new application for bail.'*

[8] The two sections referred to in the judgment are section 60 (1) of the Criminal Procedure Act 51 of 1977 (CPA) which provides that *' 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*

² Rule 67(5) provides 'Upon an application for leave to appeal being granted the registrar or clerk of the court shall prepare a copy of the record of the case, including a transcript thereof if it was recorded in accordance with the provisions of rule 66(1), and place such copy before the judicial officer who shall within 15 days thereafter furnish to the registrar or clerk of court a statement in writing showing-

- (a) the facts he or she found to be proved;
- (b) his or her reasons for any finding of fact specified in the appellant's statement of grounds of appeal; and
- (c) his or her reasons for any ruling on any question of law or as to the admission or rejection of evidence so specified as appealed against.

deposits with the clerk of the court or, as the case may be, the 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.'

[9] And in section 63 of CPA provides that ' *Any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, increase or reduce the amount of bail determined under ss 59 or 60 or amend or supplement any condition imposed under s 62, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application.'*

[10] The state took the view that the applicant has not yet lodged an appeal before this court. The state found its support in the case of *S v Baleka & Others* 1986 (1) SA 361 (T) at 376F-G. It however, worth noting that the decision was not followed by the SCA in *Makola* supra.

[11] It is clear that the proceedings or charge must be 'pending before the court' in order to function as provided by the two sections of the CPA quoted above. In this case the applicant has been granted leave to appeal by the court a quo. The same court refused him bail pending appeal. He appealed such refusal to this court, and the appeal was unsuccessful. As a result of unavailability of the transcribed record he has been unable to prosecute his appeal against conviction and sentence.

[12] I am mindful that in the case of *Makola* the court concluded that the charges were pending before the high court. The case had been formally transferred from the magistrate's court to the high court. In this case whilst leave to appeal has been granted no steps have been taken to enrol the matter before the high court for appeal on the merits on conviction and sentence. The applicant fully explains the reasons. It is clear that the failure is on the part of the officials of the department. However, such failure does not confer this court with the jurisdiction to hear an application on new facts. The matter is not pending before the high court.

[13] The process of what steps are to be followed when dealing with an appeal from the magistrate's court are contained in Uniform Rule of Court 51(1) which provides

that:’ *An appeal by a convicted person against a conviction, sentence or order made by a magistrate’s court in a criminal matter, or an appeal by the director of public prosecutions or other prosecutor against a dismissal of a summons or charge or other decision of a magistrate’s court in such a matter, shall be set down by the director of public prosecutions or registrar on notice to the appellant or his or her legal representative for hearing on such day as the judge president may appoint for such matters*’. It is self-evident that the appeal has not been set down for hearing. The act of setting down the matter will have the effect of having the matter to be regarded as pending before the high court.

[14] The applicant purports to bring his application in terms of section 321 of the CPA. It is clear that the section refers to scenario where *‘question law has been reserved for consideration by the court of appeal.’* In this case the conviction and sentence is from the regional court, also there is *‘no question of law reserved’* for consideration by the high court. The section finds no application in this case.

[15] In the case of *S v Mahomed* 1977 (2) SA 531 (A) the court held that Chapter 31 of the CPA applies exclusively to criminal cases which were heard by high court as a court of first instance. This position was endorsed by A Kruger *‘Hiemstra’ Criminal Procedure’* Lexis 2009 at 31-1 Issue 7.

[16] This point was also emphasised by Maya JA (as she then was) in *Beetge v S* [2014] JOL 31646 (SCA) at para [4] where she formulated the position as follows: *‘An application to be admitted to bail after conviction is governed by section 321 of the Criminal Procedure Act 51 of 1977. These provisions prohibit the suspension of a sentence imposed by a superior court by reason of any appeal against a conviction unless the trial court thinks it fit to order the sentenced accused’s release on bail. Therefore, it behoves the sentenced accused to seek bail from the trial court. In so doing, he or she must place before the Court the necessary facts that would allow it to exercise its discretion in his or her favour and grant bail.’*

Order

[17] In conclusion the Boksburg regional court is still seized with the matter.

1. The applicant’s appeal is not pending before the high court.
2. The Boksburg regional court is ordered to hear the bail application.

T Thupatlase
Acting Judge of the high court

Heard on: 24 May 2023

Judgment on 27 June 2023

Appearances:

For the Applicant: Mr F Mashele

Instructed: Frans Mashele Incorporated

For the Respondent: Adv. Sereme

Director of Public Prosecutions – Gauteng