

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Heard on: 06/09/2022 & 28/11/2022

Delivered on: 13/01/2023

In the matter between:

CASE NUMBER CA & R 37/2022

SIMON KENNETH MABOGOLE

APELLANT

and

THE STATE

RESPONDENT

CASE NUMBERS: CA & R 43/2021; CA & R 44/2021

**LESEDI VIRGINIA MOTSHWARAKGOLE
BOITSHEPO MOTSHWARAKGOLE**

**FIRST APPELLANT
SECOND APPELLANT**

and

THE STATE

RESPONDENT

JUDGMENT ON BAIL APPEAL

MAMOSEBO J:

[1] On 06 September 2022 I granted Mr Simon Kenneth Mabogole, the appellant in CA & R 37/2022 the following order and reserved my reasons:

1. The bail appeal is upheld.
2. The order of 07 September 2021 by the Regional Court Magistrate in Mothibistad, Case Number RC22/2018, dismissing the appellant's bail application pending the outcome of his appeal against conviction and sentence, is hereby set aside and substituted with the following order:

Bail is granted to the appellant in the amount of R2000.00 (Two Thousand Rand), on the following conditions:

- (a) That the appellant shall not, directly or indirectly, make contact with the witnesses who testified during his trial;
- (b) That the appellant shall not leave the district of ZF Mgcawu without informing the investigating officer thereof;
- (c) That the appellant, if his appeal against conviction and sentence is dismissed, shall report within 72 (seventy-two) hours after judgment has been handed down to the nearest Correctional Services Centre to start serving his sentence.

[2] On 28 November 2022, Ms Lesedi Virginia Motshwarakgole and Ms Boitshepo Motshwarakgole, the appellants in case numbers CA&R 43/2021 and CA&R 44/2021 brought applications for bail pending an appeal hearing against their convictions and sentences.

[3] The three appellants appeared before the Regional Court Magistrate, N Mbalo, under case number Mothibistad RC 22/2022 on seven counts: (i) kidnapping (ii) kidnapping; (iii) kidnapping, (iv) murder r/w the provisions of

s51(1) of Act 105 of 1997, (v) attempted murder, (vi) attempted murder and (vii) c/s 120(1)(3)(b) of Act 60 of 2000. They were convicted on all counts and sentenced on 06 July 2020 as follows: (i) 6 years imprisonment; (ii) 6 years imprisonment; (iii) 6 years imprisonment; (iv) life imprisonment; (v) 10 years imprisonment; (vi) 10 years imprisonment and (vii) 5 years imprisonment.

The sentences in counts (i), (ii), (iii), (v), (vi) and (vii) were ordered to run concurrently with count (iv) of murder.

[4] Mr Mabogole filed a notice to appeal his convictions and sentences on 01 February 2021 and simultaneously sought condonation for the late filing of his notice to appeal against his conviction and sentence. He also filed a notice of application for bail pending appeal on the same day, 01 February 2021. He was partially successful in that the Regional Magistrate only granted him leave to appeal his sentence in count 4 but dismissed his application for bail pending appeal. He filed a notice to appeal the decision on 22 September 2021.

[5] The Motshwarakgoles filed a notice of application for bail pending appeal on 23 September 2022. Counsel for the State, in the Motshwarakgole application, Adv J Rosenberg, filed his heads of argument one day out of time. There was no opposition by the appellants' counsel, Adv S Letsie. I accepted the explanation for the delay and granted condonation.

[6] The two issues for determination are whether the Regional Magistrate erred:

6.1 In finding that there are no reasonable prospects of success on appeal regarding the convictions; and

6.2 In not finding that there are exceptional circumstances warranting the release of the appellants on bail pending the outcome of the appeal.

[7] Notwithstanding that the Regional Magistrate had dismissed Mr Mabogole's application for leave to appeal his convictions and sentence and only granted

him leave to appeal his sentence in count 4 of murder, s 309 of the Criminal Procedure Act¹ (the CPA) bears emphasising and stipulates:

“309 Appeal from lower court by person convicted

*(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: **Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).**” (emphasis added)*

It was not necessary for him to apply for leave to appeal on the charge of murder as he had an automatic right to do so.

[8] Section 93ter(1) of the Magistrates’ Court Act² provides:

“93ter Magistrate may be assisted by assessors

(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-

- (a) before any evidence has been led; or*
- (b) in considering a community-based punishment in respect of any person who has been convicted of any offence,*

*summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: **Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.**” (emphasis added)*

[9] Mpati P, writing for a unanimous Court in *S v Gayiya*³, held:

¹51 of 1977 as amended

²32 of 1944

³2016 (2) SACR 165 (SCA) at para 8

*“[8] In my view the issue in the appeal is the proper constitution of the court before which the accused stood trial. The section is peremptory. It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder (as in this case) shall be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. **The starting point, therefore, is for the regional magistrate to inform the accused, before the commencement of the trial, that it is a requirement of the law that he or she must be assisted by two assessors, unless he (the accused) requests that the trial proceed without assessors.**” (emphasis added)*

[10] The appellants were never afforded an opportunity by the regional magistrate to decide whether or not to request that the trial proceeds without assessors before they were asked to plead to the charges. The issue of assessors was only canvassed during the testimony of Lee-Anne Kemp the second witness and the magistrate acknowledged that it was an oversight on her part not to have done so at commencement of the trial. On this point alone, the appellants have prospects of success on appeal since s93ter (1) and the *Gayiya* judgment, among others, are authority that the appointment of assessors is peremptory. The composition of the court in this instance comprised the regional magistrate alone as opposed to her sitting with two assessors. I was satisfied that the appellant, Mr Mabogole has discharged the onus to be admitted to bail. I am accordingly satisfied that the Motshwarakgoles have discharged the *onus* to be admitted to bail.

[11] As a result, the following order is made:

1. The bail appeal is upheld.
2. The order of 07 September 2021 by the Regional Court Magistrate in Mothibistad, Case Number RC22/2018, dismissing the appellants' bail application pending the outcome of their appeal against conviction and sentence, is hereby set aside and substituted with the following order:

Bail is granted to the appellants in the amount of R2000.00 (Two Thousand Rand), on the following conditions:

- (a) That the appellants shall not, directly or indirectly, make contact with the witnesses who testified during their trial;
- (b) That the appellants shall not leave the district of ZF Mgcawu without informing the investigating officer thereof;
- (c) Should the appellants' appeal against convictions and sentences be dismissed, they shall report within 72 (seventy-two) hours after judgment has been handed down to the nearest Correctional Services Centre to start serving their sentence.

MAMOSEBO J
JUDGE OF THE HIGH COURT

Appearances in case number CA & R 37/2022

For the Appellant: Mr H Steynberg
Instructed by: Legal Aid South Africa: Kimberley Justice Centre

For the Respondent: Adv CG Jansen
Office of the Director of Public Prosecutions

Appearances in case numbers CA & R 43/2021; CA & R 44/2021

For the Appellants: Adv S Letsie
Instructed by: Akani Mathonsi Attorneys
c/o Matlejoane Attorneys

For the respondent: Adv J Rosenberg
Instructed by: Office of the Director of Public Prosecutions