

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



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CAF 07/2022

In the matter between:

LOBELO TSHEPO

Appellant

and

THE STATE

Respondent

CORAM: HENDRICKS JP et MFENYANA J et DIBETSO-BODIBE AJ

DATE OF HEARING : 02 FEBRAURY 2024

DATE OF JUDGMENT : 15 FEBRUARY 2024

FOR THE APPELLANT : ADV. MOROKE

FOR THE RESPONDENT : ADV. JACOBS

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00am on 15 February 2024.

ORDER

Resultantly, the following order is made:

- (i) The appeal is struck from the roll.**

JUDGMENT

HENDRICKS JP

Introduction

[1] This matter was enrolled, pursuant to an application for a date of hearing before a Full Court of this division been made. The application for "reconsideration of bail", is made in lieu of an application for bail, which was dismissed by Mahlangu AJ on 25 May 2022. What lies at the heart of this appeal is the question whether the correct procedure was followed to enroll this matter before this Full Court. The merits of the appeal was not dealt with for reasons that will become clear later on in this judgment.

[2] In a nutshell, the appellant is arraigned before the High Court (court *a quo*), and the trial is pending. He applied to be released on bail, which application was unsuccessful. As alluded to earlier, he now appeals to the Full Court of this division (this Court), to be admitted to bail.

[3] In the judgment of **S v Banger** 2016 (1) SACR 115 (SCA), penned by Van Der Merwe AJA (Cachalia and Mbha JJA concurring), the following is stated in paragraph [11] to [15].

“[11] [Section 16\(1\)](#) of the [Superior Courts Act](#) provides:

‘Subject to [section 15\(1\)](#), the Constitution and any other law—

(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted—

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of [section 17\(6\)](#); or

(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal.’

[12] Thus, it is clear that in respect of all appeals against the refusal of bail by the High Court sitting as a court of first instance, application for leave to appeal must be made to that court. If that court refuses leave to appeal, it may be granted by this court in terms of [s 17\(2\)\(b\)](#) of the [Superior Courts Act](#). If the High Court consisted of a single judge, the appeal lies to a full court, unless a direction is given in terms of [s 17\(6\)](#) that the matter requires the attention of this court. If, as is the case here, the High Court of first instance

consisted of more than one judge, the appeal lies directly to this court.

[13] The appellant did not apply for leave to appeal to the High Court against its dismissal of his bail application. This court therefore has no jurisdiction to entertain the matter and it should be struck from the roll.

[14] Bail appeals are inherently urgent in nature. An accused person should not be deprived of his or her constitutional rights to freedom and to freedom of movement for longer than is reasonably necessary. The majority of appeals against the refusal of bail by the High Court as a court of first instance, will arise from a court that consists of a single judge and will not require the attention of this court. In these matters application for leave to appeal should generally be made immediately after the refusal of bail and, upon leave to appeal having been granted, a full court of that Division of the High Court should generally dispose of these appeals more expeditiously and cost-effectively than was the position before the advent of the [Superior Courts Act](#).

[\[15\]](#) The matter is struck from the roll.”

[4] To sum up: No appeal lies against the refusal of bail by the High Court sitting as a court of first instance, without leave to appeal in terms of the Superior Courts Act 10 of 2013 been granted. An incorrect procedure was followed to bring this appeal before the Full Court without at first seeking leave to appeal from the court *quo*. Insofar as reliance is placed on the Full Court judgment of this Court in the matter of **Damcy Dielele v The State, CAF 02/2022**, delivered on **26 July 2023**, a judgment penned by my sister **Reid J**

(was Snyman) with **Reddy AJ** and **Maakane AJ** concurring, an incorrect procedure was followed.

[5] The judgment in **S v Banger**, supra, was already delivered on **28 May 2015**, and the Full Court in the aforementioned judgement of Damcy Dielele ought to have followed the decision in **S v Banger**. This is based on the principle of *stare decisis*. Likewise, this Court is also bound to follow the procedure as enunciated in **S v Banger**.

[6] As a result of an incorrect procedure been followed to enroll this matter before this Full Court, it follows axiomatically that the matter should be struck from the roll. The merits of the appeal and the application for condonation not been considered, because of the incorrect procedure that was followed.

Order

[7] Resultantly, the following order is made:

(i) The appeal is struck from the roll.

R D HENDRICKS

**JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG**

I agree

**SM MFENYANA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG**

I agree

**O DIBETSO-BODIBE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG**