



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 195/2015

In the matter between:

ALLAN WAYNE BANGER

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Banger v S* (195/2015) [2015] ZASCA 79 (28 May 2015).

Coram: Cachalia and Mbha JJA and Van der Merwe AJA

Heard: 20 May 2015

Delivered: 28 May 2015

Summary: 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.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius and Fourie JJ concurring, sitting as court of first instance):

The matter is struck from the roll.

JUDGMENT

Van der Merwe AJA (Cachalia and Mbha JJA concurring):

[1] This judgment considers the effect of the Superior Courts Act 10 of 2013¹ on an appeal against the refusal of bail by a High Court sitting as a court of first instance.

[2] The appellant, Mr Allan Wayne Banger, was convicted in the regional court on 331 counts of contravening s 6 of the Prevention of Organised Crime Act 121 of 1998. The appellant admitted that during the period from 16 January 2003 to 17 November 2006, he received payments totalling R2 034 146.73. The regional court found that the appellant ought reasonably to have known that these monies represented the proceeds of unlawful activities and sentenced him to 10 years' imprisonment, five years of which were suspended for a period of five years on condition that he is not convicted of contravening s 6 of Act 121 of 1998, committed during the period of suspension.

[3] The regional court granted leave to appeal against the convictions and sentence. It also granted the appellant bail pending the outcome of the appeal to the High Court. The appeal was heard by the North Gauteng Division, Pretoria (Fabricius and Fourie JJ). It dismissed the appeal on 19 March 2015. Counsel for the appellant indicated that an application would be made to this

¹The date of commencement of the Superior Courts Act for present purposes is 23 August 2013.

court for special leave to appeal against the dismissal of the appeal against both conviction and sentence. In the light hereof, the appellant applied to the High Court for bail pending the application for special leave to appeal on the merits. The High Court dismissed the application. The appellant did not apply to the High Court for leave to appeal against the refusal of bail, but noted an appeal to this court in the belief that the appellant had an automatic right of appeal.

[4] It is important to point out that the regional court had granted bail pending the outcome of the appeal to the High Court. The bail had lapsed when the appeal was dismissed. The application to the High Court to extend the bail pending an application for leave to appeal to this court, was therefore a fresh application. The High Court dealt with this application for bail sitting as a court of first instance — albeit by two judges — and not as an appeal.

[5] There is no doubt that the appellant has the right to appeal against the refusal of bail. That is provided for in s 35(3)(o) of the Constitution. What is in issue is the procedure applicable to an appeal against the refusal of bail by the High Court sitting as a court of first instance.²

[6] This question was first dealt with by this court in *S v Botha*.³ Prior to the enactment of the Superior Courts Act, appeals from the High Court (then the Supreme Court) were regulated by ss 20 and 21 of the Supreme Court Act 59 of 1959. The court held in *Botha* that as bail applications are criminal proceedings, an appeal against the refusal of bail by a High Court sitting as a court of first instance did not lie to it in terms of s 20 of the Supreme Court Act, as the section regulated only appeals against a judgment or order of the High Court in civil proceedings or on appeal to it.

[7] Section 21(1) of the Supreme Court Act provided:

'In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and any other law,

²The same procedure would be applicable to an appeal by an accused person against a condition of bail imposed by the High Court as court of first instance.

³*S v Botha* [2001] ZASCA 146; 2002 (1) SACR 222 (SCA).

have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.’

The court held that s 21 was sufficiently wide to include bail appeals from the High Court sitting as a court of first instance, unless they were excluded by any other law. It consequently had to consider whether such bail appeals were excluded by the provisions of s 315(4) of the Criminal Procedure Act 51 of 1977. This section provides:

‘An appeal in terms of this Chapter shall lie only as provided in ss 316 to 319 inclusive, and not as of right.’

[8] The court further held in *Botha* that none of these sections were applicable to bail appeals. It therefore concluded that s 21(1) of the Supreme Court Act provided for a right of appeal directly to this court against the refusal of bail by the High Court sitting as a court of first instance. As no provision required leave to appeal in respect of such right of appeal, it became known as an automatic right of appeal. In *S v Masoanganye*⁴ Harms AP lamented the fact that the calls of this court to correct the legislative oversight that resulted in the automatic right of appeal, had been ignored for more than two decades.⁵

[9] In my view, the complaint has now been addressed in the Superior Courts Act. The position currently is as follows: Chapter 5 of the Superior Courts Act deals with appeals against any decision of the High Court as a court of first instance or on appeal to it, except for appeals from the High Court that are regulated in terms of the Criminal Procedure Act or in terms of any other criminal procedural law.⁶ This is the result of the definition of ‘appeal’ in s 1 of the Superior Courts Act. The clear intention was to create a regulatory scheme in respect of all appeals from the High Court. Subject to any other law, appeals from the High Court are regulated either in terms of the Superior Courts Act or the Criminal Procedure Act.

⁴*S v Masoanganye* [2011] ZASCA 119; 2012 (1) SACR 292 (SCA) para 15.

⁵See also *S v Viljoen* [2002] ZASCA 81; 2002 (2) SACR 550 (SCA) para 26 and *S v Kock* [2003] ZASCA 1; 2003 (2) SACR 5 (SCA) para 26. Further see E du Toit (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2014) at ch9-103 – ch9-104.

⁶In terms of the Interpretation Act 33 of 1957 ‘law’, means any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law.

[10] Section 65 of the Criminal Procedure Act provides for an appeal to the High Court against the refusal of bail or the imposition of a condition of bail by a lower court. In terms of s 65A(1), the Director of Public Prosecutions (DPP) may appeal to the High Court against a decision of a lower court to release an accused person on bail or against the imposition of a condition of bail. The DPP may in terms of s 65A(2) appeal to this court against the decision of the High Court to release an accused person on bail. The provisions of s 316 of the Criminal Procedure Act apply *mutatis mutandis* to such a case.⁷ It follows that the DPP must obtain leave to appeal from the High Court or, if refused by that court, by this court on petition to it in terms of s 316(8). It is important to note that s 316 of the Criminal Procedure Act does not provide for an appeal in respect of bail by an accused person.⁸ Sections 315 and 316 deal only with appeals that originate from a conviction or sentence by a single judge of the High Court. Section 316(1) provides that any accused convicted of any offence by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order. If an application for leave to appeal is granted, the appeal must, in terms of s 315(2)(a), be heard either by a full court of the relevant Division of the High Court or this court, depending on whether the appeal requires its attention. If such appeal is heard by a full court, a further appeal to this court is possible with the special leave of this court on petition to it, in terms of s 316(3). The Criminal Procedure Act does not, however, provide for an appeal against the refusal of bail by the High Court sitting as a court of first instance.⁹ It is also not provided for in any other criminal procedural law. It follows that such appeal is regulated by the Superior Courts Act.

[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—

⁷See s 65A(2)(b) of the Criminal Procedure Act.

⁸*S v Botha* para 11.

⁹*S v Botha* para 3.

- (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.

C H G VAN DER MERWE
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:

F van As

Instructed by:

Justice Centre, Pretoria

Justice Centre, Bloemfontein

For Respondent:

Ms P Vorster

Instructed by:

Director of Public Prosecutions, Pretoria

Director of Public Prosecutions, Bloemfontein