

order given
11/01/2018 ✓✓



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO: A650/ 17

(1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
08/02/2018
DATE SIGNATURE

In the matter between:

SYDNEY OZILE NDABA

APPLICANT

and

THE STATE

RESPONDENT

JUDGMENT

MAVUNDLA. J.,

- [1] The applicant approached this Court, by way of urgent proceedings seeking an order admitting him to bail pending appeal on conviction. This Court granted him bail in the amount of R10, 000. 00 subject to the condition that he executes his appeal and that in the event thereof not being successful surrender himself to the nearest police

station or the registrar of this Court within seven days of being informed of the appeal being unsuccessful. The Court further indicated that the reasons for this order would follow. These reasons are therefore set out herein below.

- [2] The Applicant was convicted at the Regional Court of Pretoria on a count of fraud and sentenced to 5 (five) years imprisonment on the 20 August 2015. He was granted leave to appeal only on sentence, but refused leave to appeal on conviction. He was granted bail of R10, 000.00 pending the appeal on sentence. However, the appeal on sentence was dismissed in this Court. On the 22 August 2015 He was, on petition on the 1 December 2017, granted leave to appeal on conviction by two judges of this Court, who held the view that there are reasonable prospects of success on conviction.
- [3] The applicant then approached this court on urgent basis in terms of rule 6(12) of the Uniform Court rules, seeking an order admitting him on bail pending the appeal on conviction.
- [4] The State, in opposing the bail application contended that the applicant should have approached the Regional court, from which the conviction originates. In this regard the State relied on the provisions of section 307 of CPA No 51 of 1977, and various authorities.
- [5] On behalf of the applicant it was submitted that this Court has an inherent common law power to grant bail, *in casu*, where the regional court had held that there was no prospect of success on appeal on conviction, which decision was on petition overturned by a decision of two judges, who held the view that there are reasonable prospect of success on appeal on conviction.
- [6] it is trite that the question of bail is always an urgent issue, and requires speedy resolution by the Court. *In casu*, the counsel for the respective parties did not take issue with this aspect and confined themselves to the crisp issue whether this Court can entertain the bail application pending appeal as a court of first instance, where the conviction emanated from a lower court.
- [7] Generally, the Court that has jurisdiction to release a person on bail pending appeal against conviction and or sentence, is the court from which the appeal emanates. This is so because that Court is steeped in the atmosphere of the proceedings which resulted in the conviction and or sentence. Does this therefore mean that the

jurisdiction of the high court to entertain a bail application by a person convicted in a lower court is ousted? In my view the answer is no.

- [8] The question of release on bail pending appeal of a person convicted by a lower court, is governed by s307(1) read with s308A and 309. These sections provides as follows:

(a) Section 307 of the CPA, Act 51 of 1977 provides as follows:

“(1) Subject to the provisions of section 308, the execution of any sentence shall not be suspended by the transmission of or the obligation to transmit the record for review unless the court which imposed the sentence releases the person convicted on bail.”

(b) Section 308A provides that:

“The execution of a sentence of correctional supervision referred to in section 276(1)(h), shall not be suspended by the transmission of the record to review in terms of section 304(4), unless the court which imposed the sentence releases the person convicted---

On bail, in which case the provisions of section 307(2), (3), (4), (5) and (6) shall *mutatis mutandis* apply.”

(c) Section 309 which in general deals with an appeal of a convicted person from a lower court provides, *inter alia*, that:

“(4) When an appeal under this section is noted, the provisions of: .

(a)....

(b) Sections 307 and 308A shall *mutatis mutandis* apply with reference to sentence appealed against.”

- [9] In a well-reasoned, with respect, unreported judgment Seegobin J in the matter of *Travis Bailey and 4 others v The State* case no : AR 371/13 KZ ND, dealing with the crisp issue on point in casu, held as follows:

“[7] The power of the High Court (previously the Supreme Court) to grant bail has been the subject of debate in a number of leading cases. In the absence of any statutory enactment empowering the court to do so, the court has the power to grant bail as an incident of its common law power to control its own judgements. The authorities cited herein under are illustrative of the point.

[8] In *Chunilall v Attorney- General Natal*, Didcott J pointed out that the power to grant bail is a special power, that is derived from the CPA, and the court has no powers, outside of those

presented within the four corners of the CPA. Emphasis was placed on the fact that the court has no power, a[tr] from that placed on it from the CAP, to grant bail.¹

[9] However, the Supreme Court of Appeal in *Magistrate, Sutttherheim v Mashiya*² relied on its inherent jurisdiction for its ability to intervene in uncompleted bail proceedings in the magistrate's court. Further in *Majali v S*³ THE high court pointed out that it is able to supervise and 'quality control' lower courts with regard to civil and common matters. The court pointed out that the jurisdiction to intervene lies within the common law.

[10] In *S v Hlongwane*, the issue facing the court was whether it could grant bail where there is a petition pending. The court discussed the powers of the high court (then Supreme Court) to grant bail in general, in terms of its statutory powers as well as the common law. The headnote contains the following useful guidelines:⁴

"(1) That the Supreme Court has the power to use the *interdictum de homine libero exhibendo* to enquire into the lawfulness or unlawfulness of detention of any person and where such detention is unlawful, to order his release. That wide common law power could possibly include the narrower power to order the conditional release on bail of a person in appropriate circumstances.

(2) That the Supreme Court does have a general common law power to release a prisoner on bail has been accepted or presupposed in various decisions.

(3) When a person has been lawfully arrested on a charge for purposes of criminal proceedings, his right to release on bail until he is sentenced in the trial court is regulated by chap 9 (see s58-710 of the Criminal Procedure Act 51 of 1977. Chapter 9 contains a codification of such rights from arrest to sentence/ An accused cannot therefore during such period rely on any common-law power of the court to release on bail except possibly if particular circumstances occur where such common-law power can be exercised within the framework of chap 9 and without conflicting with it.

(4) After sentence in a criminal trial in a Supreme Court the court has the common-law power to control its sentence. The court can accordingly suspend the sentence pending the determination of any further steps which may be performed in a court (including application for leave to appeal, a petition to the Chief Justice, appeal, a special entry or reservation of a question of law) and temporarily release the sentenced person. The court may also impose a condition, for instance that the person lodge bail in order to secure his release. The court has therefore, after sentence, a common-law power to release on bail.

(5) A part of (4) above overlaps with s 321(1) (b) and (2) of Act 51 of 1977 and where this occurs s321 (1) (b) and (2) replaces the common law.

(6) A Provincial Division's power to release on bail a person convicted in the Supreme Court and sentenced to imprisonment does not expire after the Court grants leave to appeal to the Appellate Division.

¹ Ft nt 3: See *Chunilall v Attorney- General, Natal* 1979 (1) SA 236 (D); also *Beehari v Attorney- General, Natal* 1956 (2) SA 598 (N) And *S v Kaplan* 1967 (1) SA 634 (T); See also van der Merwe et al Du Toit'

² Ft nt 4: 2003 (2) SACR 106 (SCA) at 110a.

³ Ft nt. 5: *Majali v S* [2011] ZAGP JHC 74 para 14; Van Der Merwe OP CIT CH9-P8.

⁴ Ft.nt: 6: *S v Hlongwane* 1989 (4) SA 79 (T) at 81 of the headnotes and also Van Der Merwe op cit xh9-p8 and A Kruger Hiemstrar's Criminal Procedure 9Services issue 6—May 2013) p9-14(1)-p9-15.

(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 governed by s. 304(2) (c) (VI) (release on bail by a Provincial Division as a Court of appeal). Where this occurs the statutory power replaces the common law power.

(9) After sentence in an inferior court, the inferior court itself has statutory power to release on bail pending the determination of a review or an appeal."

(10) After disposal of an appeal by the Appellate Division and since the abolition of appeals to the Privy Council, no court has any power, common-law or statutory, to release a sentenced prisoner on bail, neither pending a petition to the State President for clemency, nor pending petition to the State President in terms of s 327 of Act 51 of 1977 for the hearing of evidence which only became available subsequent to the trial"

[11] The principle set out in *S v Hlongwane (supra)* have been applied in a number of cases⁵, including *S v Hatting* in which McLaren J held as follows:⁶

'This court has been given no power by statute to grant bail in circumstances such as these, but it was held in *Copthall Stores Ltd v Willoughby's Consolidated Co Ltd* 1931 AD 305 that this court has an inherent right to control its own judgments.'

[12] In *Majali v S (supra)* it was held as follows at paragraph 15 (emphasis in original text):

'The common-law inherent jurisdiction power to grant bail must be exercised consistently with the nature and purpose of section 39(2) of the Constitution, which provides that the court 'must promote' the spirit, purport and objects of the Bill of Rights and 'enjoins courts to develop the common law in the interests of justice' when dealing with matters involving the fundamental rights encapsulated in section 121(2)(a) and 35(1)(f), of the Constitution.'

.....

[20] It would seem to me that the High Court always has power to control its own proceedings. Inherent in this is the power to grant bail which is an incident of its common-law power to control its own judgments. This is not to say that in every instance the High Court would be obliged to consider an application for bail. This would depend on the facts and circumstances of each case. The general rule, however, is that bail applications should be pursued in the court of first instance because it is that court that is best equipped to deal with the issue, having been steeped in the atmosphere of the case. A refusal of bail in that court could result in that decision being taken on appeal to the High Court and thereafter to the SCA if necessary. As a matter of practice this is the route that should be followed. The peculiar circumstance of a case, may dictate otherwise."

⁵ Ft nt: 7 *S v Human* 1990 (2) SACR 155 (NC), *S v Malcom* 1999 (1) SACR 49 (SEC) and referred with approval in *Crossberg v S* [2007] SCA 93 (RSA) at para 14.

⁶ Ft nt: 8 *S v Hattingh* 1992 (2) SACR 466 (N) at 496 (N) at 496b; McLaren J quoted Centlivres CJ in *R v Milne & Erleigh* (7) 1951 91 SA 791 (A) at 881H. See also Van Der Merwe op ch9 p9-p10 to 10.

- [10] It needs pointing out that in the *S v Hlongwane (supra)* matter the Court: "held that there was no statutory provision which allowed release on bail of an accused pending a petition to the Chief Justice. However, the Court had a common law power to release such accused. The Court remarked that it was advisable that an application to release on bail pending a petition to the Chief Justice be brought before two Judges and, if possible, those Judges who had heard the appeal in the first instance."
- [11] It is trite that this Court has an inherent jurisdiction to grant bail pending the finalization of an appeal; vide the judgment of Ngcobo J as he then was in *S v Thornhill*⁷ particularly where he expresses the view that section 35(1) (f) of the Constitution reaffirms the common-law inherent jurisdiction of the High Court to grant bail. The common-law has always been accepted and applied by our courts; vide *Prinsloo v National Director of Prosecutions*⁸.
- [12] In the matter of *S v Dlamini; S v Dladla and Others; Joubert; S v Schietekat*⁹, the Constitutional Court held, *inter alia*, that the Court has an ultimate discretion to decide whether the circumstances of a particular case demand whether in its discretion bail should be fixed or refused.
- [13] It is not disputed that this Court has inherent jurisdiction to grant bail in this case, vide *Chunguete v Minister of Home Affairs and Others*¹⁰. In exercising the inherent powers this Court has to grant bail pending appeal, I took into account the peculiar circumstances of this case, which are:
- (a) the appeal against sentence has since been disposed of;
 - (b) leave to appeal against conviction was refused by the lower court;
 - © two judges reversed the lower court's decision and granted leave to appeal against conviction, because they held the view that there are reasonable prospects of success¹¹ on appeal against the conviction;
 - (d) the appeal against conviction has since been noted and therefore pending in the High Court;
 - (e) the applicant was admitted on bail pending the appeal against sentence.
- [14] For the aforesaid reasons it was ordered that:

⁷ 1998 (1) SACR 177 at 180h-181c.

⁸ 2011 (2) SA 214 at 223C-D.


⁹ 1999 (4) SA 623 (CC) at 628 D.

¹⁰ 1990 (2) SA 836 WLD at 843F-849H.

¹¹ Vide *S v Ndlovu and Another* 1999 (2) SACR 645 WLD et *S v Hudson* 1996 (1) SACR 431 (W). At 647e-g.

1. Bail in the amount of R10, 000. 00 is granted to the applicant; subject to the following conditions:

- (i) he executes the appeal against his conviction;
- (ii) he surrenders himself to the nearest police station or the registrar of this Court, in the event of his appeal being unsuccessful, within seven days of being informed thereof.



N. M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 08 FERUARY 2018

APPLICANT `S ADV : ADV. M. G. SKOSANA

INSTRUCTED BY : SHAPIRO & LEDWABA INC

RESPONDENTS` ADV : ADV. P. W. COETZER

INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTION.