THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 252/2011

In the matter between:

ANDRIES JOE MASOANGANYE **First Appellant**
TLALENG ALINA MHELKWA **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: *Masoanganye v The State* (252/11) [2011] ZASCA 119 (7 July 2011)

Coram: Harms AP, Brand and Maya JJA

Heard: 05 July 2011

Delivered: 07 July 2011

ORDER

On appeal from: North West High Court (Mafikeng) (Leeuw JP sitting as court of first instance):

1. The appeal of the first appellant is dismissed.

2. The appeal of the second appellant is upheld. The order of the court a quo with regard to her is set aside and replaced with the following:

(a) Bail consisting of the amount of R25 000 is granted to TLALENG ALINA MHLEKWA subject thereto that she:

(i) furnish the Registrar of the North-West High Court Mahikeng and the Director of Public Prosecutions, North-West, Mahikeng, with her full residential and postal address as well as of the address of her attorney of record; and

(ii) deliver the Notice of Appeal to the Full Bench within twenty (10) days of this order, as required in Rule 49(2) and (3) of the Uniform Rules.

(b) has to, within twenty (20) days after receipt of a copy of the record of the trial proceedings from the aforesaid Registrar in accordance with the provisions of Rule 49A of the Uniform Rules apply to the aforesaid Director of Public Prosecutions, to set a date for the hearing of the appeal as required in Rule 49A(2);

(c) TLALENG ALINA MHLEKWA has to at least twenty (20) days before the date for the hearing of the appeal deliver her Heads of Argument in accordance with the provisions of Rule 49A(3) of the Uniform Rules.

(d) TLALENG ALINA MHLEKWA has to within seventy-two (72) hours of service of an order to surrender contemplated in Section 307(3)(b) read with Section 321(2) of the Criminal Procedure Act, No. 51 of 1977, in the manner prescribed by the Uniform Rules on her at her residential address referred to in (a)(i).

(e) If TLALENG ALINA MHLEKWA should fail to comply with the provisions of paras (b), (c) and (d), bail shall be provisionally cancelled and the bail money provisionally forfeited and a warrant for her arrest shall be issued.

JUDGMENT

HARMS AP (BRAND and MAYA JJA concurring)

[1] Mr Andries Masoanganye and Mrs Tlaleng Alina Mhlekwa, to whom I shall refer for the sake of convenience as the first and second appellant respectively, were found guilty and sentenced to periods of imprisonment by Leeuw JP in the North West High Court, Mafikeng. They were the first and third accused in a case that concerned the theft of funds from the Guardian Fund. The first appellant was the Master and the second appellant the Assistant Master of the High Court in Mmabatho at the relevant time. Important to note for purposes of this judgment is the fact that they were allegedly in cahoots with an attorney, Mr Abdul Kader Ahmed, who used his firm's trust account for diverting the money involved. Ahmed was a co-accused, and he too was found guilty and sentenced to a period of incarceration.

[2] The appellants and Ahmed applied to the trial court for leave to appeal to this court and for an extension of their bail pending the finalisation of their appeal. The learned judge below granted them leave to appeal against conviction and sentence but ordered that the appeal be heard by the full court of the North West High Court. She released Ahmed on bail but refused the appellants bail.

[3] We have before us an appeal by the appellants against the refusal of the court below to grant them bail and an application by them to lead further evidence on appeal in support of their bail appeal.

[4] There is in addition applications by the appellants and by Ahmed for a

direction that the appeal be heard by this court instead of the full court. Such application is dealt with in chambers but it is convenient to set out our reasons for dismissing these in this judgment.

[5] The background to these applications is the following. It would appear that Ahmed had applied for a separation of trial, which was refused. This, he said, meant that he had to incur unnecessary legal expenses and that he therefore did not have a fair trial. It seems that Leeuw JP was asked and did in the course of the trial make a special entry on the record in this regard.

[6] It would also appear that the accused had asked the learned judge during the trial to recuse herself on the basis of a perceived animosity towards the accused by virtue of numerous indulgences granted to the prosecution. She dismissed the application and apparently made a special entry at the request of the accused based on her refusal.

[7] The last issue was raised by the two appellants only. Their final complaint was that the learned judge had asked for a correctional supervision report for purposes of sentencing. It was not forthcoming and she proceeded to sentence them without such a report. Although asked, Leeuw JP did not make the necessary special entry.

[8] The appellants and Ahmed allege that these issues entitle them to an appeal as of right to this court by virtue of s 318 of the Criminal Procedure Act 51 of 1977 and that it does not make sense to have two appeals in the same matter, one before the full court on the merits and another before this court on the special entries.

[9] The argument is no doubt correct provided the special entries were proper special entries as envisaged by s 318. They are, however, not. As was explained in *Staggie v The State* (38/10) [2011] ZASCA 88 (27 May 2011):

*'*Special entries are an anachronism dating from the time when the right to appeal in a criminal case was severely restricted. In spite of what was said in a time frame not far removed from the extension of the right to appeal by Schreiner ACJ in *R v Nzimande &*

others 1957 (3) SA 772 (A) at 773H-774D, the only purpose it serves today is to record irregularities that affect the trial that do not appear from the record. Examples given by Hiemstra[1] relate to the removal of an assessor by the presiding judge for reasons that were not debated in open court (*S v Malindi & others* 1990 (1) SA 962 (A)); the failure of the prosecutor to disclose discrepancies in a witness's statement (*S v Xaba* 1983 (3) SA 717 (A)); and where the was a breach of the attorney-client relationship and the evidence so obtained was used against the accused (*S v Mushimba* 1977 (2) SA 829 (A).'

[10] Like in *Staggie*, all the so-called irregularities relied did not qualify because they all concerned an attack on rulings made by the court during the proceedings and they do not relate to irregularities that affect the trial that do not appear from the record. This means that the notices of appeal filed in this court by the appellants and by Ahmed were irregularly filed and have to be set aside.

[11] This means that the application that the appeal be heard by this court because of s 318 was misconceived. However, the appellants and Ahmed gave another reason. They believe that the judges assigned to hear the appeal may defer to the trial judge because she is the judge president of that court. This belief, if truly held, has no factual basis. There is on the papers before us no reason to believe that the judges that will hear the appeal will not hold to their judicial oath and decide the case fearlessly. If the appellants and Ahmed have reason to apply for the recusal of any particular judge, that application should be directed to that judge at the appropriate time. In our system, if there is reason to believe that proximity could be a problem, the practice is to 'import' a judge or judges from other high courts to hear the particular case.

[12] We had regard to the notices of appeal filed not only in this court but also in the high court. The issues are purely factual and appear to be staight forward. There is accordingly no reason to direct that the appeal be heard by this court. On the contrary, the registrar will be directed to return the notices of appeal filed in this court because they were incorrectly accepted. The full court can deal with the alleged irregularities in the course of the appeal.

---

1 *Suid-Afrikaanse Strafproses* (Kriegler and Kruger 6 ed) p 888.

[13] I now revert to the appeal proper. An appplication for bail after conviction is regulated by s 321 of the Act. It provides that the execution of the sentence of a superior court 'shall not be suspended' by reason of any appeal against a conviction unless the trial court 'thinks it fit to order' that the accused be released on bail. This requires of a sentenced accused to apply for bail to the trial court and to place the necessary facts before the court that would entitle an exercise of discretion in favour of the accused. Compare *S v Bruintjies* 2003 (2) SACR 575 (SCA) para 8.

[14] Since an appeal requires leave to appeal which, in turn, implies that the fact that there are reasonable chances of success on appeal, is on its own not sufficient to entitle a convicted person to bail pending an appeal: *R v Mthembu* 1961 (3) SA 468 (D) at 471A-C. What is of more importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction, and real prospects that a non-custodial sentence might be imposed.

[15] It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue having been steeped in the atmosphere of the case. Through legislative oversight, something this court has complained about for more than two decades and ignored by the Executive, a convicted person has an automatic right of appeal to this court against a refusal of bail. But there is a limit to what this court may do. It has to defer to the exercise of the trial court's decision unless that court failed to bring an unbiased judgment to bear on the issue, did not act for substantial reasons, exercised its discretion capriciously or upon a wrong principle.

[16] The problem is that the trial judge, contrary to established practice, failed to give reasons for granting leave to appeal. The problem is exacerbated by the fact that the judgment on conviction is not before us due to the failure of the trial judge to release it – even after four months. We do not know the reasons but the delay is, prima facie, inexcusable.

[17] This failure makes it difficult for us to assess whether the appellants have any real prospects of success on the merits. In addition, although the appellants have filed full affidavits and heads, they did not deal with the merits of the appeal. We are

also unable, in the absence of extracts from the record, to assess whether there is any merit in the bias allegation nor do we know what a pre-sentence report would have shown that could have led to a non-custodial sentence being imposed. This means that we can but give little weight to chances of success on conviction.

[18] A further problem is that the court below intimated that it had other reasons for refusing bail which it was prepared to disclose if approached. Such an approach was not made. It would appear that the trial judge was under the impression that the application for bail could be renewed because she said that she was not satisfied that the appellants could be released on bail 'at this stage'. On a conspectus of the judgment as a whole it seems that what the learned judge had in mind was that the appellants could produce further evidence concerning their assets – the only matter that she dealt with in her judgment. Her judgment boils down to this: she was not satisfied that the appellants were not a flight risk because they did not have sufficient assets. Ahmed, who had sufficient assets, was held not to be a flight risk for that reason only.

[19] The proper route to have followed would have been to allow the matter to stand down – as requested by counsel – or to postpone the bail application. However, what the court failed to consider is that the personal circumstances of an accused – much more than assets – determine whether the accused is a flight risk. The court knew that the second appellant had three children, one of 18 months, that her husband lives and work in the country and that she is still employed in some or other position in a master's office. These facts, in my view, if taken into account, would have satisfied that she was not a flight risk. Although not as strong a case could be made out for the first appellant, his personal circumstances are such that he, too, could hardly be seen as a flight risk.

[20] That is not the end of the matter. One has to consider the seriousness of the crimes and the possible length of incarceration. As counsel for the state conceded, there is a real likelihood that the second appellant might have served her full sentence by the time the appeal is finalised. This means that unless she is released on bail her appeal may become academic. It is different with the first appellant. He was sentenced to an effective period of ten years' imprisonment for having stolen, in

his position as Master, over a period of more than a year a sum in excess of R1million from the Guardian Fund and government. There is no likelihood that his ultimate sentence will be reduced to less than three years. In the light of this it would not be appropriate to grant him bail.

[21] The following order is made:

1. The appeal of the first appellant is dismissed.

2. The appeal of the second appellant is upheld. The order of the court a quo with regard to her is set aside and replaced with the following:

(a) Bail consisting of the amount of R25 000 is granted to TLALENG ALINA MHLEKWA subject thereto that she:

(i) furnish the Registrar of the North-West High Court Mahikeng and the Director of Public Prosecutions, North-West, Mahikeng, with her full residential and postal address as well as of the address of her attorney of record; and

(ii) deliver the Notice of Appeal to the Full Bench within twenty (10) days of this order, as required in Rule 49(2) and (3) of the Uniform Rules.

(b) has to, within twenty (20) days after receipt of a copy of the record of the trial proceedings from the aforesaid Registrar in accordance with the provisions of Rule 49A of the Uniform Rules apply to the aforesaid Director of Public Prosecutions, to set a date for the hearing of the appeal as required in Rule 49A(2);

(c) TLALENG ALINA MHLEKWA has to at least twenty (20) days before the date for the hearing of the appeal deliver her Heads of Argument in accordance with the provisions of Rule 49A(3) of the Uniform Rules.

(d) TLALENG ALINA MHLEKWA has to within seventy-two (72) hours of service of an order to surrender contemplated in Section 307(3)(b) read with Section 321(2) of the Criminal Procedure Act, No. 51 of 1977, in the manner prescribed by the Uniform Rules on her at her residential address referred to in

(a)(i).

(e) If TLALENG ALINA MHLEKWA should fail to comply with the provisions of paras (b), (c) and (d), bail shall be provisionally cancelled and the bail money provisionally forfeited and a warrant for her arrest shall be issued.

_____

L T C Harms
Acting President

APPEARANCES

APPELLANT/S	C J Zwiegelaar (Me)
	Instructed by Smit Stanton Incorporated, Mahikeng
	Naudes Attorneys, Bloemfontein
RESPONDENT/S:	M G Ndimande
	Instructed by The Director of Public Prosecutions, Mmabatho
	The Director of Public Prosecutions, Bloemfontein