

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A397/2009
DATE OF HEARING: 22 October 2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

HERBERT HACK

Appellant

and

THE STATE

Respondent

JUDGMENT

MALULEKE J AND RANCHOD J:

After the conclusion of the bail hearing this court ruled that the application be dismissed and that reasons will follow later. These then, are the reasons:

1. The appellant applied for “extension of bail” pending application or petition to the Supreme Court of Appeal (“SCA”) for special leave to appeal against our dismissal of his appeal on the 10 October 2014 against conviction for 51 counts of fraud and a

sentence of 5 years imprisonment imposed upon him on the 08 February 2008 by the Regional Magistrate N. L. Louw sitting in the Johannesburg Specialised Commercial Crime Court. The appellant was released on bail of R45 000.00, pending appeal on the 08 February 2008 which bail terminated on 10 October 2014 when the appeal was dismissed by this court and the appellant was ordered to surrender himself within 72 hours to commence serving the sentence.

2. It is necessary at the onset to record the following pertinent facts and provisions:

2.1. On the 10 October 2014 we made the following order:

- 2.1.1. *"The appeal on sentence and conviction is dismissed;*
- 2.1.2. *The appellant is to present himself to the Registrar of the High Court, Gauteng Local Division Johannesburg within 72 hours of the making of this order to commence serving his sentence".*

2.2. s16 (1) (b) of the Superior Courts Act 10 of 2013 provides:

"16 (1) subject to s15 (1), the Constitution and any other law...

(a) ...

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal".

2.3. s321 of the Criminal Procedure Act provides:

(1) The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal, unless –

(a) ...

[paragraph (1) (a) deleted by Act 33 of 1996]

(b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused be released on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided.

3. On the 10 October 2014, immediately after the order in paragraph 2.1. above was handed down Counsel for appellant gave oral notice of intention to apply for extension of bail pending application to us for leave to appeal our decision to the SCA. In the light of the recent SCA decision of *Van Wyk and Galela v The State (20273/2014) (20448/2014) ZASCA 152 (22 September 2014)* the appellant has to approach the SCA direct for special leave to appeal to that Court in terms of s16 (1) (b) of Act 10 of 2013. In other words, we have no jurisdiction for purposes of hearing application for leave to appeal further our decision. At the time there was, in our minds, uncertainty as to whether in the circumstances we could consider application for bail pending petition to the SCA.
4. On 15 October 2014 applicant's Counsel, **Mr Eia**, addressed a letter to us (Maluleke and Ranchod JJ) advising *inter alia* that the appellant was in the process of settling the petition for special leave to appeal and requesting that since it is evident that the application for bail must be heard by us, bail should be provisionally extended pending a formal application to us for leave to appeal our decision on the 22 October 2014. For this request Mr Eia then relied on the following cases: *S v Hlongwane 1989 (4) SA 79 (T)*, *S v Human 1990 (2) SACR 155 NC*, *S v Nel 2002 (1) SACR 425 (T)* and *S v Tsotsi 2004 (2) SACR 273 (E)*. In the light of these decisions we accepted and agreed with appellant's Counsel that we do indeed have the authority and jurisdiction to hear and consider the application for bail or extension of bail pending a petition to the SCA and therefore on 20 October 2014 the parties were advised that the application for extension of bail will be heard on 22 October 2014.
5. At the commencement of this hearing Ms Coetzee for the respondent took the point, ostensibly in *limine*, that since the applicant has to-date still not complied with the court

order of the 10 October 2014 to hand himself to the Registrar of the Gauteng Local Division, Johannesburg within 72 hours after the date of the order, he is thereby in contempt of the court order of this court which was to-date “*made 12 days or 288 hours ago*”. It is further contended that in the light of this non-compliance it is accordingly not in the interests of justice at this stage to grant the applicant bail pending his petition to the SCA and consequently his application should be dismissed.

6. There is no evidence by appellant to explain the reasons for this continued breach of the court order. Mr Eia submitted from the bar that:

- (a) But for the court’s misunderstanding of its jurisdiction, applicant could have obtained extension of the bail on the date of the order;
- (b) Ms Coetzee, for respondent, had represented to him that the Director of Public Prosecutions will not enforce the court order; and
- (c) Applicant is an Orthodox Jew and this is a period of “holy holiday” for him, and as we understood Mr. Eia this was legitimate reason not to comply with the order.

7. The failure of the appellant to comply with our court order must also be considered in the light of the fact that it was an express condition of the bail pending appeal granted to appellant on 08 February 2008 by the magistrate that on the unsuccessful determination of his appeal he must hand himself in to commence service of his sentence. Appellant was and continues to be legally represented and was no doubt well aware of the conditions of bail pending appeal as well as our court order of the 10 October 2014.

8. The grounds of the petition and proposed appeal do not in our view enjoy reasonable prospects of success. We are mindful of the fact that the SCA is being petitioned to decide this very issue, and we have considered the matter only in the exercise of our

discretion to decide in accordance with the provision of s321 of CPA whether it is in the interests of justice that the execution of sentence of a superior court be suspended on the basis of the facts before us. As was pertinently stated by **Maya JA** in *Beetge v The State* (925/12) (2013) ZASCA 1 (11 February 2013) at paragraph 4:

“The application to be admitted to bail after conviction is governed by s321 of Act 51 of 1977. These provisions prohibit the suspension of a sentence imposed by a superior court by reason of any appeal against a conviction unless the trial court thinks it fit to order the sentenced accused’s release on bail”.

In these circumstances we are not persuaded that it is in the interests of justice to suspend the execution of sentence when we believe that the petition is without reasonable prospects of success.

9. The sentence in this case was imposed on 08 February 2008. In *S v Nel* 2002 (1) SACR 425 at 429 (i) in a matter where bail was sought pending application for leave to further appeal from the SCA to the Constitutional Court, **Moseneke J** (“as he then was”) pertinently opined as follows:

“It is not in the interests of justice that a duly convicted person should delay or postpone serving his sentence by seeking to be released on bail without any reasonable prospect of an appellate court altering such conviction or sentence”.

10. The situation in our present case is analogous. In any event we are in agreement with the respondent’s submission that if applicant is in breach of a condition of bail and in contempt of our court order of the 10 October 2014 as he evidently is, then it cannot be in the interests of justice that this application for extension of bail should be considered.

In the result this application for bail pending petition application to the SCA for special leave was refused and dismissed.

G.S. S. MALULEKE
JUDGE OF THE HIGH COURT

AND

N. RANCHOD
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellant	: Adv. P. Eia
Instructed by	: Werksmans Attorneys (Mr Burger)

Counsel on behalf of Respondent	: Adv. C Coetzee
Instructed by	: Director of Public Prosecutions

Date heard	: 10 October 2014
Date delivered	: 22 October 2014