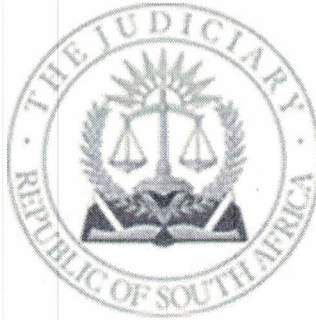
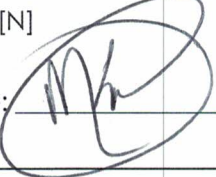




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: [N]
(2) OF INTEREST TO OTHER JUDGES: [N]
(3) REVISED: [N]
(4) Signature:  Date: 5/5/2023

APPEAL CASE NO.: A41/2023

In the matter between:

LEON DEREK D'ABRETON

Appellant

and

THE STATE

Respondent

NEUTRAL CITATION: *Leon Derek D'Abreton vs The State* (Case Number: A41/2023)

[2023] ZAGPJHC 432 (5 May 2023)

JUDGMENT

INTRODUCTION

- [1] On 9 December 2022, the appellant was convicted on a count of murder read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 and one count of assault common.
- [2] On 27 February 2023, the appellant was sentenced to 13 years' imprisonment in respect of count 1 and 6 months in respect of count 2.
- [3] The sentence of 6 months was ordered to run concurrent with the sentence on count one. Leave to appeal both conviction and sentence was refused.
- [4] On 13 March 2023, the appellant filed a petition for leave to appeal to the judge President in terms of section 309B of the Criminal Procedure Act 51 of 1977. As at the date of the hearing of this appeal, the applicant was still awaiting the outcome of his petition.
- [5] On 20 March 2023, the appellant applied for a bail pending the outcome of his petition and his application for bail was refused.
- [6] The current appeal is against the magistrate's refusal of bail. In refusing the Appellant's bail application, the magistrate was of the view that it would not be in the interest of justice to realise him on bail taking into consideration the offence the Appellant was convicted of. It is also obvious that the fact that the magistrate had refused the Appellant leave to appeal played a major role in refusing his bail application pending his petition to the judge president.
- [7] In the circumstances, the magistrate held that it would not be in the interest of justice to release the Appellant on bail pending the outcome of the petition when he was of the view that there are no prospect of success of the appeal.
- [8] Appellant submitted that he is not a flight risk and owns unencumbered properties within the Republic of South Africa. To this end, it was stated that

Appellant owns several properties in South Africa the whereabouts of some of the properties are unknown to the State.

[9] Counsel on behalf of the appellant submitted that the said properties and addresses have already been disclosed to the State and as such the apprehension that the Appellant is a flight risk is not warranted. To further bolster the Appellant's case, it was made mention of the fact that the Appellant had been on bail and attended his trial diligently for a period of almost 5 years. Further, it was argued that when he was convicted of murder and assault, it was clear to him that he will be sentenced to direct imprisonment but was granted bail pending sentence and again he attended court without fail. This it was argued is an indication that he is not a flight risk.

[10] In the matter of Berend Stephanus Smith v the State (CA&R 150/09) [2009] ZAECHGHC 52 (18 August 2009), the court stated the following at paragraph 3:

"In considering an application for bail pending a petition for leave to appeal on conviction, the magistrate was obliged to balance the liberty of the individual against the interest of the good administration of justice, and in so doing, consider the prospects on success on appeal."

[11] The court further stated that:

"The test in a bail application has been variously stated – whether the appeal is free from predictable failure, whether the appeal is arguable or hopeless; whether there is a possibility that the appeal may be allowed; whether or not the appeal is manifestly doomed to failure."

[12] Indeed and as stated in paragraph 7 above, it is clear that the magistrate took into consideration the issue of prospect of success of the appeal but it is not correct to conclude that it was the only issue that he considered.

[13] He considered the fact that the interest of justice is not a one-way stream but also the interest of the State and or communities must be taken into account. He took into consideration the fact that the Appellant had already been

sentenced to 13 years of imprisonment, a fact that was unknown to him when he attended his case for purposes of sentence. He now knows that he is facing a term of imprisonment of 13 years should his leave to appeal fail.

[14] The court a quo is criticized for the apparent failure to grant bail to the accused with conditions namely that he reports three times weekly at the Police Station in Boksburg.

[15] I am in agreement with the State's submission that the perusal of the Appellant's affidavit attached to his application, he does not request any such conditions to be attached.

[16] The issues that the Appellant raises and alleges that they were not dealt with were in fact dealt with including the issue of him being a flight risk.

[17] It may be that the Appellant is not satisfied with the outcomes thereof but fact of the matter is that they were dealt with.

[18] It further must be borne in mind that this court as a court of appeal is confined to the record presented and that basis I cannot look into other matters that were not raised in the court a quo.

[19] As matters stand, the Appellant has lodged a petition with the Judge President for leave to appeal. I am of the view that this application is premature.

[20] In the circumstances, the following order is made;

1. Appellant's appeal against the refusal of his bail pending the outcome of petition for leave to appeal is dismissed;
2. The appellant may approach this court for the reconsideration of his bail application should his petition be successful.



KUMALO MP J

Judge of the High Court of South Africa

Gauteng South Division, Johannesburg

Appearances:

For the Appellant: Adv. Danie Combrink

Instructed by: Moumakoe Clay Inc.

For the State: C Mack

Instructed by: NDPP.

Hearing date: 02 May 2023

Delivered: 05 May 2023