

Reportable:	YES
Circulate to Judges:	YES
Circulate to Regional Magistrates:	YES
Circulate to Magistrates:	YES



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **CA&R 47/2020**
Date Heard: **07/10/2021**
Date Delivered: **29/10/2021**

In the matter between:

NATASHA LIEBENBERG

Applicant

v

THE STATE

Respondent

JUDGMENT

O'Brien AJ

- [1] The applicant appeared in the Regional Court Kimberley on various charges of fraud, theft and uttering of a forged document. She initially pleaded not guilty to all the charges, but during the trial, she made specific admissions in terms of section 220 of the Criminal Procedure Act, 51 of 1977 ('the CPA'). Because of these admissions, the court convicted her of all the charges except one. The charges were taken together for purposes of sentence, and it sentenced her to six years imprisonment.

- [2] She appealed both the conviction and sentence after being granted leave on petition by the Judge President of this division. After that, she applied for bail pending the outcome of the appeal. Her application was successful, and she was granted bail in the amount of R5 000.00 coupled with certain conditions.
- [3] Her appeal to the Kimberley High Court succeeded in part. On certain charges the High Court found there to be a duplication. It set aside the charges concerning forgery and uttering a forged document. The court reduced her sentence to four years imprisonment. She now applies for bail pending a petition to the Supreme Court of Appeal ("the SCA") against the conviction and sentence. It is unclear from the judgment on which charges the applicant's sentence was reduced. Also, whether the charges were taken together for purposes of sentence. More about that later.

Jurisdiction

- [4] The issue in dispute is whether this Court has jurisdiction to decide this application. Mr Mphela for the state relies on an unreported decision of this Court in ***Anele Kohlani v The State*** (case number 974/21) delivered on 11 June 2021 submitted that this court does not have jurisdiction to decide bail for lack of jurisdiction. In his view, the only Court which could fix bail is the SCA.
- [5] Mr Schreuder, on behalf of the applicant submitted with reference to ***S v Banger 2016(1) SACR 115 (SCA)***, that the court has jurisdiction to decide the question of bail pending the petition to the SCA.
- [6] In *Kohlani* the learned judge relied on the decision of ***Van Der Walt v Director of Prosecutions, Mpumalanga 2020(2) SACR 132 (MM)*** in concluding that the applicant (*Kohlani*) should approach the SCA to consider the question of bail pending an intended application for special leave to appeal to the SCA. This necessitates a careful consideration and analysis of the statutory provisions, and the Van Der Walt decision in an application for bail pending an appeal to the SCA.

[7] The ratio in ***Van der Walt*** appears to be that a Court under the new dispensation - The Superior Court Act 10 of 2013 - has to take into consideration when deciding the question of bail pending an application for special leave to the SCA, whether the applicant has a reasonable prospect of success on the merits of the case. Accordingly, so the argument goes, bail could only be determined by the SCA when special leave must be granted. Stated differently, it is only the SCA who could decide the question of bail.

[8] I am in respectful disagreement with the reasoning in Van Der Walt and Kohlani. The Court in Van Der Walt proceeds from the premise that it is not entitled to determine an application for bail when the SCA must determine if an applicant has a reasonable prospect of success on the merits. But is the consideration of bail pending appeal and reasonable prospects of success on appeal conceptually the same, in my view not.

[9] In ***Egling v S [2003] JOL 11005 (W)*** Stegman J dealt extensively with the difference between the test for leave to appeal on the merits and the test for bail pending appeal. After referring to several of authorities, he concludes on page 29:

"...When a court is approached to release a prisoner on bail pending appeal, it is required to exercise a discretion. The starting point is that the decision of the trial court is taken to be correct. At the same time, the convicted person has a right of appeal that must not be rendered nugatory by the refusal of bail for insufficient reasons. It is in the interest of justice that, wherever possible, liberty should be upheld by the release of the applicant on bail pending appeal.. "

And on page 30:

"I hold that there is no general requirement of the law that an applicant for bail pending appeal must demonstrate that he has a reasonable prospect of success on appeal." (my emphasis).

[10] I respectfully agree with the reasoning encapsulated in the last sentence of the preceeding paragraph. I accept ***Egling*** was decided before the

introduction of the Superior Courts Act. But there is a conceptual difference between bail pending appeal and reasonable prospects of success on appeal regarding the merits of a conviction and sentence.

- [11] My starting point is the Constitution. Section 35(3)(o) states every accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court. That right includes the right to appeal against the refusal of bail.

- [12] In *S v Banger 2016(1) SACR 115 (SCA)* at para 14, the court said bail appeals are inherently urgent. An accused person should not be deprived of his/her constitutional rights to freedom and freedom of movement for longer than is reasonably necessary. The Court emphasized an applicant's right to appeal against the refused bail; however, 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.

- [13] In *Banger*, the court dealt with the distinction between Section 21(1) of the Supreme Court Act, 59 of 1959, and the Superior Courts Act. The Court reasoned that in terms of the new dispensation regarding 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 the High Court comprised of more than one judge, the appeal lies directly to the SCA. By implication, as I understand the Court's reasoning, an unsuccessful appeal against conviction and sentence does not preclude an applicant from applying for bail in the High Court pending a further appeal to the Supreme Court of Appeal. As stated in *Egling*, an applicant for bail pending need not show that he has a reasonable prospect of success on appeal. Reasonable prospects of success on appeal is but one factor that must sway a court to grant bail.

- [14] The SCA in *Banger* reasoned that after the dismissal of an appeal by a full bench of the High Court, the previous bail lapsed and a new application must be made. In *Banger* the accused was convicted and sentenced in the Regional Court. An appeal to the High Court was unsuccessful. The accused, instead of applying for bail pending appeal in the High Court, filed a

petition to the SCA. In view of his application for special leave to appeal to the SCA, the accused applied for bail pending the outcome of his application for special leave on the sentence and conviction. The High Court dismissed his application. The accused did not apply to the High court for leave to appeal against the refusal of bail, believing he had an automatic right of appeal. The Supreme Court of Appeal struck the matter from the roll for the reasons mentioned to in paragraph [13] above.

- [15] **Banger** was not discussed or referred to in **Kohlani** and **Van der Walt**. In my respectful view, the reasoning that the SCA must determine whether an accused has reasonable prospects of success, and therefore has to hear an application for bail, is flawed and should not be followed. In Van Der Walt, the court erred by not distinguishing between bail pending appeal and a reasonable prospect of success on appeal.
- [16] There is another reason I differ from the reasoning in **Kohlani** and **Van der Walt**.
- [17] Section 16 of the Superior Courts Act relevantly determines:
“(1) 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 instances lies, upon leave having been granted –
 (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;
 (b) an appeal against the decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by that court or the Supreme Court of Appeal...”
- [18] In **Director of Public Prosecutions, Gauteng v KM 2017(2) SACR 177 (SCA)**, the court discussed section 311 of the CPA and decided that this section provides for an appeal as of right, without leave. An appeal under section 311 of the CPA is also an appeal regulated in terms of the CPA.

Accordingly, section 16(1)(b) of the Superior Courts Act does not apply.¹ It further held that in terms of the definition of an appeal in the Superior Courts Act does not include an appeal in a matter regulated in terms of the CPA or in terms of any other criminal proceedings. The question of bail is thus not governed by the provision of section 16(1)(b) of the Superior Courts Act. Therefore a High Court is not precluded to decide the issue of bail pending an application for special leave to appeal to the SCA.

[19] Bail proceedings are criminal proceedings. The provisions of the CPA governs the issue of bail. In section 65 of the CPA, provision is made for an appeal to a High Court if bail is refused in a lower court. See ***S v Botha 2002(1) SACR 222 (SCA)*** at paragraph 5 followed in ***S v Tucker 2018(1) SACR 616 (WCC)***. Because section 1 of the Superior Courts Act excludes an appeal in a matter regulated by the CPA, the provisions' of section 16(1)(b) requesting special leave to appeal do not apply. (KM supra at para 35). This shows that the bail determination in the circumstances like the present (where the appellant was unsuccessful in the High Court) the High Court has the jurisdiction to determine bail. Stated differently, the SCA need not determine the prospects of success on appeal for a High Court to decide bail.

[20] The applicant in the matter under discussion was sentenced to six years imprisonment. On appeal, that sentence was reduced to four years imprisonment. She has now applied for special leave to appeal to the SCA against conviction and sentence. When her appeal against her conviction and sentence succeeded in part, her bail lapsed. Therefore, the applicant is of right entitled to apply for new bail. On ***Kohlani*** and ***Van Der Walt***, the applicant must lodge her application for bail pending special leave to appeal to the SCA. This approach contradicts ***Banger*** and ***KM***, as discussed above. This Court has jurisdiction to entertain this application afresh for bail pending the decision of the SCA to grant special leave to appeal or not.

[21] I turn to the merits of this application. As stated previously, the conviction and sentence succeeded in part on appeal. However, the order of the court of

¹ See paragraphs 32-35 in particular of ***KM***.

appeal appears to be problematic. In paragraph (a) of the order, it states that the appeal against the conviction and sentence succeeds in part. It reduced the sentence to four years imprisonment. The difficulty with this order is that it does not say on what charges the applicant was successful. It bears mention that the Regional Court took all the charges together for the purpose of the sentence. Second, the order on appeal does not say which sentences were set aside and which sentences were substituted. Third, the order does not say whether the court took together the charges for the purpose of the sentence. Fourth, the order does not say whether the sentence is antedated. There is thus a reasonable prospect that a higher court would interfere with the sentence, albeit on technical issues.

- [22] Mr Mphela argued that the Court should not let the applicant on bail pending special leave to appeal. Although conceding there may be some difficulty with the order imposed on appeal, he submitted that the applicant has no prospect of success on appeal. He bases this argument on the applicant's admissions made in terms of section 220 of the CPA, which amounted to a guilty plea. However, the applicant contends she was coerced to make these admissions. Whether that is the truth or not is not for me to decide.
- [23] He further submitted that the applicant had shown suicide tendencies, and she might not report to correctional services. I considered this argument carefully. However, the applicant has already spent eight months in prison, was released, and has not committed suicide. It also appears that there is a genuine attempt to contest the conviction and sentence. I received no evidence that the applicant is a flight risk, and will abscond.
- [24] In my view, the interest of justice, given an individual's right to liberty, moves me to grant the applicant bail.
- [25] I make the following order:
1. Bail is granted to the applicant pending her application for special leave to the Supreme Court of Appeal in the amount of R5 000.00 under the following conditions:

- (a) If the Applicant's application for special leave to appeal to the Supreme Court of Appeal is dismissed or partly successful, she has to report to Correctional Service Centre, Kimberley;
- (b) Such reporting to the Correctional Centre, Kimberley, must be done within 48 hours after being served with a notice to do so.



S.C O'BRIEN
 Acting Judge

On behalf of the Applicant:

Adv.J. SCHREUDER
Adv. C.F VAN HEERDEN
 (PGMO Attorneys)

On behalf of the Respondent:

Adv. I MPHELA
Adv. L. SETOUTO
 (DDP, Kimberley)