

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO



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

**Case No: K/S 07/2015
Heard on: 23/01/2018
Delivered on: 02/02/2018**

In the matter between:

**KEARABETSWE McNULTY MABEJANE
KITLANO OCCASION MABEJANE
GADIHELE PATRICIA KGOMOELELA
TSHEPISO SHADRACK MODUTWANE
PATRICK MOGAPI
SIPHO GIFT KEOGATILE**

**1st Applicant/accused 1
2nd Applicant/accused 2
3rd Applicant/accused 3
4th Applicant/accused 4
Accused 5: N/A
5th Applicant/accused 6**

and

THE STATE

Respondent

JUDGMENT: APPLICATION FOR BAIL PENDING APPEAL

MAMOSEBO J:

- [1] This is an application for bail pending an appeal to the Full Bench of the Northern Cape Division on conviction which is opposed by the State.
- [2] The five applicants were each convicted on 29 August 2016 of Count 1: murder with *dolus eventualis* as a form of intent; Count 2: Assault with intent to cause grievous bodily harm. They were sentenced on 16 November 2016 to 15 years' imprisonment on the murder charge and two years' imprisonment in respect of the Assault GBH charge. The two sentences in respect of each one of them were ordered to run concurrently.
- [3] Leave to appeal was refused. They were also unsuccessful in their application to be released on bail pending appeal. The applicants petitioned the Supreme Court of Appeal (SCA) and were successful in that leave was granted to appeal to the Full Bench of this Division on conviction, which precipitated this application.
- [4] Heavy reliance, by all the legal representatives appearing on behalf of the applicants, was placed upon the fact that six different judges of the Supreme Court of Appeal (SCA), have granted leave to appeal against their conviction. This, they argued, is an indication that they have strong prospects of success on appeal. Hancke AJA dealt with this aspect in *S v Scott-Crossley*¹ as follows:

“[7] The prospects of success do not in itself amount to exceptional circumstances as envisaged by the Act – the Court must consider all relevant factors and determine whether

¹ 2007 (2) SACR 470 at 473e (para 7)

individually or cumulatively they constitute exceptional circumstances which would justify his release (*S v Bruintjies*)².”

- [5] In the *Bruintjies case*³ the appellant and his co-accused were convicted of robbery with aggravating circumstances and possession of unlawful firearms. They were sentenced to 15 years and five years respectively. The appellant applied for and was granted leave to appeal to the Full Bench against his conviction and sentence. The SCA dismissed his appeal. The SCA remarked that the fact that a sentenced person has been granted leave to appeal does not automatically suspend the operation of his sentence, nor does it entitle him to bail as of right, especially for a serious crime such as murder, citing *R v Mthembu*⁴ with approval. All relevant factors must be taken into consideration by the Court considering applications of this nature and determining whether individually or cumulatively they warrant a finding that exceptional circumstances exist justifying the applicant's release on bail.
- [6] Mr Bode, appearing for the third and fourth applicants, added that the successful granting of leave can presuppose the existence of a reasonable prospect of success in the appeal, which in itself constituted an exceptional circumstance. As already alluded to, the SCA pronounced that this, on its own, cannot amount to exceptional circumstances.
- [7] Another factor which was argued on behalf of the applicants related to the aspect that they were on a 'mere R500.00' bail until they were sentenced and never absconded. Mr Schreuder, appearing for the first

² 2003 (2) SACR 575 (SCA)

³ See footnote 2 above

⁴ 1961 (3) SA 468 (D)

and second applicants, relied on *S v Dlamini: Sv Dladla and Others; S v Joubert: S v Schietekat*⁵ in support of his argument that the applicants be released on bail. Counsel overlooked the following instructive passage in the judgment⁶ by Kriegler J:

“What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.”

- [8] Mr Mxabo, appearing for the State, referred to *Beetge v The State*⁷ and argued that the onus still rests on the applicants to present exceptional circumstances which he submits they have failed to do. These exceptional circumstances should be weighed against the interests of justice. He contended that save for the fact that the SCA has on petition granted them leave the applicants have not placed before Court any other factor that is out of the ordinary. All the other factors, including their personal circumstances were considered when the application was previously declined, counsel contended.

- [9] As stated in *Crossberg v S*⁸:

“Over and above the procedural right is the Constitutional right to freedom and security of the person as set out in s 12(1) of the Constitution. Our courts have always treated matters of personal freedom as matters of importance and urgency.”

⁵ 1999 (2) SACR 51 (CC) at 88h – i; 89e and 90b - d

⁶ The last paragraph at page 88i

⁷ (925/12) [2013] ZASCA 1 (11 February 2013)

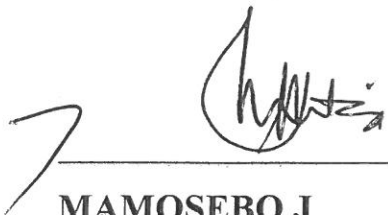
⁸ [2007] SCA 93 (RSA) delivered 22 August 2007

[10] There can be no question that the crimes with which they have been convicted are of a serious nature. To this end they are facing a long term imprisonment of 15 years. It is correct, as Mr Mxabo argued, that their situation is different in that before their conviction they did not have the experience of prison but have now experienced the inside of prison which may affect the risk of abscondment. However, the applicants have attended court and had never defaulted in their appearances. They also observed their bail conditions. They have fixed address and relatives in Mothibistad, Northern Cape Province. Regard being had to their personal circumstances they cannot be categorised as a flight risk. All these factors count in their favour. The objective of the right to bail is to minimize the interference with an accused's freedom and to avoid anticipatory punishment before conviction and sentence. The fact that they have been granted leave to appeal their convictions by the SCA may be an indication that they have prospects of success. On this conspectus I am swayed to grant the applicants bail pending their appeal to the Full Court of this Division. I proceed to make the following order.

Order:

1. The applicants are granted bail in an amount of R5 000.00 (Five Thousand Rand) each pending the determination of their appeal by the Full Bench of the Northern Cape Division of the High Court on the following conditions:
 - (a) The applicants are prohibited from obtaining any passport and/or any other travelling document whilst on bail.

- (b) The Applicants are prohibited from visiting any International Airport or Harbour where access can be obtained to any means of leaving the Republic of South Africa.
- (c) The Applicants are prohibited from leaving the Northern Cape Province without the prior written consent of the Investigating Officer in this matter.



MAMOSEBO J
JUDGE OF THE HIGH COURT

For 1st and 2nd Applicants:

Adv Schreuder

Instructed by:

Engelsman & Magabane Attorneys

For 3rd and 4th Applicant:

Mr R Bode

Engelsman & Magabane Attorneys

For 5th Applicant:

Mr A Van Tonder

Kimberley Justice Centre

For the Respondent:

Adv NA Mxabo

Director of Public Prosecution