

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED.
27/02/2017	
DATE	SIGNATURE

CASE NO: A25/2017

In the matter between:

Abraham Coetzee

Applicant

and

The State

Respondent

JUDGMENT

OPPERMAN AJ

INTRODUCTION

- [1] This is an appeal against the refusal of bail by the Regional Magistrate, Johannesburg, pending the Appellant's petition against his conviction and sentence.

- [2] The Appellant was convicted on 16 May 2016 on two counts of theft by general deficiency as envisaged in Section 100 of the Criminal Procedure Act No. 51 of 1977, as amended ('the CPA') for a total value of R1 090 000 (counts 1 and 2) and one count of fraud in an amount of R4.2 million (Count 6).
- [3] On 15 November 2016, the trial court sentenced the Appellant to 5 years' imprisonment on each of the theft counts and a further 15 years' imprisonment on the fraud count. The Court ordered that the sentences on Counts 1 and 2 run concurrently with the sentence imposed in Count 6. In the result, the Appellant has been sentenced to an effective term of 15 years' imprisonment.
- [4] The three convictions are underpinned by an allegation that the Appellant abused his position of trust as an attorney in his dealings with the monies of the complainants.
- [5] On 15 November 2016, the Appellant unsuccessfully applied for leave to appeal against his conviction and sentence.
- [6] After protracted attempts to secure a date for the hearing of his application for bail pending his petition, which steps *inter alia* included the bringing of an urgent application to the High Court to secure bail, his bail application was finally heard and refused by the trial court on Monday, 6 February

2017.

- [7] The Appellant now appeals against the refusal of bail pending the outcome of his petition.

DOCUMENTS TO WHICH THIS COURT MAY HAVE REGARD

- [8] The parties were in agreement that the court should consider this appeal with reference to the following documents:

- 8.1. Transcribed record of the bail application;
- 8.2. The evidence relied upon for purposes of the bail application consisting of an affidavit deposed to by the appellant's father and the petition brought by the appellant;
- 8.3. The Notice of Appeal;
- 8.4. The Charge sheet;
- 8.5. The judgments in respect of conviction, sentencing, leave to appeal and bail pending the petition.
- 8.6. Supplementary reasons received from the learned magistrate on the day of the hearing.

GROUND OF APPEAL

[9] It is argued on behalf of the Appellant that the learned Magistrate erred in refusing the application for bail pending the Appellant's petition to this Court. The gravamen of the Appellant's appeal centres around two issues in respect of which, so the Appellant contends, the Magistrate misdirected himself. These issues are:

9.1. a disregard for the Appellant's constitutional right to a fair trial as a result of a failure to allow the Appellant an opportunity to gain access to certain relevant office files seized and detained by the Law Society, which, he contends, would have assisted the Appellant in preparing for trial and putting forward his defence to the charges, more particularly Counts 1 and 2; and

9.2. an infringement of the Appellant's rights to a fair trial as a result of the trial court's disregard for the rules of evidence and principles relating to a fair trial in that it placed reliance on inadmissible evidence and disregarded evidence which corroborated the Appellant's version of events.

[10] The appeal also questions the Magistrate's decision in respect of the refusal of bail on the basis that the Magistrate had incorrectly applied the legal threshold for the consideration of bail pending the outcome of a

petition against conviction and sentence.

THE MAGISTRATE'S JUDGMENT

[11] In considering the application for bail pending the petition, the learned Magistrate made three pertinent findings that impacted on his ruling in the matter:

11.1. He found that the Appellant was no flight risk.

11.2. He found "... *that the State proved its case beyond a reasonable doubt.*"

11.3. He found that no court of appeal would interfere with the findings of the trial court to the extent that the Appellant would not have to serve a term of imprisonment.

THE APPROPRIATE LEGAL THRESHOLD

[12] At the heart of a decision on the issue of bail pending appeal lies two relevant factors that are interconnected, they are:

12.1. the prospects of success on appeal; and

12.2. the likelihood of the applicant for bail absconding.

- [13] It goes without saying that after the conviction of an accused person, different considerations will apply especially if the applicant for bail has been convicted of a serious offence and sentenced to a substantial period of imprisonment. *S v Williams*, 1981 (1) SA 1170 (ZAD) at 1172 H; *R v Milne and Erleigh* (4) 1950 (4) SA 601 (W); *R v Mthembu* 1961 (3) SA 468 (D). Over time our Courts have started to adopt a more lenient approach and moved away from the requirement that an applicant for bail pending an appeal or petition must show a reasonable prospect of success on appeal before bail can be granted.
- [14] The test is, is the appeal "*reasonably arguable and not manifestly doomed to failure*". If there is no risk of an Appellant absconding if bail is to be granted, a court should lean in favour of granting bail. See *S v Anderson* 1991 (1) SACR 525 (C) at 527 B-G; *S v Hudson* 1996 (1) SACR 431 (W) at 434 A-D; *Bailey and Others v The State* [2013] ZAKZPHC 72 at paragraph 29.
- [15] This more lenient approach has been confirmed in a number of cases reflecting different shades of the approach than that embodied in the conventional reasonable prospects of success test. See *S v McCoulagh* 2001 (1) SACR 542 (W) at 549-551 and *S v Mabapa* 2003 (2) SACR 579 (T) at paragraph 5. The following dictum by Flemming DJP in *S v Hudson* (*supra*) at 434 A- D provides a useful guideline for the manner in which the prospects of success should be considered. It is put thus by

Flemming DJP:

"In S v Anderson 1991 (1) SACR 525 (C) Marais J, with reference to a case where there is no reason to be concerned about whether or not the applicant will abscond, did not support an enquiry whether there 'is a reasonable prospect of success'. He said that if the appeal is 'reasonably arguable and not manifestly doomed to failure', the lack of merit in the appeal should not be the cause of refusal of bail. I agree. I add that if the conclusion that the appeal is manifestly doomed to failure can be reached only after what is tantamount to or approximates a full rehearing, the appeal should ordinarily for purposes of considering bail be treated as an appeal which is arguable. The question is not whether the appeal 'will succeed' but, on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment. Cf S v Moeti 1991 (1) SACR 462 (B) wherein it was said that the applicant for bail must convince that there is a 'a reasonable possibility,' that the appeal will avert imprisonment."

See too *Bailey and Others v S* (supra) at para 29

- [16] The essential issue is whether the interests of justice permit the release of the Applicant on bail even after his conviction.

THE MISDIRECTIONS BY THE MAGISTRATE IN HIS JUDGMENT

- [17] The learned Magistrate mentions three arguments raised by the Appellant in support of his application for bail pending appeal in respect of conviction:

17.1. The fact that certain files in the possession of the Law Society

could not be obtained which files would have assisted the Appellant in his defence (this impacts on the conviction on counts 1 and 2);

17.2. The fact of the R4.2 million cheque, forming the subject matter of the conviction on Count 6 having been issued to the Appellant in his personal capacity; and

17.3. The fact that the original cheque that forms the subject matter of Count 6 could not be produced.

[18] Despite the Magistrate having identified and mentioned the aforesaid three topics forming the basis for the contention that the Appellant has an arguable case on appeal, none of these arguments were considered and/or addressed by the Magistrate in his refusal of bail.

[19] It is perhaps opportune at this juncture to deal with another feature of this matter. The practice directives of this Court require of an Appellant to *inter alia* place before the court of appeal, the record of the proceedings in the bail application as well as the supplementary reasons, if any, by the learned Magistrate, in respect of his refusal of bail. In an affidavit deposed to by the Appellant's attorney of record ('Mr Reid'), he explains how the learned Magistrate initially, on 6 February 2017, indicated that he was not desirous to supply any further reasons to supplement his judgment of 6

February 2017. It appears from the statement of Mr Reid that the learned Magistrate subsequently, on 10 February 2017, indicated that he wanted to supply further reasons but that he was not in a position to do so until he had been provided with a full transcript of the trial proceedings which, at the time of the filing of the appeal papers in this appeal, were not available. The learned magistrate provided supplementary reasons on 27 February 2017 being the date of the hearing of this matter. To the best of this court's knowledge this was done without the transcribed record.

[20] The learned Magistrate convicted and sentenced the Appellant to a substantial period of imprisonment without the need to be possessed of a typed transcript of the court proceedings. He thereafter entertained the Appellant's application for leave to appeal and ruled on it. He also ruled on the application for bail pending the petition. The Magistrate provided reasons for his refusal of bail pending the petition in his judgment – also without the aid of a typed record.

[21] In delivering all of his aforesaid judgments, the learned Magistrate must have clearly relied on his own notes for purposes of coming to a decision in respect of the Appellant's conviction, the appropriate sentence, the refusal for leave to appeal as well as the bail pending the petition application.

[22] It may well be that the learned magistrate requires the transcribed record

to deal with the arguments raised in paragraph [17] hereof, but if immediate answers to those issues (and some others raised hereinafter) are not available from the judgment on conviction, the judgment on sentence and the judgment on the application for leave to appeal (all of which were available to the magistrate to furnish supplementary reasons), is that not indicative of the fact that the appeal is reasonably arguable and not manifestly doomed to failure? I would think so.

- [23] The learned magistrate in the supplementary reasons highlights the following: *'Mr van Staden was appointed as **curator bonis** and he dealt with the appellants practice. After taking over the files an inventory of all the files was prepared and these files were then stored in the archives at the Law Society. The files the applicant demanded the Law Society to produce were not part of the files seized by the Law Society'*. During argument the court was referred to that portion of Mr Van Staden's evidence, which does not support this construction of the facts. It appears as though Mr Van Staden conceded that the Law Society had these files. Mr Chauke objected to the court being referred to portions of the record without the state having a similar opportunity. In my view there is merit to this objection. However, if the court is handed a portion of the record which is clearly in conflict with a factual proposition advanced, I consider it in the interests of justice to receive that portion of the record and to have regard to the content thereof under circumstances where the liberty of the appellant is at stake. It was not disputed that it was a correct transcription

of Mr Van Staden's evidence. The learned magistrate must be given credit for being cautious and for calling for the transcribed record of the proceedings for purposes of providing supplementary reasons. At first blush, it would appear that he might well have been mistaken about the import of Mr Van Staden's evidence as the portion of the record relied upon suggests that the Law Society did in fact have the files.

[24] The other issues not addressed by the learned magistrate include:

- 24.1. that he might incorrectly have relied upon a copy of a letter dated 28 January 2006 which was handed in as Exhibit "D", the authenticity of which was placed in dispute;
- 24.2. that he might have failed to consider the contents of a letter handed in as Exhibit "F", corroborating the Appellant's version;
- 24.3. that he might have failed to have regard to Exhibit "G", being a Section 236 affidavit, being an extract of the Appellant's personal bank account at Investec Bank and reflecting the deposit of the cheque into the said bank account and
- 24.4. that he might have disregarded the admissions made by the Appellant in respect of the said bank account, being a personal account and not a trust account, which admissions had been

accepted as Exhibit "H".

[25] It appears as though the learned Magistrate erred in respect of his interpretation and application of the relevant case law setting out the legal threshold for consideration in applications for bail pending a petition. The following misdirections appear from the judgment:

- 25.1. Although the Magistrate correctly referred to the decision of *State v Hudson (supra)* in respect of the legal threshold that applies when bail pending a petition is considered, he did not apply this threshold in his judgment.
- 25.2. The following finding of the Magistrate supports the foregoing conclusion: *"When the court looks at the facts in the current matter, the facts are such that, the court is of the view that the State proved its case beyond reasonable doubt. The funds were channelled into the Accused attorney's trust account which funds were dispersed by the Accused for other reasons other than the reason they were taken from. Relating to the fraud count, the conduct of the Applicant was that, he intended to defraud the complainant permanently of the possession of the money."*
- 25.3. The learned Magistrate erroneously revisited his own judgment as if he was presiding over the matter as a court of appeal. He

essentially confirmed the finding that the Appellant's guilt had been proven beyond reasonable doubt.

[26] The learned Magistrate relied on the decision of in *S v Smith*, 2012 (1) SACR 567 (SCA). This decision deals with the test applicable when an application for leave to appeal is considered and not with the test to be applied when applications for bail pending appeal are considered.

[27] The learned Magistrate incorrectly relied upon *S v Bruyntjies*, 2003 (2) SACR 575 (SCA) at paragraph 5. This decision deals with the applicable considerations where bail is considered in respect of a schedule 6 offence, i.e. in instances where the Court is to consider whether or not there are exceptional circumstances present. The present matter is not concerned with a Schedule 6 offence and hence the threshold set out in the *Bruyntjies* decision does not find application.

RELEVANT CONSIDERATIONS

Is the Appellant a flight risk

[28] The Magistrate found there to be no risk of the Appellant absconding. I agree. The appellant is a 47 year old South African citizen who has been residing in South Africa since his birth. He is married with three children aged 19, 16 and 11. The eldest child is studying education. The youngest

children are dependant on the appellant and his wife who is a homemaker. Until date of his sentence he was working at the service station owned by his father and was a labour consultant from time to time. His father is 70 years old and has had 4 bypass operations. Because of this, the appellant effectively ran the service station which employs 28 people. The service station is indebted to the Bank in the sum of approximately R1.5 million. The appellant owns no property abroad. He does not possess a valid South African passport and has no previous convictions.

- [29] The appellant appeared in the regional court for the first time during July of 2009, attended court every time until March 2010 when the charges were withdrawn against him. He was advised to appear in court again during March 2011 when bail was set at R10 000 and he was required to report three times per week. The reporting requirements were later reduced.
- [30] He was convicted on 16 May 2016 and remained on bail and appeared for his sentencing, which occurred on 15 November 2016.
- [31] There is thus very little risk of the appellant absconding. The true consideration is therefore whether or not the Appellant has an arguable case on appeal.

The prospects of success on appeal

- [32] The Appellant submitted into evidence, in support of his application for bail pending petition, his petition to the Judge President of this Court in support of leave to appeal against his conviction and sentence.
- [33] The Appellant contends (in the trial and again in the petition) that the monies of the complainant in Count 1 (Mr Brown), were deposited into trust and that such monies were set off against a debt owed by Mr Brown in respect of legal costs incurred. The Appellant contends that this fact would appear from the files kept by the Appellant when he was an attorney but that he was not allowed access to such files in his preparation for, and during, his trial. He alleges that there is no evidence to gainsay this version advanced during his trial.
- [34] With regard to Count 2, the Appellant explains how the complainant, Mr Sibisi, had received all the monies he had deposited into trust with interest. The appellant says that Mr Sibisi had conceded in cross-examination that he had indeed received his monies with interest. This, the Appellant contends, would also appear from the files kept by him in his attorney's practice, to which he did not have access. He alleges that there is no evidence to gainsay this version of the Appellant. The Appellant points out that the representative of the Law Society, Mr van Staden, conceded that the Law Society was indeed possessed of certain files of

the Appellant. The Appellant contends that the fact of him having been deprived of access to these files impacted severely on his defence in the matter. If this argument of the Appellant were to be sustained on appeal, it might well be found that his right to a fair trial would have been shown to be infringed.

- [35] With regard to the fraud charge (count 6), the Appellant explains that it was the State's case that the Appellant had received monies from the complainant in Count 6, Ms Cook, in trust, that he had deposited these monies into his trust account and that he had expended these monies contrary to the wishes of the depositor. The Appellant makes out an arguable case that the Court may well be found to have erred in finding that the State has proven its case beyond reasonable doubt in circumstances where the Magistrate relied on documentary evidence that was not properly proven (being secondary evidence by means of copies of original documents that were only provisionally allowed) and also by disregarding relevant evidence that was not in dispute (being a statement of the Appellant's bank account, a letter addressed to the investor and accepted as Exhibit "F" as well as the Appellant's Section 220 admission accepted as evidence as Exhibit "H").
- [36] I find that the appellant's appeal is reasonably arguable and not doomed to failure and, without seeking to bind the judges charged with deciding the petition, am of the view that the appellant also passes the higher

threshold. I find that the appellant has reasonable prospects of success in succeeding in his petition, in other words, there exists sound rational grounds for the conclusion that there are prospects of success on appeal.

- [37] That being so, I conclude that the appellant is entitled to be released on bail pending finalisation of his petition and if leave to appeal be granted, pending finalisation of his appeal.

BAIL CONDITIONS

- [38] The state requested that if the court is inclined to grant bail, it is to attach the same conditions than those which existed at sentencing stage ie that the appellant report to the Police Station in George once a week. I don't see any reason why this requirement should not continue.

ORDER

- [39] I accordingly make the following order:

The Appellant is to be released on bail in an amount of R10 000 on condition that:

- 1) the Appellant hands himself over to the appropriate prison authorities within a period of 7 days after his attorney of record has received notification of his dismissal of his application in terms of section 309C (2) of the CPA against his conviction and sentence, or, within a period of 7 days after

having abandoned such application, or, should leave to appeal be granted, within a period of 7 days after his attorney of record (or he personally) has received notification of his dismissal of his appeal, or, within 7 days after having abandoned such appeal.

- 2) The appellant reports every Wednesday, commencing 1 March 2017, at the George Police Station, between 06h00 and 21h00.


I Opperman

Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 27 February 2017
Judgment delivered: 27 February 2017
Appearances:
For Appellant: Adv D Dörfling SC with Adv Lotz
Instructed by: Marinus van Jaarsveld Attorneys
For Respondent: Adv Chauke with Adv Bronkhorst
Instructed by: Office of the DPP