



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR371/13

In the matter between:

**TRAVIS BAILEY**

**First Applicant**

**BONISILE CHUTSHELA**

**Second Applicant**

**ZENZELE DLEZI**

**Third Applicant**

**TYRONE HOFLAND**

**Fourth Applicant**

**TRACEY-ANNE PRETORIUS**

**Fifth Applicant**

And

**THE STATE**

**Respondent**

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**ORDER**

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The application is dismissed.

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**JUDGMENT**

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**SEEGOBIN J:**

## **INTRODUCTION**

[1] This is an application by the five applicants for bail pending the outcome of their review application and an appeal against sentence both of which are set down for hearing in this court on 6 March 2014. The applicants were arraigned in the Magistrate's Court, Durban, on one count of contravening section 5(b) read with sections 1, 13(f), 17(e), 18, 19, 25 and 64 and Part III of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992, and further read with sections 51(2)(a) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The allegation was that on 21 October 2010 and at or near Briar Lane Durban North in the district of Durban, the accused unlawfully dealt in an undesirable dependence producing substance to: **Tetrahydrocannabinol**, contained in 44.148 kilograms of cannabis or dagga as it is commonly referred to. The trial proceeded before the learned magistrate, Ms N Kathrada. The applicants, who were legally represented, pleaded not guilty to the charge but failed to testify in their defence. At the conclusion of all the evidence presented by the State they were convicted. The first, fourth and fifth applicants were each sentenced to eight (8) years imprisonment while the second and third applicants were each sentenced to five (5) years imprisonment. It is common cause that the applicants are currently serving their sentences and have been doing so since about May 2013.

[2] Following upon their unsuccessful applications in the court *a quo* for leave to appeal against conviction and sentence, the applicants were subsequently granted leave by the High Court to appeal against sentence only, pursuant to a petition filed by the applicants with the Judge President. It is this appeal which has been set down on 6 March 2013.

## **REVIEW PROCEEDINGS**

[3] Together with the appeal is a review application instituted by the applicants in which they seek to have the 'entire proceedings' conducted in the court *a quo* to be set aside on the basis of an alleged irregularity committed by the learned magistrate

during the sentencing stage. The alleged irregularity relates, *inter alia*, to the fact that the learned magistrate had ordered the conversations of the legal representatives which took place during the adjournments, to be transcribed. The applicants further allege that the learned magistrate went ahead and listened to the recorded conversations that took place privately between the legal representatives and unilaterally attributed remarks to certain of the legal representatives. They contend that this conduct on the part of the learned magistrate has resulted in a serious miscarriage of justice. The applicants accordingly contend that the learned magistrate was biased against them and as such the 'entire proceedings' fall to be set aside.

[4] It should be pointed out that the review which is currently pending before this court is in fact the fourth review application being brought by the applicants in this matter. The first two reviews involved the alleged incompetence of the applicants then legal representative, Advocate Van der Veen. It would seem that no allegations of bias were made against the learned magistrate at that stage nor of any acrimony that may have existed between the bench and the defence. Both these applications were dismissed by Mr Justice Kruger and Madam Justice Mokgohloa, the court finding that the allegations that the applicants had not received a fair trial due to the alleged incompetence of their counsel, to be unfounded. It would seem that the initial review application under case no. AR155/12 was either dismissed or struck off the roll by the court on 28 August 2012 due to non-appearance.

## **HIGH COURT'S JURISDICTION**

[5] In the present application for bail before me a preliminary issue to be decided is whether this court has jurisdiction to entertain an application for bail pending the outcome of the review/appeal in this matter. Ms Greef who appeared on behalf of the State contended that by virtue of the provisions of section 307(1) of the Criminal Procedure Act 51 of 1977<sup>1</sup> ("CPA") the correct forum in which the issue of bail should be dealt with is the court *a quo*. Essentially this section provides that a sentence of

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<sup>1</sup> Section 307(1) of the Criminal Procedure Act reads as follows: "Subject to the provisions of section 308, the execution of any sentence shall not be suspended by the transmission of or the obligation to transmit the record for review unless the court which imposed the sentence releases the person convicted on bail."

an accused person is not automatically suspended pending a review unless the court which imposed the sentence releases the accused on bail. She contended that the same principle is implicit in the wording of section 309(5) of the CPA<sup>2</sup> regarding the situation where an appeal is pending.

[6] Mr Mathews, who appeared on behalf of the applicants, submitted that in view of the fact that both the review proceedings and the appeal are currently pending in the High Court it is the High Court which has the power to entertain an application for bail and not the lower court. He submitted that given the peculiar circumstances of this matter, namely one that involves a review of the learned magistrate's conduct as well as an appeal, it would be imprudent to remit the matter to the learned magistrate to consider an application for bail at this stage.

[7] The power of the High Court (previously the Supreme Court) to grant bail has been the subject of debate in a number of leading cases. In the absence of any statutory enactment empowering the court to do so, the court has the power to grant bail as an incident of its common law power to control its own judgments. The authorities cited hereunder are illustrative of the point.

[8] In *Chunilall v Attorney-General Natal*, Didcott J pointed out that the power to grant bail is a special power, that is derived from the CPA, and the court has no powers, outside of those presented within the four corners of the CPA. Emphasis was placed on the fact that the court has no inherent power, apart from that placed on it from the CPA, to grant bail.<sup>3</sup>

[9] However, the Supreme Court of Appeal in *Magistrate, Sutterheim v Mashiya*<sup>4</sup> relied on its inherent jurisdiction for its ability to intervene in uncompleted bail proceedings in the magistrate's court. Further in *Majali v S*<sup>5</sup> the high court pointed out that it is able to supervise and 'quality control' the lower courts with regard to civil

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<sup>2</sup> Section 309(5) states: "When a provincial or local division of the Supreme Court gives a decision on appeal against a decision of the magistrate's court and the former decision is appealed against, such division of the Supreme Court has the power in respect of the granting of bail which a magistrate's court has in terms of section 307."

<sup>3</sup> See *Chunilall v Attorney-General, Natal* 1979 (1) SA 236 (D); also *Beehari v Attorney-General, Natal* 1956 (2) SA 598 (N) and *S v Kaplan* 1967 (1) SA 634 (T) 636A-B. See also S van der Merwe *et al Du Toit's Commentary on the Criminal Procedure Act* (Revision Service 50 – January 2013) ch9-p8.

<sup>4</sup> 2003 (2) SACR 106 (SCA) at 110a.

<sup>5</sup> *Majali v S* [2011] ZAGPJHC 74 para14; Van der Merwe op cit ch9-p8.

and criminal matters. The court pointed out that the jurisdiction to intervene lies within the common law.

[10] In *S v Hlongwane*, the issue facing the court was whether it could grant bail where there is a petition pending. The court discussed the powers of the high court (then the Supreme Court) to grant bail in general, in terms of its statutory powers as well as the common law. The headnote contains the following useful guidelines:<sup>6</sup>

- “(1) The Supreme Court has the common-law power to use the *interdictum de homine libero exhibendo* to enquire into the lawfulness or unlawfulness of the detention of any person and where such detention is unlawful, to order his release. That wide common-law power could possibly include the narrower power to order the conditional release on bail of a person in appropriate circumstances.
- (2) That the Supreme Court does have a general common-law power to release a prisoner on bail has been accepted or presupposed in various decisions.
- (3) When a person has been lawfully arrested on a charge for the purposes of criminal proceedings, his right to release on bail until he is sentenced in the trial court is regulated by chap 9 (ss 58–71) of the Criminal Procedure Act 51 of 1977. Chapter 9 contains a codification of such rights from arrest to sentence. An accused cannot therefore during such period rely on any common-law power of the court to release on bail except possibly if particular circumstances occur where such a common-law power can be exercised within the framework of chap 9 and without conflicting with it.
- (4) After sentence in a criminal trial in a Supreme Court the court has the common-law power to control its sentence. The court can accordingly suspend the sentence pending the determination of any further steps which may be performed in a court (including application for leave to appeal, a petition to the Chief Justice, appeal, a special entry or the reservation of a question of law) and temporarily release the sentenced person. The court may also impose a condition, for instance that the person lodge bail in order to secure his release. The court has therefore, after sentence, a common-law power to release on bail.
- (5) A part of (4) above overlaps with s 321(1)(b) and (2) of Act 51 of 1977 and where this occurs s 321(1)(b) and (2) replaces the common law.

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<sup>6</sup> *S v Hlongwane* 1989 (4) SA 79 (T) at 81 of the headnote and also Van der Merwe op cit ch9-p8 to p9 and A Kruger *Hiemtra's Criminal Procedure* (Service Issue 6 – May 2013) p9-14(1) – p9-15.

- (6) A Provincial Division's power to release on bail a person convicted in the Supreme Court and sentenced to imprisonment does not expire after the court grants leave to appeal to the Appellate Division.
- (7) After sentence in an inferior court, the Supreme Court has a common-law power to release on bail pending further proceedings in a superior court. Where the court is asked to exercise that common-law power, the statutory power of the inferior court has to be borne in mind.
- (8) A part of the area covered by the common-law power referred to in (7) above, is also governed by s 304(2)(c)(vi) (release on bail by a reviewing court) and by s 309(3) read with s 304(2)(c)(vi) (release on bail by a Provincial Division as a court of appeal). Where this occurs the statutory power replaces the common-law power.
- (9) After sentence in an inferior court, the inferior court itself has a statutory power to release on bail pending the determination of a review or an appeal.
- (10) After disposal of an appeal by the Appellate Division and since the abolition of appeals to the Privy Council, no court has any power, common-law or statutory, to release a sentenced prisoner on bail, neither pending a petition to the State President for clemency, nor pending a petition to the State President in terms of s 327 of Act 51 of 1977 for the hearing of evidence which only became available subsequent to the trial."

[11] The principles set out in *S v Hlongwane* (supra) have been applied in a number of cases,<sup>7</sup> including *S v Hattingh* in which McLaren J held as follows:<sup>8</sup>

"This court has been given no power by statute to grant bail in circumstances such as these, but it was held in *Copthall Stores Ltd v Willoughby's Consolidated Co Ltd* 1913 AD 305 that this court has an inherent right to control its own judgments."

[12] In *Majali v S* (supra) it was held as follows at paragraph 15 (emphasis in original text):

"The common-law inherent jurisdiction power to grant bail must be exercised consistently with the nature and purpose of section 39(2) of the Constitution, which provides that a court 'must promote' the spirit, purport and objects of the Bill of Rights and '*enjoins courts to develop the common law in the interests of justice*' when

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<sup>7</sup> *S v Human* 1990 (2) SACR 155 (NC); *S v Malcolm* 1999 (1) SACR 49 (SEC) and referred with approval in *Crossberg v S* [2007] SCA 93 (RSA) at para 14.

<sup>8</sup> *S v Hattingh* 1992 (2) SACR 466 (N) at 496b; McLaren J quoted Centlivres CJ in *R v Milne & Erleigh* (7) 1951 (1) SA 791 (A) at 881H. See also Van der Merwe op cit ch9-p9 to p10.

dealing with matters involving the fundamental constitutional issue of liberty. In this context, to '*promote*' means to further or advance the constitutional imperative of taking into proper account the fundamental rights encapsulated in sections 12(1)(a) and 35(1)(f), of the Constitution."

[13] This was re-iterated by the learned authors Van den Berg and Van der Merwe (see footnotes below) when they state as follows:<sup>9</sup>

"The court correctly held that the High Court's inherent jurisdiction included the exercise of supervisory control over lower court proceedings, and the power to exercise such control by intervening in uncompleted lower court proceedings. It is submitted, however, that in granting bail the court went too far, considering the unremarkable facts and limited prejudice that the accused would suffer as a result of the postponement. The High Court in effect usurped the function of the lower court and, it is submitted, was not justified in intervening and hearing the matter as a court of first instance. It must, however, be acknowledged that the learned judge's reasoning that the courts are enjoined to develop the law in accordance with the spirit of the Constitution was admirably activist in the circumstances, and is to be commended."

[14] In *S v Tsotsi* the issue was whether the high court was able to grant bail pending the review and possible setting aside of proceedings that occurred in the military court. Although the civilian high courts play a role in overseeing the military courts and their processes, there was no provision within the CPA or any of the military statutes or codes that allowed the high courts to grant bail of a person convicted in the military courts. Plasket J held as follows regarding the inherent power of the high courts to grant bail:<sup>10</sup>

"Two points need to be made about the common-law power to grant bail. The first is that, as it derives from the inherent jurisdiction, it must be exercised consistently with the nature and purpose of the inherent jurisdiction which was, in terms of the common law, and is, in terms of s 173 of the Constitution, a power that exists to enable Superior Courts (in the words of s 173) 'to protect and regulate their own process, and to develop the common law'. The second point flows from this. It is that the power to grant bail in the absence of a statutory empowerment is a manifestation

<sup>9</sup> J Van Der Berg *Bail – A Practitioner's Guide* 3ed (2012) at 70 – 71; Van der Merwe op cit ch9-p10.

<sup>10</sup> *S v Tsotsi* 2004 (2) SACR 273 (E) paras 11 – 12. Also Van der Merwe op cit ch9-p10. Regarding the extension of bail after conviction generally see Kruger op cit p9-3.

of the power of Superior Courts to regulate their own orders in the interests of justice . . . Circumstances such as those pertaining in this case—where a person seeks bail pending an application to the High Court to review and set aside a conviction and sentence—appear to me to fall within the ambit of the inherent jurisdiction, even though the proceedings that will be challenged on review are proceedings before a military court—a court that functions not in terms of the Criminal Procedure Act but in terms of the Defence Act, the MDC and the Military Discipline Supplementary Measures Act, within its own hierarchy of courts and serving its own purposes that do not correspond completely with the purposes served by the civilian courts. Despite the fact that military courts are not part of the ordinary court structure, the Superior Courts exercise a supervisory jurisdiction over them that is similar in all material respects to the supervisory jurisdiction that they exercise over magistrates' courts. In these circumstances, I cannot see a reason in principle why the inherent jurisdiction does not apply to enable this Court to grant bail: This Court, in doing so, could be said to be exercising its common-law jurisdiction to control the orders of lower courts within its area of jurisdiction, one of the bases for jurisdiction at common law contemplated by Eloff AJP and Stegmann J in *S v Hlongwane*.”

[15] Plasket J further remarked that whenever the inherent jurisdiction of the high court is in issue, the court has a discretion whether or not to invoke same.<sup>11</sup>

[16] Often the inherent jurisdiction to grant bail has come about in extradition cases. In one such case<sup>12</sup> Mahommed J held that the high court had the inherent jurisdiction to grant bail where a person is to be committed to prison in terms of s 10(1) of the Extradition Act 67 of 1962, even though there are no appeals pending against the magistrate’s decision.

[17] Where a court has referred a matter to another court for trial, or conviction, or sentencing the court retains all powers regarding the bail conditions, etc. until the accused has appeared in such court for the first time.<sup>13</sup>

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<sup>11</sup> *S v Tsotsi* supra para 13. Also Van der Merwe op cit ch9-p10.

<sup>12</sup> *Veenendal v Minister of Justice* 1993 (1) SACR 154 (T). See also *S v Thornhill* (2) 1998 (1) SACR 177 (C) at 180e-g. See also Van der Merwe op cit ch9-p11.

<sup>13</sup> Van der Merwe op cit ch9-p17.

[18] Where no litigious proceedings are pending, i.e. where the matter has reached the final court forum and has been disposed of, then the high court will have no power to grant bail, including the bail of a person to be removed from the Republic as he or she has been found to be an illegal immigrant in terms of the Admission of Persons to the Republic Regulation Act 59 of 1972.<sup>14</sup> Also bail pending an appeal lapses where an appeal has been struck off the roll and will as such need to be considered afresh where a court is considering the re-instatement of the appeal.<sup>15</sup>

[19] In *S v Ndjadayi*<sup>16</sup> the court held that the effect of the Constitution Act 200 of 1993 on an application for release from detention was a species of *interdictum de libero non exhibendo* and as such civil proceedings under and in terms of section 20 of the Supreme Court Act 59 of 1959.<sup>17</sup> Refusal of bail is as such appealable by the court of first instance, i.e. the high court, but only with leave of the court. But in *S v Botha en 'n ander*<sup>18</sup> it was held that bail proceedings are criminal proceedings for the purpose of sections 20 and 22 of the Supreme Court Act<sup>19</sup> and that there is a right to appeal the bail proceedings to a higher court without the need for prior leave by the court of first instance.

[20] It would seem to me that the High Court always has the power to control its own proceedings. Inherent in this is the power to grant bail which is an incident of its common law power to control its own judgments. This is not to say that in every instance the High Court would be obliged to consider an application for bail. This would depend on the facts and circumstances of each case. The general rule, however, is that bail applications should be pursued in the court of first instance because it is that court that is best equipped to deal with the issue, having been steeped in the atmosphere of the case. A refusal of bail in that court could result in that decision being taken on appeal to the High Court and thereafter to the SCA if

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<sup>14</sup> *Chunguete v Minister of Home Affairs* 1990 (2) SA 836 (W); Van der Merwe op cit ch9-p11.

<sup>15</sup> Van der Merwe op cit ch9-p17.

<sup>16</sup> 1995 (2) SACR 583 (E).

<sup>17</sup> See sections 16 and 17 of the Superior Courts Act 10 of 2013.

<sup>18</sup> 2002 (1) SACR 222 (SCA).

<sup>19</sup> See sections 16, 17 and 19 of the Superior Courts Act 10 of 2013. See also *S v Van Wyk* 2005 (1) SACR 41 (SCA) para 1; Van der Merwe op cit ch9-p11.

necessary. As a matter of practice this is the route that should be followed. The peculiar circumstances of a case however, may dictate otherwise.

## **MERITS OF THE BAIL APPLICATION**

[21] I revert to the application proper. The application is brought on notice of motion supported by affidavits from the various applicants. An opposing affidavit was filed by the State. The applicants did not deem it necessary to file a reply.

[22] Save for certain allegations contained in the affidavits of the fourth and fifth applicants concerning the alleged conduct of the learned magistrate insofar as the review application is concerned, the case made out by each of the applicants is the same. They all aver that they were released on bail pending the finalisation of the criminal proceedings in the court *a quo*, that they attended each and every court appearance without incident and that even after conviction they continued to attend all court appearances without any incident. Additionally, they set out their personal circumstances which are relevant to the issue of bail. These circumstances are all spelt out in the affidavits and I do not consider it necessary to repeat them in any great detail herein. The applicants are all South African citizens and are aged 44, 24, 51, 35 and 36 years respectively. The first, second and third applicants aver that they are not in possession of any passports, assets, bank accounts or ties outside of the country. The fourth and fifth applicants say nothing about all of this. The second and third applicants aver that due to the ongoing violence in the prisons, both of them have been traumatised and consider their lives to be in danger. The third applicant in particular contends that he was repeatedly stabbed and “otherwise assaulted” on numerous occasions in the past four months. He provides no details regarding such stabbing and assaults. All of them undertake to adhere fully to any bail conditions that may be set by this court.

[23] A matter of grave concern insofar as the first, second and third applicants are concerned is the fact that neither one of them has any financial resources whatsoever. In this regard the first applicant makes the following disclosure in paragraph 5 of his affidavit:

“(5)

I digress further herein to add that this matter is currently also subject to a review application, such review matter having been set for hearing in March 2014. I am aware that my second and third co-applicants herein, namely Chutshela and Dlezi, have no financial resources whatsoever at this stage. I am also advised that the legal resources of my other remaining co-applicants herein are almost exhausted and, in order to reduce legal costs herein, the decision has been taken to bring application in order that both matters, namely the review application and sentence appeal, be argued simultaneously before the High Court in March 2014. For that matter, it should be noted that I personally currently have no resources for the legal proceedings whatsoever at this stage and am entirely reliant on my wife and family for assistance in this regard.”

[24] Despite the fact that he has no financial means to fund his own bail, the first applicant is nonetheless “*prepared to attempt to assist both my second and third co-applicants herein, namely Chutshela and Dlezi, insofar as the depositing of bail monies is concerned, as and where possible*”.

[25] The second and third applicants make it plain that they have nothing and are totally reliant on the first applicant for assistance. The third and fourth applicants, on the other hand, say nothing about their financial positions or whether they can afford to pay any bail at all. During the course of the argument on 29 November 2013 I did raise with Mr Mathews my concerns regarding the financial positions of the applicants and whether they can afford to pay bail in the first place.

## DISCUSSION

[26] Generally while courts would always lean in favour of granting bail to an accused person pending his/her trial, different considerations apply after conviction and sentence. This was pointed out by the court in *S v Williams*<sup>20</sup> where the following was stated:

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<sup>20</sup> 1981 (1) SA 1170 (ZA) at 1171H – 1172B.

“Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as *R v Milne and Erleigh* (4) 1950 (4) SA 601 (W) and *R v Mthembu* 1961 (3) SA 468 (D) stress the discretion that lies with the Judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are interconnected because the less likely the prospects of success are the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the *onus* is on the applicant to show why justice requires that he should be granted bail.”

[27] In *S v Hudson*,<sup>21</sup> Flemming DJP set out the following principles in the light of the factors set out in *S v Williams* (supra):

“To hold that the prospects of success on appeal may never be a permissible consideration, would run counter to authority. The need to have regard to the prospects is also readily apparent if one considers the extremes.

- (a) If it is known that the appeal is very likely to succeed, the spectre is raised of the administration of justice detaining a man well knowing of the prospect that he will be undergoing something which he should be able to avoid. In *S v De Abreu* 1980 (4) SA 94 (T) the Court, aware of the undesirability of a single Judge anticipating a decision on appeal, took into account that on the particular charges the appeal was likely to succeed.
- (b) If it is so that the appellant has no prospect of avoiding imprisonment, the only value of bail is to the appellant. He would gain postponement and not avoidance. (A chance to take to flight is not a legitimate advantage.) A court will not allow bail procedures to frustrate punishment procedures which have been duly formalised. Cf *S v Hlongwane* 1989 (4) SA 79 (T) at 102E-G.”

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<sup>21</sup> 1996 (1) SACR 431 (W) at 432d-g.

[28] Flemming DJP in *S v Hudson*, (supra) set the test as follows at 433e-f:

“Considering the granting of bail involves, as is well known, a balancing of the interests of the administration of justice against the wishes of the accused. But that is, of course, not accurate. Those interests are not fully in opposition. It is also to the public good and part of public policy that a person should enjoy freedom of movement, of occupation, of association, etc. That public interest is qualified, when appropriate, in the interests of the administration of justice. Secondly, considering bail involves a balance between unequal considerations. Risk of harm to the administration of justice involves unquantifiable and unprovable future possibilities. The interests of the accused generally turn upon extant facts and intentions. But it remains the chances that the administration of justice may be harmed which may justify the impact of detention despite a pending appeal.”

[29] In *S v Hudson* (supra) Flemming DJP showed support for Marais J’s approach in *S v Anderson* when he says the following at 434a-d:

“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 a 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 reasonable possibility’ that the appeal will avert imprisonment.”

[30] In *S v Myers* <sup>22</sup> the factors that were carefully weighed concerned the likelihood of success of the appeal and the possibility of the accused absconding. In this matter, the accused had absconded once before when the Law Society wished

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<sup>22</sup> 1993 (1) SACR 383 (C) at 384j – 385a.

to investigate his practice – on this basis the court decided that he be held in custody pending the outcome of the appeal.

[31] The approach of the court in *S v Mabapa*<sup>23</sup> was the following:

“Although the conventional approach to bail pending appeal has been that it should be granted only if there are reasonable prospects of success on appeal and no likelihood that the appellant will abscond (see *S v Anderson* 1991 (1) SACR 525 (C) at 527e - g, per Marais J), a more lenient, fundamental rights and liberty-orientated approach has developed in the last decade. In some instances the test applied was in fact whether it could be said that the appellant had *no possibility* of success on appeal (see *S v Anderson* (*supra* at 526j), per Marais J and *S v Naidoo* 1996 (2) SACR 250 (W) at 252, per Joffe J). This more lenient approach is set out by Shakenovsky AJ in *S v McCoulagh* 2000 (1) SACR 542 (W) at 549 - 51, and it is not necessary to quote passages from the judgments again. The shades of approach differing from the conventional can be summarised as follows:

- (a) Even in the absence of reasonable prospects of success, bail should be granted where the possibility cannot safely be excluded that the term of imprisonment, which the Court of appeal may substitute would, at that stage, have expired. In such a case, 'it is enough that the appeal against sentence is reasonably arguable and not manifestly doomed to failure' - *S v Hudson* 1996 (1) SACR 431 (W) at 434b, per Flemming DJP; *S v De Villiers en 'n Ander* 1999 (1) SACR 297 (O) at 310c. To the test stated in *Anderson*, Flemming DJP added 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. . . . (T)he applicant for bail must convince that there is a "reasonable possibility" that the appeal will avert imprisonment.’

With reference to the *Hudson* case, it was stated in two reported judgments that bail pending appeal ought not lightly to be refused on the sole ground of absence of prospects of success - *S v Ndhlovu and Another* 1999 (2) SACR 645 (W) at 646j; *S v De Villiers en 'n Ander* (*supra*).

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<sup>23</sup> 2003 (2) SACR 579 (T) para 5.

- (b) The approach that it is desirable that sentence be served as soon as possible, if there is no reasonable prospect of success on appeal “should be applied with circumspection and care, and *only in clear-cut cases*” - *S v Richardson* 1992 (2) SA 169 (E); supported in *S v Hudson* (*supra* at 434a) (emphasis added by Flemming DJP).
- (c) The test is whether the applicant has *no* possibility of success on appeal - *per* Joffe J in *S v Naidoo* 1996 (2) SACR 250 (W) at 251h - i. This test was disapproved of by Van Oosten J in *S v Rawat* 1999 (2) SACR 398 (W) at 401f. Van Oosten J concluded at 401g - h that  
 “where it has not been shown that a *reasonable* possibility exists that the Court of Appeal will interfere with the appellant's sentence to the extent that the appellant may not go to prison, then bail should not be granted”.’ [original emphasis].

[32] In *S v Mabapa* (*supra*) the court further held in para 8 that:

“In deciding what the standard is, it remains significant that s 35(1) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that everyone who has been arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. This provision has been considered in depth by the Constitutional Court in *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC) (1999 (4) SA 623, 1999 (7) BCLR 771), Kriegler J writing for an unanimous Court. Section 35(3) also guarantees the right of an accused to a fair trial, which includes the right to be presumed innocent and the right to appeal to a higher Court. The constitutional importance of the right to appeal has been recognised in *S v Steyn* 2001 (1) SACR 25 (CC) (2001 (1) SA 1146; 2001 (1) BCLR 52). Section 12 of the Constitution guarantees everyone's right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause. But, as cautioned by Kriegler J in *S v Dlamini* (*supra* in para [79]), the Constitution does not create an unqualified right to personal freedom. If such a right may even be limited or removed before conviction, the principle applies even more strongly after conviction pending appeal. Although the opportunity for interfering with evidence is not that real at this stage, the possibility that a convicted person may abscond when on bail pending the appeal, is increased. Of course, all the other factors mentioned in s 60 of the Criminal Procedure Act must be considered and if the conclusion under that section remains that bail should not be granted, the matter of prospects of success,

*sic rebus stantibus*, should not be relevant after conviction. This judgment deals with those cases where a person would have been (and still would be) granted bail under s60(4) - (11) but he or she has now been convicted and sentenced to imprisonment.

[my emphasis]

[33] However, In *S v Masoanganye*,<sup>24</sup> Harms AP (as he then was) pointed that

“[s]ince an appeal requires leave to appeal which, in turn, implies that the fact that there are reasonable chances of success on appeal, is on its own not sufficient to entitle a convicted person to bail pending an appeal: *R v Mthembu* 1961(3) SA 468 (D) at 417 A-C. What is of more importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction, and real prospects that a non-custodial sentence might be imposed.”

[34] In the present matter Mr Mathews has contended strongly, insofar as the review proceedings are concerned, that it is ‘*highly probable*’ that the entire proceedings before the court *a quo* will be set aside given the gross irregularity that was committed by the learned magistrate. I disagree. In my view, even if it is found that the irregularity complained of has resulted in a miscarriage of justice it is highly unlikely that the entire proceedings would be set aside and the trial ordered to commence *de novo* before another magistrate. Since the alleged irregularity is confined to the sentencing proceedings it is only these proceedings that may in all likelihood be set aside. In that event there would be nothing stopping the reviewing appeal court from considering the issue of sentence afresh.

[35] The essential issue in this matter is whether the interests of justice permit the release of the applicants on bail at this stage. The applicants have been convicted of a serious offence. The proliferation of drugs and the prevalence of drug-related offences in this country are a matter of grave concern. The evidence showed that the applicants were cultivating a ‘superior’ quality of dagga. They did so by creating a sophisticated greenhouse effect in a residential suburb. It is a known fact that drugs not only destroy innocent lives, they also destroy the very fabric of society. It is for this reason that our courts are now imposing robust sentences for such offences. In these circumstances, I do not believe that the sentences imposed by the learned

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<sup>24</sup> 2012 (1) SACR 292 (SCA) para 14.

magistrate are shockingly inappropriate or disproportionate to the offence committed. Even though the applicants have been given leave to appeal against sentence which presupposes some prospects of success, this does not, in my view, mean that a totally non-custodial sentence will be imposed. I do not consider the applicants prospects to be clear-cut so as to mean that their sentences will be set aside and replaced with a wholly non-custodial one.

[36] Additionally, I consider that inasmuch as the applicants may have adhered to their bail conditions up to the sentencing stage, things have now changed with the sentences they face. The risk of abscondment is even greater at this stage. A further factor to be considered is that their review and appeal are to be heard on 6 March 2014 which is less than three months away. It seems that the main reason why the applicants are seeking bail at this stage is to allow them an opportunity to pursue employment opportunities in the meantime given their precarious financial positions. This, in my view, hardly serves as a cogent reason for the granting of bail particularly having regard to the serious nature of the offence of which they have been convicted.

[37] In all the circumstances and for the reasons set out herein, I am not persuaded that the interests of justice should permit the release of the applicants on bail at this stage.

## **ORDER**

[39] The order I make is the following:

The application is dismissed.

|                        |   |                                                              |
|------------------------|---|--------------------------------------------------------------|
| Date of Judgment       | : | 18 December 2013                                             |
| Date of Hearing        | : | 28 November 2013                                             |
| Counsel for Applicants | : | Adv. S Mathews                                               |
| Instructed by          | : | Stowell & Co.                                                |
| Counsel for Respondent | : | Adv. W Greeff                                                |
| Instructed by          | : | The Director of Public Prosecutions<br>Durban, KwaZulu-Natal |