



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NUMBER: A216/23

In the matter between:

CLETUS CHINONYE OBIWURU

Appellant

And

THE STATE

Respondent

Date Heard : 10 June 2024

Date Judgment delivered eletronically : 16 July 2024

JUDGMENT

Nziweni, J

Introduction

- [1] This case concerns a bail appeal. In this appeal, the appellant seeks to appeal the Regional Court Magistrate's ruling that denied admitting him on bail, pending the

consideration of his petition to this Division for leave to appeal. During the pendency of the trial in the Regional Court, the appellant was admitted on bail.

- [2] After trial by the Regional Court magistrate in Khayelitsha ("the court a *quo*"), the appellant was convicted on a charge of a contravention of section 5 (b) read with certain sections of the Drugs and Drug Trafficking Act, Act 140 of 1992 (Dealing in Drugs). Following the conviction, before sentencing, the appellant's bail was extended pending imposition of sentence, subject to the bail conditions previously set.
- [3] Pursuant to the appellant's conviction, on 5 October 2022, the court a *quo* sentenced him to twelve years (12) imprisonment of which five (5) years imprisonment was suspended on certain conditions. After the imposition of the sentence, the appellant's bail was revoked.
- [4] The appellant then applied for leave to appeal only against the conviction. At the application for leave to appeal, the court a *quo*, denied the appellant's application for leave to appeal his conviction.
- [5] After the court a *quo*'s refusal to grant leave to appeal, the appellant applied in the court a *quo* to be released on bail pending the consideration of his petition.
- [6] At the commencement of the bail application before the court a *quo*, the magistrate was informed that the appellant had filed a notice or a petition with the registrar of this Division to grant him leave to appeal. After the appellant presented evidence, the application for bail pending consideration of the petition was denied because *inter alia*, there existed no reasonable prospects that a court of appeal would

interfere with the court a *quo*'s verdict and there are no reasonable prospects that a non-custodial sentence would be imposed. The court a *quo* also mentioned that the period of imprisonment imposed upon the appellant increased the likelihood of absconding.

[7] It emerged as common ground between the parties that the petition has not yet been considered by this Court due to various reasons. Thus, in the instant case, it is common cause between the parties that the nature of this appeal is in relation to bail pending petition.

[8] It is also common cause between the parties that the court a *quo* applied amongst other factors, the test of 'prospects of success' in deciding to refuse to admit the appellant on bail pending petition.

[9] Consequently, as things currently stand, no leave to appeal has yet been granted. Thus, it is still unknown as to whether the appellant's appeal is going to be adjudicated or not. Notwithstanding that, the applicant applies to this Court to set aside the refusal by the court a *quo* to let him out on bail, pending the consideration of his petition for leave to appeal.

[10] In this appeal it is contended on appellant's behalf that the court a *quo* misconstrued the applicable test to bail application pending petition. Hence, it is submitted on appellant's behalf that this appeal hinged on one particular misdirection, namely the test to be applied in bail pending appeal.

[11] Accordingly, the determinative question arising in this appeal, stated very shortly is whether the court a *quo* acted well within its discretion in denying that the appellant

be admitted on bail pending the petition. Of course, intertwined with this question is the most vexing question of this case; whether, the right test was applied by the court *a quo* in its consideration to refuse bail.

- [12] To put it in other words, the matter before me is reduced to the very narrow question of whether in the context of this case, the learned Regional Court magistrate erred in interpreting the law by applying a test that was overly stringent in terms of what the appellant was required to establish in order for him to be admitted on bail.

Bail pending petition

- [13] It is, I think, worthwhile pausing at this point to restate the law as it stands regarding bail pending petition. In *S v Hlongwane and Others* (AR507/13) [2015] ZAKZPHC 1 (28 January 2015), the court stated that the use of the word “noted” in section 309(4) (b) of the Act avoided a *lacuna*. According to the *Hlongwane* case, the noting of a petition triggers the initiation of an appeal procedure. Additionally, in the *Hlongwane* matter, the court acknowledged that the appeal process may be terminated prior to the appeal being heard. For instance, if the petition is not granted.
- [14] Thus, as is clear from the *Hlongwane* case, the denial of leave to appeal by the magistrate does not translate to the end of the road as far as the appeal procedure is concerned. Put differently, the denial of leave to appeal does not lead to the conclusion that the appeal procedure has been exhausted. The moment the

applicant notes a petition he or she is entitled bring a bail application, pending the consideration of the petition.

- [15] Thus, at the outset, I bear very much in mind that the issue in this appeal is not whether bail pending petition can be granted. During the hearing of this appeal, it was very clear that both parties conceded as much.

The Law

- [16] What is mentioned in section 65 (4) of the CPA is trite, but it is necessary to repeat. Section 65(4) states the following:

“The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.”

- [17] In *S v Barber* 1979 (4) SA 218 (D) at 220 E-F, the following was stated:

“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail.”

- [18] I have already indicated (in paragraph 11 above) that it is important that this Court has to be persuaded that the magistrate exercised the discretion which he had, wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate’s exercise of his discretion. I think it should also be

stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.

[19] It bears mentioning that the exercise of discretion by the bail court does not translate to mean it has absolute and unfettered discretion. The discretion is, in fact fettered and must be applied judicially. In the sense that the bail court is expected to exercise its discretion in accordance with correct legal principles and must have regard to the legal framework.

[20] It is also important to record that in the case heavily relied on by the appellant of *S v Coetzee* 2017 JDR 0451(GP) ("the Coetzee matter"), the following is stated:

" . . . 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 bail absconding"

The proper test for bail pending appeal or petition

[21] As I have already indicated, the launching of a petition is not a guarantee that the petition is going to be granted. However, it is as well to remind oneself that the bail court hearing an application for bail pending appeal is only concerned with an application for release of the applicant. Hence, it is important to emphasise and to remember that though it is all too tempting, it is not the task of the bail court to try and second guess the outcome of the petition or the appeal. Essentially, it is not

the place of the court *a quo* to give an opinion about prospects of success of appeal.

[22] In terms of section 35 (3) (h) of the Constitution, every accused person is presumed innocent until proven guilty. Thus, the presumption of innocence is entrenched in the Constitution. It is well settled that; a conviction ends the presumption of innocence. Accordingly, the release pending trial is entirely different to the release pending disposition of an appeal.

[23] I am extremely indebted to counsel on both sides for their comprehensive, thoughtful and the efficient way in which the arguments were handled and presented. This made it light for this Court to deal with the issues.

[24] As noted above, the thrust of the appellant's arguments on this appeal rest entirely on the assertion that the court *a quo* used a wrong test in coming to the conclusion that bail should be denied. It is firmly asserted on appellant's behalf that the court *a quo* materially misdirected itself in finding that the appellant was required to establish 'a reasonable prospect of success' ("the stringent test"). It is further contended that the test the court *a quo* ought to have applied was whether the appeal 'is reasonably arguable and not doomed for failure' ("the less stringent test").

- [25] On this basis, the appellant submits that the court *a quo* in the exercise of its discretion, imposed a heightened standard in its determination as to whether bail pending petition should be granted or not.
- [26] Mr Prinsloo on appellant's behalf argued that the standard of 'prospects of success' for evaluating whether an applicant for bail pending petition or appeal qualifies to be released; does not play a role unless the appeal is doomed to failure.
- [27] In addition, Mr Prinsloo developed these submissions in the course of his argument. He submitted that if you have prospects of success, it does not necessarily mean the likelihood of success. The emphasis of his argument is that the court *a quo* treated the test to be akin to likelihood. Mr Prinsloo suggests that the magistrate misunderstood what is meant by the term 'prospects'. He emphasised that the word 'prospects' must not be confused with the word 'likelihood'. The term 'prospects', so Mr Prinsloo argued, denotes a sliding scale. Mr Prinsloo illustrated his argument by suggesting that the highest bar test means the appeal is going to succeed; the lowest bar test means that prospects of success do not play a role unless appeal is doomed to fail. According to Mr Prinsloo, the third test lies in between the two other tests.
- [28] Thus, Mr Prinsloo contends that the three possible tests became blurred with the magistrate. It is Mr Prinsloo's assertion that the magistrate conflated the test of appeal with the test of reasonable success. The appellant's counsel submitted

further that reasonable prospects must be viewed as different than reasonable arguable.

[29] Mr Prinsloo argued that the 'reasonably arguable point' means that the version of the appellant is reasonably possible. According to the counsel, the 'reasonably arguable point' is patently a less stringent requirement compared to 'prospects of success' test.

[30] Additionally, during oral submissions, the central contention for the appellant was that the court *a quo* ought to have applied the test announced in *S v Anderson* 1991 (1) SCAR 525 (C). According to Mr Prinsloo, the Anderson matter clarified the minimum standard that should be applied. Mr Prinsloo repeatedly emphasised that the magistrate applied a much more stringent test than mandated in the *Anderson* and the *Coetzee* matters.

[31] On behalf of the respondent, Ms Du Preez stressed that there was no misdirection by the magistrate in his refusal to follow the principles set out in the *Coetzee* matter. She contended that the magistrate was not bound by the principles enunciated in the *Coetzee* matter.

Review of authorities

[32] In *Rohde v The State* 2020 (1) SACR 329 (SCA) (18 December 2019), at paragraphs 8 -9, 14 -16, Nicholls JA writing a minority judgment, stated the following in respect of the fact that leave to appeal is granted:

"[8] Being granted leave to appeal a conviction is an important consideration but it is not, in and of itself, a sufficient ground to grant an accused bail . . . Even

if one were to accept for present purposes that the appellant has reasonable prospects of success, this is but one of the factors to be considered.

[9] Although dealing with a Schedule 6 offence in *Masoanganye v S*, this Court held that what was of more importance than merely being granted leave to appeal was the seriousness of the crime, the real prospects of success on conviction and the real prospect that a non-custodial sentence may be imposed. As to whether the appellant was a flight risk, the Court went on to say that: 'It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best placed equipped to deal with the issue, having been steeped in the atmosphere of the case. . .

[14] We know the nature and gravity of the punishment - the appellant has been found guilty and faces the prospect of 20 years in prison. There is no possibility of a non-custodial sentence should his appeal be dismissed. It is also on record how unpalatable the appellant finds conditions in prison. This must be taken together with the fact that the appellant holds three different passports. He has dual citizenship with South Africa and Australia and has British citizenship which he holds by virtue of England being his country of birth. He resided with his family in Australia for several years in the 1990's. We are informed that all three passports are in police custody and have expired. But this does not preclude the appellant from renewing his passports. What is important is that his past life has been one of international mobility. Nor can it be ignored that South Africa's borders are notoriously porous.

[15] Section 60(6)(e) enjoins a court to consider the ease with which extradition could be effected if the appellant were to flee. Unfortunately, bitter experience has taught us in South Africa that those with financial means are often able to evade justice for years. There can be no question of this Court condoning a different set of rules for the rich and the poor.

[16] The appellant's financial situation is not entirely clear. . ." Emphasis added.

- [33] Quite apart, however, from any consideration as to any test applicable, the law is supposed to be applied consistently to everyone. In the instant case, it is common ground that the court *a quo* did not apply the approach adopted in the *Coetzee* matter, instead it exclusively relied upon the case of *S v Masoanganye and Another* 2012 (1) SACR 292 (SCA) (“the *Masoanganye* matter”) and other decisions from the Supreme Court of Appeal.
- [34] It is also contended on appellant’s behalf that the court *a quo* misinterpreted or misapplied the *Masoanganye* matter. According to the appellant this is so because the *Masoanganye* matter concerned an appeal of bail pending an appeal to the SCA.
- [35] The argument was developed along the lines that the *Masoanganye* matter was not raising the bar for bail pending appeal. I have great difficulty in seeing how in the circumstances there could be a distinction between the present case and what was stated in the *Masoanganye* matter.
- [36] The difficulty springs from the fact that the appellants in the *Masoanganye* matter applied to the trial court for leave to appeal to the SCA and for an extension of their bail pending the finalisation of their appeal. The leave to appeal was granted but bail pending appeal was refused. The appellants then appealed to the SCA against the refusal to grant them bail. In the *Masoanganye* case the SCA, stated the following at paragraphs 14-15;

“[14] Since 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 471A-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 . . . This failure makes it difficult for us to assess whether the appellants have any real prospects of success on the merits.

[15] It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue having been steeped in the atmosphere of the case. Through legislative oversight, something this court has complained about for more than two decades and ignored by the Executive, a convicted person has an automatic right of appeal to this court against a refusal of bail. But there is a limit to what this court may do. It has to defer to the exercise of the trial court's decision unless that court failed to bring an unbiased judgment to bear on the issue, did not act for substantial reasons, exercised its discretion capriciously or upon a wrong principle." Underlining added.

[37] In the instant case the court *a quo* stated the following in its judgment:

"So it is clear that the SCA laid down this test and this test is totally different to the Coetzee's approach which as far as the Court is concerned is not in line with the approach that has been followed by the SCA . . . An assessment of the aforementioned cases makes it therefore clear that the test for bail pending the appeal seems to be more stringent if regard is had to these cases as far as the Court is concerned. The second leg therefore involved a dispassionate consideration of the facts and determination whether or not reasonable prospects of success exist that another Court may come to a different conclusion. Therefore, I reject the submissions by the defence that the Court should follow a less stringent approach." The approach is what it is. It is what the SCA has confirmed, and I am bound by the studied cases which is judgment of the highest court . . . [b]ut on this point the SCA judgement overrides the decision of Coetzee."

[38] The facts in the present case are unexceptional. Notably, the *Coetzee* matter, relied on by the appellant, is remarkably similar to the facts of the instant case. Like the present case, the *Coetzee* matter was concerned with the question of whether the court *a quo* had misapplied the legal threshold for the consideration of bail pending the outcome of petition.

[39] It appears to me, therefore, that some, albeit not perfect, analogy can be drawn between the *Coetzee* matter and the present case. However, in my view, the circumstances and what was stated in the *Coetzee* matter provide a palpable contrast to the circumstances of the present case. Moreover, with regard to the findings made in the *Coetzee* matter and those made by the court *a quo*. Thus, this case differs somewhat from the *Coetzee* matter. Nonetheless, I note that the *Coetzee* matter and the court *a quo* applied different approaches.

[40] Having reviewed the relevant case law, it is my view that the existence of the 'stringent test' is a theme that runs throughout the case law. On the basis of jurisprudence, it is clear that an application for bail pending appeal involves two issues;

1. the prospects of success on appeal; and
2. the likelihood of the applicant for bail absconding.

38. The case-law does of course recognise, in certain cases, that a less stringent test may be necessary in the determination of whether an applicant may be released on bail pending appeal.

[41] It is necessary for this judgment to recite what was stated in the *Coetzee* matter, when the following was stated:

“THE APPROPRIATE LEGAL THRESHOLD

[13] 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 prospects 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 *S v Hudson* 1996 *Bailey and Others v The State* 2013

[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 *McCoulagh* 2001 and *S v Mabapa* 2003 at paragraph 5. The following dictum by Hemming DJP provides a useful guideline for the manner in which the prospects of success should be considered

[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

[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. . . .

The prospects for success on appeal

[32] . . .

[33] . . .

[34] . . .

[35] . . .

[36] I find that the appellant's appeal is reasonably arguable and not doomed for 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 a reasonable prospects of succeeding in his petition, in other words, there exists sound rational grounds for the conclusion that there are prospects of success on appeal . . ." Underlining added.

[42] Notably, in the *Coetzee* matter, the court specifically took into account the prospect of success test albeit it characterised it as being stringent. That does not mean, however, that the *Coetzee* matter discarded the test of reasonable prospects of success. It is perhaps worth briefly noting that, in my view, the *Coetzee* matter used both criteria in the determination as to whether to admit the appellant on bail. I am only fortified in my conclusion by the fact that in the *Coetzee* matter the court expressly found at paragraph 36 that it was of the view that the appellant also passes the higher threshold and found that the appellant had a reasonable prospect of succeeding in his petition.

[43] The *Coetzee* matter further found that the appellant showed that he had prospects of success on appeal. In my view, the express reference and application of the stringent test on the face of the *Coetzee* matter is a strong indicator that the stringent test was considered, and both its existence and application were acknowledged.

- [44] Turning then to the decision of *S v Hudson* 1996 (1) SACR 431 W. I regard it as essential to recite what was stated in the Hudson case at page 431 when the court stated the following:

“It has been argued that it is a misdirection to see the assessment of the prospects of success as the ‘ultimate decision’. But if the address of appellant’s representative at the bail application is borne in mind and his reliance on *S v Williams* 1981 (1) SA 1170 (ZA), the magistrate perhaps merely stated acceptance of the contention that the prospects of success and the likelihood of absconding are two issues that must be considered. I nevertheless had doubts about the role which the prospects of success on appeal should have played in the court *a quo*. . . To hold that the prospects of success on appeal may never be permissible consideration, would run counter to authority. The need to have regard to the prospects is also readily apparent if one considers the extremes.

If it is known that the appeal is very likely to succeed, the specter is raised of the administration of justice detaining a man well knowing of the prospect that he would be undergoing something which he should be able to avoid. In *Sv 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 particular charges the appeal was likely to succeed.”

- [45] I do not believe that any of the above cited authorities had silently over-ruled the well-established line of authority that stated that a bail court has to consider the ‘prospects of success’ when determining as to whether to release an applicant on bail pending appeal.

Prospects of success or reasonable arguable case that is not doomed to fail

- [46] In my view, it is important to remember that the stringent test is designed to protect the proper functioning of the bail administration and to maintain public confidence in the administration of justice.

- [47] It is, of course, the case that the phrase 'prospects of success' is clear and unambiguous. That being so, it seems to me that the determination whether there are 'prospects of success' must be considered on a case-by-case basis. As mentioned previously, the appropriate test an applicant must meet before being admitted on bail pending the determination of his or her appeal has been articulated by our courts on numerous occasions. Hence, there is a plethora of authorities setting forth the criteria for bail pending appeal.
- [48] In *S v Oosthuizen and Another* 2018 (2) SACR 237 (SCA), the Supreme Court of Appeal ("SCA") stated that the granting of an application for leave to appeal did not per se entitle a person to be released on bail. There had to be a real prospect in relation to success on conviction and that a non-custodial sentence might be imposed, such that any further period of detention before the appeal was heard would be unjustified. Thus, an applicant must establish that there are prospects of success in the appeal [the stringent test].
- [49] On the other hand, the concept that there should be a reasonable arguable case that is not doomed for failure, requires the applicant to show that the appeal is not frivolous but has grounds that are realistically arguable. It raises an arguable point [the less stringent test].
- [50] There is no doubt that the 'prospects of success' test contemplates a high threshold. The 'prospects of success' test requires an applicant to establish a serious likelihood of success in the appeal. And it is clearly not an equivalent of a

reasonable arguable case that is not doomed to fail. Indeed, there is a good reason for the stringency of the test of 'prospects of success' which I shall explain below.

[51] In *S v Anderson (supra)* when the court dealt with the issue of an applicable test, it stated *inter alia* that:

"I appreciate that in dealing with this application I have applied a test which is less demanding than that postulated in *Beer's* case *supra*. There it was said that where release on bail pending an appeal against sentence only is in issue, an applicant for bail must show he has reasonable prospects of success. With respect, I decline to put the test as high as that in all cases concerning sentence. Where, as here, there is no risk of the applicant for bail absconding and a refusal of bail *may* (I put it no higher) result in a successful appeal against sentence being rendered futile by a refusal of bail, I think that one should eliminate the risk of that happening by granting bail. In such circumstances, and I emphasise the words 'in such circumstances', (emphasis added) I think that it is enough that the appeal against sentence is reasonable arguable and not manifestly doomed to failure.

That is of course a less rigorous test than the traditional reasonable prospects of success test which was formulated by the Courts in the context of applications for leave to appeal in situations where there was no appeal as of right. It may well be that the traditional test or something approximating to it may be appropriate in dealing with bail applications pending appeal against sentence where there is some reason to be concerned about whether or not the applicant for bail will abscond. However, that is not the situation with which I have to deal and it is therefore unnecessary for me to decide it.

Relying on *Beer's* case, the magistrate applied the more stringent test. In my view that test was inappropriate in the circumstances of this case. I appreciate that there was also no risk of the applicant absconding in *Beer's* case but, as I have said, I consider, with respect, that the test formulated in *Beer's* case is too

restrictive in such circumstances and I prefer the less stringent test which I have applied." Underlining added.

- [52] In his oral submissions, Mr Prinsloo stated that the current jurisprudence has superseded the stringent test established by prior jurisprudence. He submitted that the only test applicable is whether 'there is a reasonable arguable case that is not manifestly doomed for failure'
- [53] The court in the *Anderson* case also correctly acknowledged the existence of the stringent test and did not eschew or renounce its general application, a conclusion with which I agree. The *Anderson* case merely stated that the 'prospects of success test' did not fit in neatly with its merits. Inasmuch as the *Anderson* case did not adopt the 'prospects of success' test, that does not necessarily mean that the test has no application in all circumstances. The necessary implication is that the 'prospect of success test' is still applicable. To hold otherwise is to go contrary to the jurisprudence.
- [54] More importantly, however, according to the *Anderson* case, the use of the stringent test was a poor fit for its circumstances. Put otherwise, it was found in the *Anderson* test that there are instances where the use of the more stringent test is not suitable. I quite understand that.
- [55] Thus, the court considering bail pending appeal should not depart from the stringent test unless the circumstances of the case do not justify the application of the test. Likewise, the less stringent test, must be considered in context. In my view, the less stringent test and the more stringent test work in tandem with one another to ensure fairness.

- [56] As noted earlier, Mr Prinsloo submitted on appellant's behalf that the court *a quo* ought to have applied the less stringent test, arguing that it best reflects the law as it stands. I find it difficult to accept this line of reasoning. Surely, a court cannot apply the less stringent test in circumstances that do not require so.
- [57] The jurisprudence shows that the stringent test cannot stand the test of time in a wide variety of context. Hence, in certain cases it is acknowledged that the 'prospects of success test' does not end the matter. The court may be required to consider a second step as to whether the circumstances of the case warrant a less stringent test, which is whether 'there is a reasonable arguable case that is not manifestly doomed for failure'.
- [58] In accordance with the well-established principles set out by our courts; it is clear therefore that if the circumstances of a case leads the bail court to conclude that the application of the stringent test is demonstrably unfit, the court should depart from it. Viewed in light of the above considerations, clearly, an adverse consequence would follow from a slavish application of the stringent test.
- [59] In my view, the more stringent test spells out the test applicable or the threshold and at the same time and at the other end of the spectrum, the less stringent test clarifies the limits of the stringent test, by providing overlapping protection for applicants in certain circumstances.
- [60] Thus, the critical question in a bail pending appeal or petition is whether there are prospects of success. When considering whether to admit an applicant on bail pending appeal, the applicability of the stringent test should not be rejected lightly.

At the risk of repetition, it does not automatically follow that whenever a court is seized with an application for bail pending petition or appeal, the less stringent test is applicable. Nor is the bail court compelled to consider the less stringent case if the circumstances of the case do not warrant its application.

[61] To my mind, this means that the circumstances of any particular case may be an indication as to whether a more stringent or less stringent test is to be applied.

[62] Depending on the circumstances, the applicant may apply to the court to apply the less stringent test, or the court may *mero motu* apply the less stringent test. In the present case, what the appellant overlooked, however, is to consider as to whether circumstances existed that warranted the application of the less stringent test by the court *a quo*.

[63] I am of the view that the less stringent test was not meant to invite chaos or conflict in applications involving bail pending appeal or petition. Should there be conflict between the two tests, the courts would give differing results in similar cases. The appellant's averments in this appeal would lead to an untenable conflict between the two tests.

[64] In fact, an analysis of the circumstances of the present case reveals that the court *a quo* was not compelled to consider the less stringent test. As it turns out, the appellant seeks petition for leave to appeal only the conviction and not the sentence. The court *a quo* in its determination whether to admit the appellant on bail, also accorded consideration to the question as to whether the appellant was a flight risk or not.

- [65] The fact that an applicant for bail pending an appeal is considered to be a flight risk is a significant factor to be considered in the determination as to whether the stringent test is applicable. See *Anderson case supra*.
- [66] In view of the foregoing, surely, if there is no risk that the appellant would abscond, there is absolutely no need to consider prospects of success on appeal. Instead, the court in order to grant or refuse bail, has to consider whether there is a reasonably arguable case and not manifestly doomed for failure. This makes sense because if there is no concern that the applicant for bail would abscond, why subject him to the stringent test.
- [67] In the end, if the court is convinced that the applicant is not going to abscond, then the prospects of success become less prominent, and an arguable case comes to the fore. In the *Coetzee* matter, the court first found that the appellant was not a flight risk. After making such a finding the court then stated that the true consideration is therefore whether or not the appellant has an arguable case on appeal. I agree with this approach.
- [68] However, the prospects of success remain quite prominent and relevant if there is a likelihood of absconding. Thus, if there is a risk of absconding the test remains stringent as the person who is likely to abscond must then convince the bail court that he or she has prospects of success.
- [69] Surely, an applicant in an application for bail pending appeal who has a 'reasonable arguable case that is not manifestly doomed to fail' on appeal and is not a flight risk, he or she cannot be denied bail pending appeal or petition. This makes

absolute sense. Why would the court lower the test if there is likelihood of abscondment. Similarly, why should the court raise the test if the person is released on bail pending appeal would not in any event escape.

[70] If there is no likelihood of abscondment, the focus shifts from prospects of success to a reasonable arguable case that is not manifestly doomed for failure. The shift from one criteria to the other involves exercise of the bail court's discretion. It is thus within the court's discretion to assess which criteria is appropriate in the circumstances.

[71] As mentioned earlier, in truth there is no conflict between the two tests. This position is supported by the *Coetzee* matter. It is quite noteworthy in the *Coetzee* matter that the court, after finding that the appellant is not a flight risk, proceeded in paragraphs 32 to 36 and considered both the stringent and the lenient test. In essence, what is clear from the *Coetzee* matter is that the court did not reject the stringent test.

[72] I find the appellant's attempt to distinguish between "the stringent test cases" and "the less stringent cases" immaterial.

[73] It is important not to lose sight of the *Coetzee* matter's overall finding when considering which test was applied. I do not accept the appellant's interpretation of the *Coetzee* matter. Clearly, the appellant's reliance on the *Coetzee* matter, for the proposition that the court *quo* applied a wrong case is clearly misplaced. At the risk of repetition, contrary to Mr Prinsloo's understanding of the *Coetzee* matter, a more careful reading of the *Coetzee* matter reveals that the court observed that the

appellant passed the stringent test and also found that the appellant had reasonable prospects of success on appeal. Hence, I hold the view that the corollary of this is that the *Coetzee* matter did not ignore or discard the stringent test in deciding whether an applicant can be admitted on bail.

- [74] There is thus no lack of consensus regarding the test applicable in deciding whether to release an applicant on bail pending appeal.

Did the court a quo err in applying the stringent test

- [75] Back to the instant case, the court *a quo* stated the following in its judgment, at paginated pages 290, 291 and 292:

“[I]t is quite clear that there exist no reasonable prospects that a non-custodial sentence will be imposed having regard to the circumstances of this matter. Having said that, one cannot ignore the fact that the passport of the applicant is missing and even if it was in possession of the State, as experience has taught that getting a new passport, there is no difficult (sic)... The applicant being a foreign national has ties to his country of birth and has travelled abroad. . .

As the Court in *Rohde supra* stated at paragraph 14 and I refer:

“Nor it can be ignored that South Africa’s borders are notoriously porous . . . Unfortunately bitter experience has taught us in South Africa that those with financial means are often able to evade justice for years. . . The longer the period of imprisonment imposed, as it was the case here the greater will be the likelihood of absconding.”

- [76] A careful consideration and plain reading of the record leads to the conclusion that, the court *a quo* in considering the test applicable in an application for bail pending petition, was of a firm view that the test is one of prospects of success on appeal.

- [77] As it turns out from the foregoing, it is evident that the court *a quo* attributed weight to the fact that there was likelihood that the appellant would abscond should he be released on bail pending his appeal. Properly understood, this finding by the court *a quo* cannot be faulted. The courts have long recognised that a substantial custodial sentence provides an incentive to abscond and leave the country.
- [78] Naturally, this finding by the court *a quo* immediately raised the test to be applied. For all I can say, the court *a quo* in the circumstances of this case applied the right test in refusing bail. Palpably, the court *a quo*'s findings on the applicable test, is on all fours with the SCA cases and the SCA findings are binding upon this Court.
- [79] Viewed in light of the above considerations, I cannot see how the court *a quo* applied the wrong test in refusing bail pending petition or appeal.
- [80] For these reasons, I agree with the respondent that this appeal has to fail. It must therefore be concluded that by taking to account of all the foregoing factors that the following order ought to be made:

Order:

Appeal is dismissed.

A handwritten signature in black ink, appearing to be 'C. N. NZIWENI, J.', written over a solid black rectangular redaction box.

C. N. NZIWENI, J

Judge of the High Court

Appearances:

On behalf of Appellant:

Adv B Prinsloo

Instructed by:

Mathewson Gess Inc. Attorneys

On behalf of the Respondent:

Adv A Du Preez

Instructed by:

Director of Public Prosecution