



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

|                              |     |
|------------------------------|-----|
| Reportable:                  | YES |
| Of Interest to other Judges: | YES |
| Circulate to Magistrates:    | YES |

Case no: **3858/2024**

In the matter between:

**FRANCOIS LABUSCHAGNE**

**APPLICANT**

and

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

---

**CORAM:** JP DAFFUE, J

---

**HEARD ON:** 26 JULY 2024

---

**ORDER ON:** 26 JULY 2024

---

**REASONS**

---

*Introduction*

[1] The applicant, a sentenced prisoner, is stuck between a rock and a hard place. Neither the regional court, nor the high court is prepared to hear his bail application pending a petition to the Judge President of this court for leave to appeal his convictions and the sentence imposed upon him. Clearly, the applicant is entitled to be heard, but the question to be decided is by which court.

*Material factual background*

[2] On 25 March 2024 the applicant was convicted in the regional court, Bloemfontein (the court *a quo*) on several charges pertaining to contravention of the Sexual Offences Act 32 of 2007, the details of which are not relevant for purposes

hereof. On 9 May 2024 he was sentenced. The one sentence relevant to the present application is the sentence of 5 years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 (CPA). He is presently serving this sentence at the Bloemfontein Correctional Services Centre.

[3] Immediately after sentence the applicant's legal representative sought leave from the court *a quo* to appeal to the high court against his convictions and sentences which application was dismissed. Notwithstanding his intention to appeal, he failed to apply to the court *a quo* for bail pending a petition in terms of s 309(C)(2)(iii) for leave to appeal to this court.

[4] On 19 July 2024 the applicant applied for bail in the high court pending the reconstruction of the trial record and an application to this court for leave to appeal against his convictions and sentences. Daniso J struck the application from the roll. She held that there were no pending proceedings in the high court as the intended application for leave to appeal had not been lodged with this court and therefore, this court did not have jurisdiction to adjudicate the application. The learned judge referred to *S v Makola*<sup>1</sup> and *S v Masoanganye*.<sup>2</sup> I may add that the applicant also relied on an affidavit by his Cape Town attorney, Ms T Swanepoel, dated 19 July 2024 who alleged that the prosecutor in the court *a quo*, Mr York, had informed her correspondent in Bloemfontein that that court was *functus officio* and that the bail application could not be entertained.

[5] Hereafter the applicant applied for bail to the court *a quo* which application served before that court on 24 July 2024. The honourable presiding regional magistrate struck the matter from the roll based on the following reasons as recorded in an affidavit by the applicant's Bloemfontein attorney, Mr JH Jordaan:

- a. he did not have legislative authority to consider the bail application pending the petition;
- b. he had already dismissed the application for leave to appeal the convictions and sentences and was accordingly *functus officio*.

---

<sup>1</sup> 1994 (2) SACR 32 (A).

<sup>2</sup> 2012 (1) SACR 292 (SCA) para 15.

It is not clear whether the reasons set out by Mr Jordaan were conveyed informally by the court *a quo* to the parties. Fact of the matter is that this court has not received any written reasons from the court *a quo*. I would have expected the court *a quo* to provide the applicant with authority for the decision to strike the application from the roll on the basis of it being allegedly *functus officio*.

[6] On Friday 26 July 2024 the applicant's bail application served before me. The application that served before Daniso J was supplemented with a further affidavit deposed to by the applicant as well as the aforesaid affidavit of Mr Jordaan.

[7] The applicant was represented by Adv SJ Janse van Rensburg, whilst the Director of Public Prosecutions (DPP) was represented by Adv SC Choane. Mr Janse van Rensburg submitted, relying on my judgment in *S v Sello*,<sup>3</sup> that the high court had jurisdiction to adjudicate the bail application as a court of first instance. I pointed out to him that the facts in *casu* differ materially from the facts in that case as will be explained later herein. I requested the parties to present me with authority that this court did have jurisdiction to adjudicate the bail application. They could not assist me. I was prepared to let the matter stand down for several hours for them to find authority, but my offer was not accepted.

#### *Petition procedure in the high court and incomplete trial records*

[8] An application for leave to appeal, still referred to as a petition in the CPA, is addressed to the Judge President of the high court with the necessary jurisdiction.<sup>4</sup> This application must be accompanied by the application to the court *a quo* for leave to appeal, the magistrate's reasons and the record of the proceedings in the court *a quo* in respect of which the application was refused.<sup>5</sup>

[9] Before I evaluate the applicable legal principles, it is recorded to be common cause that the trial record is incomplete. It appears from the applicant's affidavit, confirmed by correspondence, that there was a complete mess with the recording of the proceedings in the court *a quo*.<sup>6</sup> Consequently, the applicant cannot proceed with

<sup>3</sup> (1173/2023) [2023] ZAFSHC 83 (13 April 2023).

<sup>4</sup> Section 309(C)(2)(iii) of the CPA.

<sup>5</sup> Section 309(C)(4)(c) of the CPA; see *Shinga v The State & another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae)*; *S v O'Connell and others* 2007 (2) SACR 28 (CC) para 55.

<sup>6</sup> The applicant has shown that the trial proceeded over several days and that on most days the proceedings have not been recorded and/or the court personnel have been unable so far to provide the transcribers with the

an application for leave to appeal in terms of s 309(C)(2)(a)(iii), read with s 309(C)(4)(c) of the CPA. Furthermore, the presiding regional magistrate is the only person who can appropriately consider and adjudicate a bail application on the evidence presented to him as the court of first instance.

[10] I observed in *S v Nkhahle*<sup>7</sup> as follows:

'It becomes more and more prevalent, from my own experience dealing with reviews and appeals in this division, but also reading judgments from other divisions, that courts of appeal are confronted with missing and/or incomplete records. Something needs to be done urgently. We are living in the digital era, the so-called Fourth Revolution, but it is often forgotten that the human element can never be ignored. Machines and sophisticated equipment must be operated by people and if the operators do not possess the necessary skills, the best equipment in the world become useless. I shall make some suggestions *infra*.'

[11] In *S v Schoombee and another*<sup>8</sup> the Constitutional Court authoritatively confirmed the importance of a proper record of proceedings in connection with the right to a fair trial as follows:

'It is long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal. An adequate record of trial court proceedings is a key component of this right. When a record 'is inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside.'"

The Constitutional Court went further and also confirmed that the loss of trial records is a widespread problem which raises serious concerns about endemic violations of the right to appeal. Also, that reconstruction should not be the norm in providing appellants with their trial records.<sup>9</sup>

[12] A complete trial record is the foundation of an appeal process. The duty of all parties, including the presiding judicial officer, to ensure that proper trial records are kept, is beyond doubt.<sup>10</sup> A reconstruction of the trial record will have to be embarked upon before the applicant may apply to this court for leave to appeal.

---

recordings for 18 April 2023, 19 July 2023, 8 September 2023, 25 March 2023 (when judgment was delivered) and 9 May 2024 (when sentences were imposed). The complainant and her mother testified on the first three days and the applicant obviously regards their testimony as crucial.

<sup>7</sup> 2021 (1) SACR 336 (FB) para 16.

<sup>8</sup> 2017 (2) SACR 1 (CC) para 19.

<sup>9</sup> *Ibid* para 38.

<sup>10</sup> *Mompoti v S* (A86/2018) [2018] ZAFSHC 129 (30 July 20218) at paras 9-11.

[13] It is not necessary for purposes hereof to deal further with this issue, save to state that it is apparent that the applicant is prevented, without a proper trial record, from lodging an application in the high court in accordance with s 309C(2)(a)(iii) of the CPA for leave to appeal to this court against his convictions and sentences.

*Evaluation of the statutory provisions and the legal principles relating to bail*

[14] It is appropriate to consider the rationale for adjudicating bail applications on an urgent basis. In *Magistrate Stutterheim v Mashiya*<sup>11</sup> the Supreme Court of Appeal emphasised that 'the right to a prompt decision is thus a procedural right independent of whether the right to liberty actually entitles the accused to bail.' It is also not strange to find that an appellant has the right to appeal the refusal of bail without prior leave of the court refusing bail.<sup>12</sup> Furthermore, everyone has the right to freedom and security of the person as set out in s 12(1) of the Constitution. The rights to human dignity, equality and freedom are referred to in conjunction with each other in four sections of the Constitution,<sup>13</sup> emphasising the value attached to freedom of the individual. Therefore, although the applicant's situation is different than other citizens in that he has been convicted and sentenced to imprisonment, I believe that it is of paramount importance that matters of personal freedom be dealt with on an urgent basis.

[15] Mr Janse van Rensburg, relying on my judgment in *Sello*,<sup>14</sup> submitted that I was entitled to adjudicate the bail application. In *Sello* leave to appeal the conviction and sentence had already been granted by two of my colleagues. The notice of appeal as well as the complete trial record had been filed and the parties were merely awaiting a date for hearing of the appeal. When I pointed out to Mr Janse van Rensburg that the facts *in casu* were not on all fours with the facts in that case, he immediately conceded this.

[16] Although s 60 of the CPA deals with bail applications by accused persons which is not the case *in casu*, it is appropriate to refer to this section and some authorities in order to support the conclusion reached in this judgment. I quote the following:

**'60 Bail application of accused in court**

<sup>11</sup> 2003 (2) SACR 106 (SCA) p 113 c-d.

<sup>12</sup> Section 65 of the Criminal Procedure Act 51 of 1977; also *S v Van Wyk* 2005 (1) SACR 41 (SCA) para 1.

<sup>13</sup> Sections 1, 7(1), 36(1) and 39(1)(a)

<sup>14</sup> Footnote 3 above.

(1)(a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

(b) Subject to the provisions of section 50 (6) (c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.

(c) If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.' (emphasis added)

Cognisance should be taken that subsec 60(1)(b) has been amended with effect from 1 August 1998. Prior thereto subsec 60(1) read as follows:

'An accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior Court, to that Court, to be released on bail in respect of such offence, and any such court may, subject to the provisions of s 61, release the accused on bail in respect of such offence on condition that the accused deposits with the clerk of the court or, as the case may be, the Registrar of the Court, or with a member of the prisons service at the prison where the accused is in custody, or with any police official at the place where the accused is in custody, the sum of money determined by the court in question.' (emphasis added)

Contrary to the reference to pending proceedings, the amended subsection refers to the stage when 'the accused appears in such other court for the first time.' Until such time the magistrate's court as the transferring court retains jurisdiction in respect of bail applications. The question to be answered is whether this section applies *in casu*, bearing in mind that it may be argued that the applicant has not yet appeared in this court for the first time. As mentioned, he has already been convicted and sentenced in the regional court. The apparent purpose of the legislature as expressed in subsec 60(1)(b) is to ensure that the magistrate's court retains jurisdiction in respect of bail applications until the accused person appears in such other court, *ie* the regional court or the high court, for the first time.

[17] I made the following observations in *Sello*:<sup>15</sup>

'I came across two judgments that are not directly applicable, but indicate a possible lack of jurisdiction by the high court to determine bail applications in the present circumstances, to wit *Director of Public Prosecutions, Eastern Cape, and Another v Louw NO: In re S v Makinana (Makinana)* and *S v Seroka*. The facts in *Makinana* differ from the matter in casu. In that case there was a dispute as to whether the magistrate's court or the regional court had jurisdiction to hear a bail application once the matter had

---

<sup>15</sup> *Sello loc cit* paras 9-11.

been transferred to the regional court for trial. The accused's bail application was dismissed by the magistrate's court before the transfer and after transfer to the regional court he again applied for bail, alleging new facts. The regional magistrate refused to hear the application on the basis that he had no jurisdiction. The high court made the following order:

'It is declared that, in terms of s 50(6)(c) of the Criminal Procedure Act 51 of 1977, read with s 60(1) of the Act, a magistrate's court has exclusive jurisdiction to hear a bail application in respect of any case in which an accused person is charged with a Schedule 6 offence (provided that the Director of Public Prosecutions does not direct otherwise in terms of the proviso to s 50(6)(c)) from the first appearance of the accused until he or she appears in any other court to which his or her matter may be transferred, whereupon such other court shall enjoy jurisdiction to entertain a bail application (whether or not it is the accused's bail application).' (Emphasis added)

The presiding judges in *Makinana* also referred with approval to *S v Makola* where the court held as follows pertaining to a part-heard matter in the Supreme Court (now the high court): 'My interpretation above is fortified by the further consideration that where the matter is pending before the Supreme Court, such Court will in any event be the appropriate Court at that stage of the proceedings to deal with any bail application. Counsel prosecuting on behalf of the State would certainly be in a better position than a prosecutor in the magistrate's court to assist the Court and to deal with the latest facts and circumstances relevant to a bail application. It would indeed lead to an anomalous situation if the present case against the appellant was to proceed in the Witwatersrand Local Division while his second bail application had to be dealt with in the magistrate's court at Boksburg.' (Emphasis added)

The facts in *Seroka* also differ from the facts in *casu*. In that case the matter had been transferred to the regional court for trial whereupon the accused applied to that court for bail. There was only one regional magistrate at the seat of the court and he decided to refer the matter back to the magistrate's court for the bail application. The magistrate refused to hear the application, but the high court held that the decision was invalid and set it aside. It held that once an accused person has appeared in another court pursuant to a transfer of such person from the transferring court for sentencing or trial purposes, such receiving court shall be vested, to the exclusion of the transferring court, with exclusive jurisdiction in respect of bail application proceedings, unless the receiving court refers the matter back to the transferring court for a bail application.' (footnotes omitted)

[18] The facts in *S v Makola*<sup>16</sup> are not on all fours with the facts in *casu*. In *Makola* the criminal trial served before the high court (then known as the Supreme Court) as the court of first instance. FH Grosskopf JA made the following statement on behalf of a unanimous court:

'In my judgment s 60(1) gives both the 'lower court' and the 'superior Court' jurisdiction to release an accused on bail. As far as the lower court is concerned the section provides that '[a]n accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after

---

<sup>16</sup> 1994 (2) SACR 32 (A) p 34 d-e.

such appearance, apply to such court . . . to be released on bail in respect of such offence. . . .' The Supreme Court, on the other hand, will have the jurisdiction to entertain an original application for bail, as opposed to an appeal, at any stage, provided 'the proceedings against the accused are pending' in such Court.' (emphasis added)

The learned judge of appeal continued as follows:<sup>17</sup>

'I do not agree that once the appellant had applied for bail in the magistrate's court s 60(1) prevented him from bringing the second bail application in the Supreme Court where the proceedings were pending.

My interpretation above is fortified by the further consideration that where the matter is pending before the Supreme Court, such Court will in any event be the appropriate Court at that stage of the proceedings to deal with any bail application. Counsel prosecuting on behalf of the State would certainly be in a better position than a prosecutor in the magistrate's court to assist the Court and to deal with the latest facts and circumstances relevant to a bail application. It would indeed lead to an anomalous situation if the present case against the appellant was to proceed in the Witwatersrand Local Division while his second bail application had to be dealt with in the magistrate's court at Boksburg.

I fail to see on what principle the appellant should be barred from bringing his second bail application on fresh grounds in the Supreme Court where the case is pending.' (emphasis added)

[19] *S v Masoanganye*<sup>18</sup> the trial court granted leave to appeal the convictions and sentences, but refused the appellants bail pending appeal. Harms AP remarked as follows in the appeal against the refusal of bail:

'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, or exercised its discretion capriciously or upon a wrong principle.'

[20] Sub-section 309(3) of the CPA must be considered. It reads as follows:

'(3) The provincial or local division concerned shall thereupon [*i*e the noting and prosecution of an appeal when there is an automatic right of appeal, or when leave to appeal has been granted in terms of s 309B or 309C] have the powers referred to in section 304(2), and ...'

<sup>17</sup> *Ibid* p 35 c-g.

<sup>18</sup> 2012 (1) SACR 292 (SCA) para 15.

Clearly, the high court's powers are restricted to cases involving an automatic right of appeal, or when leave to appeal has been granted. Therefore, it does not have the power to consider a bail application when the lower court has dismissed the application for leave to appeal and in the absence of any pending procedure in the high court.

[21] Sub-section 304(2), quoted in subsec 309(3), deals with the review court's powers. One such power is applicable *in casu*, to wit as described in subsec 304(2)(c)(vi), which reads as follows:

'(c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312-

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) ...

(vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.' (emphasis added)

[22] In *S v Hlongwane*<sup>19</sup> the full court presented a history pertaining to bail applications over a period in excess of a century, quoting various statutory provisions and judgments from this country and abroad. The following *dicta*<sup>20</sup> in *Hlongwane* confirm that the high court's common law power to deal with bail applications as *in casu* are restricted by the statutory laws. The following is a translation from the Afrikaans judgment into English:

'(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)(vi) (release on bail by a Provincial Division as a Court of appeal). Where this occurs the statutory power replaces the common law power.' (emphasis added)

<sup>19</sup> 1989 (4) SA 79 (TPD).

<sup>20</sup> *Ibid* paras 7 & 8, pp 96 G – 97 B; the English translation borrowed from Juta in the heading of the reported judgment at p 81 F-G.

[23] It is apposite to refer to three judgments of the Supreme Court of Appeal, to wit *Rohde v The State (Rohde)*,<sup>21</sup> *S v Scott-Crossley*<sup>22</sup> and *Crossberg v S (Crossberg)*.<sup>23</sup> These three judgments do not support the applicant's case. In all three instances the Supreme Court of Appeal granted leave to appeal against the convictions and sentences. In the first case *Rohde* returned to the high court to apply for bail pending appeal which application was dismissed. He successfully appealed to the Supreme Court of Appeal against the judgment refusing bail. The Supreme Court of Appeal did not entertain the bail application as a court of first instance, notwithstanding the fact that that court granted leave to appeal the conviction and sentence. In *Crossberg* the trial judge refused to hear a new bail application notwithstanding the fact that the Supreme Court of Appeal had granted leave to appeal the convictions and sentences. Consequently, the Supreme Court of Appeal came to the assistance of *Crossberg* and granted bail. It is emphasised that the State agreed to bail as well as the conditions to be imposed. The court made it clear that the trial court's view that there were no prospects of success appeared to have been without foundation.<sup>24</sup>

[24] In *Sello* I was prepared to adjudicate the bail application for the reasons advanced therein and briefly touched upon in this judgment. There is good reason why the high court should be entitled to hear bail applications as in *Sello*, whilst the Supreme Court of Appeal should not do so. In petitions to the Supreme Court of Appeal the trial record is not provided to that court, unless the accused was not represented during the trial in which case the justices considering the petition usually request to be provided with the trial record. Rule 6 of that court's rules sets out which documents are to be provided to the court.<sup>25</sup> The position is different in the high court. All

<sup>21</sup> [2019] ZASCA 193; 2020 (1) SACR 329 (SCA).

<sup>22</sup> 2007 (2) SACR 470 (SCA) para 1.

<sup>23</sup> (439/2007) [2007] ZASCA 93 (22 August 2007).

<sup>24</sup> *Ibid* paras 10, 19-21 & 23.

<sup>25</sup> SCA rule 6 reads as follows:

'Application for leave to appeal

*Filing of application*

(1) In every matter where leave to appeal is by law required of the Court, an application therefor shall be lodged in triplicate with the registrar within the time limits prescribed by that law.

*Annexures required*

(2) Every such application shall be accompanied by —

(a) a copy of the order of the court a *quo* appealed against;

(b) where leave to appeal has been refused by that court, a copy of that order;

(c) a copy of the judgment delivered by the court a *quo*; and

(d) where leave to appeal has been refused by that court, a copy of the judgment refusing such leave:

Provided that the registrar may, on written request, extend the period for the filing of a copy of the judgment or judgments for a period not exceeding one month.

*Answer*

applications for leave to appeal must be accompanied by the full trial record,<sup>26</sup> allowing the judges not only to rely on the judgment of the court *a quo* and written representations thereto, but to consider the evidence presented to the trial court.

[25] In conclusion, this court does not have any common law power to adjudicate the bail application. The statutory power of the lower court must be adhered to. Furthermore, there can also be no doubt that the court *a quo* is best suited to adjudicate the bail application based on the applicable principles notwithstanding that court's dismissal of the application of leave to appeal.<sup>27</sup> *In casu*, I do not have the benefit of the court *a quo*'s judgment in respect of the convictions, the sentence, or the judgment dismissing the application for leave to appeal, not even to speak of the trial record. In the event of a dismissal of the bail application, the applicant would be entitled to appeal to this court. In such a case the court *a quo*'s reasons for refusing bail shall accompany the notice of appeal which would place the court of appeal in a position to consider the bail appeal.

---

(3) Every affidavit in answer to an application for leave to appeal shall be lodged in triplicate within one month after service of the application on the respondent.

*Reply*

(4) An applicant who applied for leave to appeal shall, within 10 days after an affidavit referred to in subrule (3) has been received, be entitled to lodge an affidavit in reply dealing strictly only with new matters raised in the answer.

*Format of application, answer and reply*

(5) Every application, answer and reply —

(a) shall —

- (i) be clear and succinct and to the point;
- (ii) furnish fairly all such information as may be necessary to enable the Court to decide the application;
- (iii) deal with the merits of the case only in so far as is necessary for the purpose of explaining and supporting the particular grounds upon which leave to appeal is sought or opposed;
- (iv) be properly and separately paginated; and

(b) shall not —

- (i) be accompanied by the record;
- (ii) traverse extraneous matters; or
- (iii) exceed, for the founding affidavit and answer 30 pages each and for the reply 10 pages.

*Request for further documents*

(6) The judges considering the application may call for —

- (a) submissions or further affidavits;
- (b) the record or portions of it; and
- (c) additional copies of the application.

<sup>26</sup> Section 309C(4) of the CPA.

<sup>27</sup> *S v Masoanganye loc cit* para 15.

[26] Consequently, the high court lacks jurisdiction to adjudicate the bail application as a court of first instance for the reasons apparent herein. Therefore, the applicant's bail application was struck from the roll.



JP DAFFUE J

#### Appearances

For appellant: Adv GS Janse van Rensburg

Instructed by: JHJ Attorneys Inc  
Bloemfontein

For respondent: Adv SC Choane

Instructed by: Director of Public Prosecutions  
Bloemfontein