

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

15 November 2024

DATE

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SIGNATURE

CASE NUMBER: SS163/2015

In the matter between:

SIBONISO GQAMANE NDABAZINHLE MIYA

Appellant

and

THE STATE

Respondent

Coram: DOSIO J

Heard: 15 November 2024

Delivered: 15 November 2024

ORDER

The application for leave to appeal is dismissed.

JUDGMENT

DOSIO J:

Introduction

- [1] This is an application for leave to appeal to the Full Court of the Gauteng Division Johannesburg, against the dismissal of the appellant's application to be admitted to bail, pending finalisation of his trial.
- [2] Section 17(1)(a)(i) of the Superior Courts Act provides –
“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that – (i) *the appeal would have a reasonable prospect of success...*”.
- [3] An appellant who applies for leave to appeal must therefore satisfy the court that there is a reasonable prospect of success on appeal.¹
- [4] In the matter of *Matshona v S*,² the Supreme Court of Appeal stated that the test to determine whether leave to appeal should be granted in:
‘simply whether there is a reasonable prospect of success in the envisaged appeal’.³
- [5] In the case of *S v Mabena and another*,⁴ the Supreme Court of Appeal held that:
‘...the test for reasonable prospects of success is a dispassionate decision based upon the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.’⁵
- [6] In the case of *S v Smith* ⁶ the Supreme Court of Appeal held that:
‘What the test of Reasonableness prospect postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore the appellant must convince this court on proper

¹ *S v Ackerman en n' ander* 1973 (1) SA (A) 765 G-H

² *Matshona v S* 2008 (4) SA69 SCA para 4

³ *Ibid* para 4

⁴ *S v Mabena and another* 2007 (1) SACR 482 (SCA) para 22

⁵ *Ibid* para 22

⁶ *S v Smith* 2011 ZASCA 2012 (1) SACR 567 (SCA) para 7

grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding... There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.’⁷

Background

- [7] On 2 September 2024 the appellant brought an application to be released on bail on charges that fall under the category of offences listed in schedule 6 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977').
- [8] The bail application was brought in the middle of the trial which is proceeding at the Johannesburg High Court before Msimeki J. The appellant is accused one in the criminal matter with case number SS 163/2015.
- [9] The bail application was brought at this stage of the proceedings because the appellant was serving a sentence of 15 years imprisonment in respect of a conviction in 2016, on charges of kidnapping, attempted murder and attempted dealing in drugs. On 23 August 2023, he qualified for consideration to be released on parole in respect of the said sentence of 15 years imprisonment which he is serving.
- [10] The appellant's application to be released on bail was refused on 27 September 2024, on the basis that he failed to show the existence of exceptional circumstances, which in the interests of justice permitted his release on bail.
- [11] The appellant's counsel contends that there are reasonable prospects that another court will reach a different decision and that this court misdirected itself.
- [12] The respondent opposes the application for leave to appeal.
- [13] The appellant raises a number of factors on which he relies for bringing this application for leave to appeal. These factors are that the court erred or misdirected itself by inter alia:
 - (a) not finding that the mere fact that the appellant became eligible for release on parole in itself constitutes an exceptional circumstance.

⁷ Ibid para 7

This court dealt with this aspect in its judgment and refers to paragraphs [25] to [28] of its judgment. It is important to note that Mr Mabena who is the head of the parole board in Zonderwater categorically explained that the mere fact that the appellant qualified for parole did not give him an automatic right to be released on parole.

- (b) not finding that the mere fact that there is no indication when the trial will be completed, likewise in itself constitutes an exceptional circumstance.

From the submissions of the respondent's counsel, it is clear that the delays in finalising the trial were caused by the appellant himself and his co-accused, in that the appellant and his co-accused raised countless applications during the trial, some of which included challenging the indictment, the recusal of the Judge, the recusal of the State advocate and finally an application in terms of s342A of Act 51 of 1977. The respondent's counsel submitted that the cross-examination of one state witness lasted for a whole year.

- (c) by confusing the case of Mr Mafunda with the appellant's application.

The respondent's counsel submitted that the appellant is accused one in the criminal trial before Msimeki J and that Mr Mafunda is accused two. It was argued that it is inevitable that the same charges are arraigned against both accused as they are friends and partners in crime, who are equally implicated in the Sandton, Soweto and Kwazulu Natal outstanding cases, as well as the trial before Msimeki J. It was reiterated by the respondent's counsel that these outstanding matters will proceed as soon as the trial before Msimeki J is concluded. If there is an overlap and similarity in the allegations made by the respondent as to why bail should be denied, it is because both the appellant and Mr Mafunda are implicated in the same matters.

- (d) in finding that the appellant ought to have called state witnesses in the pending trial and that such a finding in itself is a novel principle warranting the decision of a full court.

The onus is on the appellant to adduce evidence that show exceptional circumstances. The appellant's counsel has argued that the ethical code of conduct applicable to all practitioners in criminal matters places a duty on them to avoid conflict and not to interfere with State witnesses. The appellant's counsel also made reference to the code of conduct

applicable to advocates who are members of a constituent Bar of the General Council of the Bar which states that:

'7.8.3 Interviewing of prosecution witnesses by defence legal practitioner

"When conducting criminal defences, a practitioner must take reasonable steps to prevent inadvertent contact with any person who is, or is likely to be, a state witness, for as long as that person is or is likely to be a state witness. If the practitioner proposes to interview someone, they must therefore ascertain whether the person is a state witness before conducting the interview. Of course, a practitioner may interview a state witness if the prosecution consents. If consent is not obtained, the interview may occur where a court grants permission.' [my emphasis]

No request was made to the State advocate or this Court during the bail application to call any of the s204 State witnesses who had already completed their evidence in the main trial and who had exonerated the appellant.

During the leave to appeal application, the counsel for the respondent submitted it had no problem if any of the s204 witnesses who had completed their evidence and who had exonerated the appellant were called in the bail application.

Mr Grigorov was a s204 State witness who has already completed his evidence and who allegedly exonerated the appellant. If the appellant is adamant that this witness exonerates him, he could have called him during the bail application. The bail application in this instance was heard by this Court who is not the presiding officer in the main trial. The two processes are different. There would be no prejudice to the appellant in having called Mr Grigorov as he has completed his evidence. Whether the trial finding goes on appeal or not, the fact remains, Mr Grigorov allegedly exculpated the appellant.

Even if this Court is wrong in this regard, there was nothing stopping the appellant from calling any other witnesses during the bail application who could have supported his alibi. This was also not done.

There is nothing novel about this. This Court refers to paragraph [65] of its judgment.

- (e) in finding that apart from the matter in the Protea Magistrates Court, with Meadowlands CAS number 267/12/2013, there are no other pending matters against the appellant.

This Court refers to its judgment where this was dealt with at paragraphs [35], [39], [40], [41], [42], [45], [57], [58] and [59].

- (f) by not considering the fact that the State merely copied and pasted the contents of a previous bail application pertaining to Mr Mafunda resulting in an incorrect finding.

This court has dealt with this at para (c) supra.

- (g) making an adverse finding in respect to the appellant not presenting viva voce evidence and that this court should have used its inquisitorial powers to insist that the appellant testify or itself call other evidence necessary for the just adjudication of this bail application.

This Court refers to its judgment at paragraphs [50], [51] and [52].

- (h) by failing to find that the case against the appellant is in serious doubt due to the appellant being exonerated on half of the charges by the State witnesses.

This Court has dealt with this aspect and refers to its judgment at paragraphs [31], [32], [33], [34], [63] and [64].

- (i) by failing to find that the appellant has a fixed address in Kwa-Zulu Natal and Gauteng.

This Court dealt with this aspect and refers to its judgment at paragraphs [29], [61] and [62].

Finding

- [14] In light of the above, this court does not find that there is a reasonable prospect of success on appeal.

Order

- [15] Accordingly, the application for leave to appeal is dismissed.



D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 15 November 2024 .

APPEARANCES

ON BEHALF OF THE APPELLANT:

Adv. S Kolbe SC

Instructed by Spangenberg Attorneys Inc.

ON BEHALF OF THE RESPONDENT:

Adv. S.J Khumalo

Instructed by the Office of the National

Director of Public Prosecutions