



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: CAB 01/2025

In the matter between:

KHUMO MALESHANE

Appellant

AND

THE STATE

Respondent

Heard: 30 JANUARY 2025

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **07 FEBRUARY 2025**.

ORDER

The following order is made:

The appeal against the refusal of bail is dismissed.

BAIL APPEAL JUDGMENT

DJAJE DJP

- [1] The appellant appeared in the Regional Court of Klerksdorp sitting in Stilfontein. He was convicted of attempted murder and sentenced to eight years imprisonment. Leave to appeal the conviction was granted. He applied for bail pending appeal which was refused. He now appeals the decision of the Regional Magistrate refusing him bail pending appeal. The state opposes the appeal.
- [2] The argument on behalf of the appellant is that the Court *a quo* misdirected itself in applying the wrong test to determine whether the interests of justice permit for the release of the appellant on bail pending appeal. According to the appellant the Court *a quo* failed to take into consideration the overwhelming evidence demonstrating that the appellant should be released on bail especially that there are prospects of success that the conviction will be set aside on appeal.
- [3] Section 65(4) of the Criminal Procedure Act 51 of 1977 states that:
- “65.
- (4) *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.*”

- [4] In **S v Barber 1979 (4) SA 218 (D)** at 220 E-F the court held that:

"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."

- [5] The appellant's case is that the Regional Magistrate erred in her exercise of discretion by refusing bail pending appeal, and that entitles this court to interfere. It is worth noting that the bail court exercises its discretion based on the principles of law governing bail applications. In **S v Coetzee 2017 JDR 0451 (GP)** the following was stated:

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

- (a) the prospects of success on appeal; and*
- (b) the likelihood of the applicant bail absconding."*

- [6] On the issue of leave to appeal being granted the Nicholls JA in **Rohde v The State 2020 (1) SACR 329 (SCA)** writing for the minority stated that:

"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."

- [7] The Supreme Court of Appeal in **S v Masoanganye & Another 2012 (1) SACR 292 (SCA)** dealt with bail application pending appeal as follows:

"[13] I now revert to the appeal proper. An application for bail after conviction is regulated by s 321 of the Act. It provides that the execution of the sentence of a superior court 'shall not be suspended' by reason of any appeal against a conviction unless the trial court 'thinks it fit to order' that the accused be released on bail. This requires of a sentenced accused to apply for bail to the trial court and to place the necessary facts before the court that would entitle an exercise of discretion in favour of the accused. Compare S v Bruintjies 2003 (2) SACR 575 (SCA) para 8.

[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 might be imposed.

[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."

[8] It was argued that prospects of success exist on appeal as the issue of identification is central. The appellant submitted that the complainant only identified him in the dock and as such the evidence is unreliable. In contention the respondent submitted that the

complainant positively identified the appellant as the perpetrator and that he knew him by sight. It is important to note that at this stage that this Court should not be concerned with the evaluation of the merits of the matter as that is the responsibility of the appeal court. The record of proceedings was not provided as well. The only record provided is the judgment on leave to appeal and the bail application record. In the application for leave to appeal the appellant raised the issue of the complainant being a single witness on identification. The court a quo in granting leave to appeal remarked that the evidence of the complainant is 'not without criticism'. As stated above, it is not for this court to pronounce on the issue of identification which still needs to be ventilated in the appeal court.

- [9] The appellant herein has been convicted of a serious offence and sentenced to a lengthy term of imprisonment. During the bail application the appellant adduced evidence that he was employed as a subcontractor, but the contract expired three months after he was sentenced. He has two children who are still attending pre-school and staying with their mother. Further that he resides with his mother and brother. He has two pending cases, and he struggles to consult with his legal representatives whilst in custody. One of the pending cases is attempted theft. He also has previous convictions, one for possession of a dangerous weapon and another of a traffic offence. He went on to state that if his appeal is unsuccessful, he will present himself to the prison authorities.

[10] It came out during cross examination by the state that the appellant has a third pending matter of malicious damage to property in the Regional Court of Klerksdorp. He responded with a lot of uncertainties relating to the third pending matter that was not disclosed. He could not remember what charges were put to him and if he had already pleaded or not. He could also not remember if the matter was appearing in the Specialised Commercial Crime Court or not. He however did concede that he was arrested in **January 2023** for robbery with aggravating circumstances whilst on bail for the current matter.

[11] The appellant's wife testified that she is unemployed and taking care of their two children. She is forced to look for employment as the appellant is no longer able to support them financially due to his incarceration. She confirmed that the appellant was residing with her and the children, which was contrary to what the appellant had stated in his evidence.

[12] In refusing bail the court *a quo* found as follows:

"The applicant before the court was arrested and released on bail in 2018. After his release on bail, he was again arrested on three other matters. All these three pending matters appears in the regional courts, Wolmaraanstad, Klerksdorp and the Specialised Commercial Crime regional court in Klerksdorp, respectively. All the charges are of a serious nature. The applicant was convicted on the current charge, an incident dating back to 2029[?] while he was released on bail.

INTERPRETER: [Vernacular] 2021 [vernacular] bail.

COURT: *During the duration of this specific trial, the applicant was again arrested on a very serious charge of robbery with aggravating circumstances. The court therefore finds, sir, that there is indeed a likelihood that if you are released on bail the public safety will be endangered or that there is a likelihood that you will commit a schedule 1 offence again and bail is therefore denied."*

- [13] The appellant herein as stated above is convicted of a serious offence and sentenced to a lengthy term of imprisonment. The record of the proceedings including the leave to appeal proceedings was not attached and before me in this application. The only record of the leave to appeal is the judgment granting leave to appeal against conviction. The Court *a quo* in granting leave to appeal stated as follows:

"the alleged misdirections that have been listed above can be said to be sufficiently weighed to justify the conclusion that if leave to appeal is granted, the appellant's prospects of success are reasonable in that result the appeal must succeed"

And read this decision, going through the judgment again this Court will then grant both the applicant's leave to appeal on the conviction."

- [14] The difficulty is that it is not clear what 'misdirections' the Court *a quo* is referring to without the benefit of the record. At this point the prospects of success will not be a determining factor whether the appellant should be granted bail or not. The consideration is the interest of justice. The appellant is not a first offender and has pending cases and he had not voluntarily disclosed all of them to the court during the application for bail. It was only when confronted by the state about the previous conviction that he admitted. In this

court, it was submitted that the appellant made a mistake for not disclosing all his pending cases. It is also concerning that the appellant was arrested for the other pending case whilst he was on trial with the current matter. This is considered very serious and affecting the prospects of the appellant being released on bail. It is important when applying for bail that all the factors be placed before court to determine if it is in the interest of justice for the applicant to be released on bail.

[15] Another factor that came out during the bail proceedings was the contradiction as to the residential address of the appellant. He testified that he resided with his mother, but his wife testified that he was residing with her at a different address. This is crucial as the address of the appellant is important in case he fails to present himself to court or to serve his sentence if the appeal is not successful. This contradiction is fatal to the determination of whether the appellant should be released on bail.

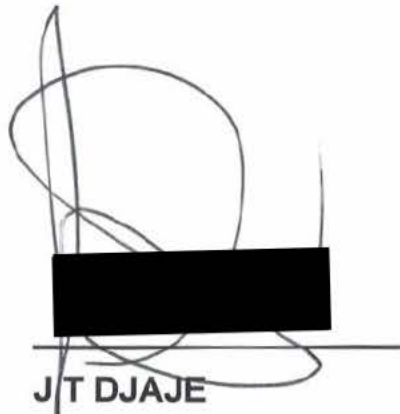
[16] The argument that the appellant will not abscond as he was attending his trial whilst on bail cannot assist the appellant at this stage. The circumstances have changed as the appellant is not convicted and sentenced to a lengthy term of imprisonment. In addition, he is facing other charges which carry minimum sentences of imprisonment if convicted.

[17] The onus is on the appellant to satisfy the court that the interests of justice permit his release. In this matter the appellant is facing a lengthy term of imprisonment if not successful on appeal, he has pending cases and there is a contradiction relating to his residential address. These factors are an indication that the appellant is not a candidate for release on bail pending the finalisation of his appeal. I am of the view that the interests of justice do not permit for the release of the appellant on bail.

Order

[15] Consequently, the following order is made:

1. The appeal against the refusal of bail is dismissed.

A handwritten signature in black ink, consisting of a large, stylized 'J' and 'T' followed by 'DJAJE'. The signature is written over a black rectangular redaction box.

J/T DJAJE

DEPUTY JUDGE PRESIDENT

HIGH COURT, NORTH WEST DIVISION

APPEARANCES

DATE OF HEARING : 30 JANUARY 2025

DATE OF JUDGMENT : 07 FEBRUARY 2025

COUNSEL FOR THE APPLICANT : MR ZISIWE

COUNSEL FOR THE RESPONDENT : ADV KOLOTI