

SOUTH AFRICA / JUDGMENT

Mkila v S (4154/2024) [2024]
ZAMPMHC 55 (23 September 2024)
[2024] ZAMPMHC 55

COURT
Middelburg High Court, Mpumalanga

BEFORE
L J Bam

CASE / FILE NUMBER
4154/2024

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IN THE HIGH COURT
OF SOUTH AFRICA
MPUMALANGA DIVISION,
MIDDELBURG (LOCAL SEAT)
CASE NO. 4154/2024 RC
132/2022
(1) REPORTABLE:
NO/YES
(2)
OF INTEREST TO OTHER JUDGES: NO/YES
(3)
REVISED

DATE:	23/09/2024
	SIGNATURE
	In
the matter between:	EMMANUAE
	MKILA
	APPLICANT
	And
	THE
	STATE
	RESPONDENT

JUDGMENT

BAM, AJ

1. This is an application for bail pending appeal. The applicant was convicted on a charge of murder and sentenced to life imprisonment by the Regional Court in eMalahleni. He has approached this court on an urgent basis which urgency is according to him justified largely by the fact that his personal liberty and freedom are at stake. The sentence was passed on 1 November 2023, and he has been in custody since then. Prior to the sentencing, he was out on bail. The application is opposed.
2. On 10 September 2024, with the agreement of both counsels for the parties, and on account of the matter most likely not proceeding on that day, the court offered to deal with this application on the papers.
3. Since this is a new application and not an appeal against refusal of bail pending appeal, the first issue is to determine whether this court has got jurisdiction to hear the application. In the Answering Affidavit deposed to by Ms Nomthandazo Mogagabe, the Clerk in the appeal section, to rebut the imputation of the delay in filing the appeal to her office, she also raises the fact that the application has been brought in the incorrect forum.[1]
4. The applicant's practice note defines the issues to be decided by this court as follows:
"That bail be granted to the applicant pending the finalisation of the appeal application in terms of section 309 (1) (a) of the Criminal Procedure Act 51 of 1977."
5. In his Founding Affidavit the applicant says that on 13 November 2023, his legal representative was informed by the Clerk of the Criminal Court that the trial record was incomplete. On the same date, a notice to appeal to this court against both his conviction and sentence was issued: "but till to date the matter has not been transferred to this honourable court for the adjudication of the appeal and this is due to the incomplete trial record".[2] This means that this Court is not yet siezed with the appeal.

THE LAW

6. Sections 309 and 309B of the Criminal Procedure Act 51 of 1977, ("the Act") give the High Court the jurisdiction to adjudicate appeals from the Magistrate's Court relating to convictions and sentences, subject to the exception of child wrongdoers and those sentenced to life imprisonment who have the automatic right to appeal. The applicant has an automatic right of appeal.
7. In the case of *Masoanganye v S*[3] the court said the following:
"It is important to bear in mind that the decision whether or not to grant bail is 1 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."

This because the trial judge would have had the opportunity to hear the evidence on the merits of the case and its decision to either refuse or grant bail pending appeal is much likely to be based on such observations. That court will have previously made a determination regarding the existence or otherwise of compelling and exceptional circumstances before passing sentence and would, with regard to this second bail application, be in a better position to evaluate these or any new ones put before it.

8. In the case of *S v Sello*,^[4] Daffue J had adjudicated the bail application of a sentenced applicant pending appeal. The leave to appeal had been granted by the two judges of the Free State Division after same was refused by the Magistrate. Before him was a notice of appeal as well as a full record of the proceedings in the lower court. All the applicant was waiting for was the trial date. The judge had to grapple with the question of jurisdiction and found a response in the case of *S v Makola* in which the court had stated 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 Magistrates Court at Boksburg.”

9. The court in *S v Makola* further stated that Section 60
- (1) of the Act gives both the lower and superior courts the jurisdiction to release an accused on bail. It noted that:

“the Supreme Court, on the other hand, will have jurisdiction to entertain an original application for bail, as opposed to an appeal, at any stage provided the process proceedings against the accused are pending in such court.”

Even though this section does not apply to sentenced persons, the principle is supportive of the court’s approach in *Sello* above which confirms that the High Court is clothed with both statutory and common law powers to adjudicate bail applications under circumstances such as the present one.

Section 309 (3) says:

“The provincial or local division concerned shall thereupon (ie. the noting and prosecution of an appeal when there is an automatic right to appeal or when leave to appeal has been granted), have the powers referred to in Section 304 (2).”

Section 304 of the Act deals with the procedure on review and at 304 (2) (2) (vi) gives the review court the power to “make 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 regards to any matter or thing connected with such person as to the court seems likely to promote the ends of justice”.

10. Ideally, as observed from authorities, the trial court must always deal with the issue of bail. However, the High Court should also be entitled to hear bail applications pending appeals especially since all leaves to appeal are accompanied by a full trial record which provides an insight to the judges concerned not only of the decision reached but also of the evidence presented.

CONCLUSION

11. The above authorities confirm that the High Court can hear a bail application pending appeal. This however is only possible when the court is already seized with the application for appeal. In the present case there is no record of an appeal having been noted in this court. This is so because by his own account, the applicant is still struggling to put the record together. The only reference to appeal is the Notice given to the Clerk of the Criminal Court and to the NPA, of the intention to launch the appeal. This court thus, has no material to refer to in determining whether bail should be granted pending appeal, especially under circumstances where the applicant is no longer clothed with the presumption of innocence.
12. In view of the above, this court cannot hear the application. The applicant can still approach the trial court for such relief or, alternatively, after the record has been filed with the notice of appeal to this court, proceed with such application.
13. The finding above means it is no longer necessary for the court to consider the issue of urgency. What is urgent now is for the applicant’s attorneys to attend to the issue of the record.
14. In the premises, the following order is made
 1. The application is dismissed
 2. There is no other as to cost.

L J BAM

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA (MIDDELBURG LOCAL SEAT)

APPEARNCES:

FOR THE APPLICANT: ADV. K DOLAMO INSTRUCTED BY: BRIAN MAPHANGA INC.
MIDDELBURG CONTACT DETAILS: 082 971 6655 / brianm1attorney@gmail.com FOR THE
RESPONDENT: ADV. T B MOLEFE OFFICE OF THE DPP MIDDELBURG INSTRUCTED BY:
NATIONAL PROCESUTING AUTHORITY CONTACT DETAILS: 084 520 1071 / tbmolefe@npa.gov.za
Date of Setdown: 10 SEPTEMBER 2024 Date of judgment: 23 SEPTEMBER 2024

This judgment shall be delivered by way of distribution to the parties or their legal representatives via electronic mail.

- [1] Answering Affidavit, paragraph 4
- [2] Paragraph 11 of the Founding Affidavit
- [3] 2012
- (1) SACR 292 (SCA)
- [4] (1173/2023)
- [2023] ZAFSHC 264 (3 May 2023)

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