IN GAUTENG SOUTH HIGH COURT

JOHANNESBURG CASE NO: A229/09

DATE: 21/08/2009

In the matter between

PETROS DUMISANI JWARA AND OTHERS APPLICANTS

And

STATE RESPONDENT

J U D G M E N T (Leave to appeal)

MOSHIDI J:

[1] This is the judgment of the court on the application for leave to appeal. It is an application for leave to appeal to the Supreme Court of Appeal against the judgment of Borchers J (of this High Court) in dismissing an appeal to her from an order of a regional magistrate refusing the applicants' bail on 25 May 2009. Borchers J is currently not available as she is on long leave.

[2] The grounds of appeal are as set out in the notice of application for leave to appeal, dated 14 April 2009. The application is opposed by the State.

[3] Before ruling on the application, I wish to make the following comment. Bail proceedings are inherently matters to be dealt with expeditiously since the liberty of the applicants is in issue. Contrary to the submissions made on behalf of the applicants, I am not entirely convinced that the applicants in fact, and procedurally require leave to appeal from this Court in order to pursue the matter in the Supreme Court of Appeal.

State counsel today has submitted that there is such a procedure. As I understand the current law the applicants indeed have the right to appeal directly to the Supreme Court of Appeal in circumstances where bail was refused. See in this regard *S v Botha en 'n Ander* 2002 (1) SACR 222. In *S v Kock* 2003 (2) SACR 5 at par. 26 Heher AJA, (as he then was), said:

> "The second matter concerns the question of the court, which is most appropriate to hear an appeal of this nature which has been initiated in the magistrate's court and pursued before a single Judge of the High Court. The present law allows a further appeal only to the Supreme Court of Appeal (by reason of 21(1) of the Supreme Court Act 59 of 1959). This appeal, which required no in-depth consideration of legal issues, however, could have been disposed of before a Full Court of the Witwatersrand Local Division at least as expeditiously and at less expense to both the appellant and the State if the law had provided greater flexibility. This is a concern which warrants the attention of the Legislature sooner rather than later."

The learned authors, Du Toit et al, in the Commentary on the Criminal Procedure Act (service 39 2008 at 9-77), define the concern as follows:

> "There is presently no mechanism whereby an appeal from the judgment of a High Court, as a court of first appeal, can be channelled to a full bench of the High Court. The Supreme Court of Appeal has recommended that the Department of Justice should urgently pay attention to this aspect. See *S v Viljoen* 2002 (2) SACR 550 (SCA), as well as *S v Kock* 2003 (2) SACR 5 (SCA) 14g - h and *S v van Wyk* 2005 (1) SACR 41 (SCA) at (1)."

As far as could be ascertained, the concern expressed above was yet to be addressed. The situation remains unsatisfactory.

[4] Based on the above, I am of the view that had the applicants utilised the above procedure immediately after the judgment of Borchers J on 25 May 2009, the matter would in all likelihood have received earlier attention as opposed to what may occur hereafter. This would have been in their interest as their trial is yet to commence.

The court is told that the trial has been set down for some time in October 2009. The applicants have been in custody since 23 March 2009. If, however, I am incorrect in my view that the applicants do not require from this Court leave to appeal, I have to deal with the merits of the application for leave to appeal.

Counsel for the applicants has submitted today that there are reasonable prospects of success on appeal. On the other hand, the State

has contended that there are no such reasonable prospects and that the application ought to be refused.

[5] The proper test has always been whether there are reasonable prospects of another court coming to a different conclusion. See in this regard *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another, NNO Pharmaceutical Society of South Africa and Others v Minister of Health and Another* 2005 (3) SA 231 (C) at 237B - C and 237 H - I.

[6] In the present matter, I have carefully studied the record of the proceedings in the regional court as well as the judgment of my Sister, Borchers J. I have also considered the arguments advanced in the heads of argument as well as the arguments advanced orally today by the respective parties.

The main factual disputes whether the applicants will probably interfere with state witnesses or investigators or have made threats of violence against investigators, in my view, are all arguable matters. The first two disputed facts are clearly by nature unpredictable.

In short, the order of Borchers J could be appealable, as is envisaged in *S v Mabena and Another* 2007 (1) SACR 482 (SCA) at par. [22]. A comforting sense of justice compels that the issue of the liberty of the applicants, which is enshrined in the Bill of Rights, should be adjudicated on by more than one Judge. It is also a matter of expediency.

[7] The application in my view falls to be allowed. In the result, I make the following order:

Leave is hereby granted to the applicants to appeal to the

Supreme Court of Appeal.

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DSS MOSHIDI

JUDGE OF THE HIGH COURT

SOUTH GAUTENG HIGH COURT,

JOHANNESBURG

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