IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: CC2/2021

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

SIGNATURE 15/03/2021 DATE

In the matter between:

MUHAMAD SAJID KHAN **Applicant**

v

THE STATE **Respondent**

JUDGMENT

MOSOPA, J

1. This is an application for leave to appeal against the decision to refuse the extension of bail of the applicant, pending sentencing proceedings, in terms of section 58 of the Criminal Procedure Act 51 of 1977 ("CPA"). The application for leave to appeal is brought in terms of the provisions of section 16(1) of the

Superior Courts Act 10 of 2013. The grounds for the leave to appeal are contained in the document entitled "Notice of Appeal", accompanying the application for leave to appeal notice.

2. Section 16(1) of the Superior Courts Act provides;

> *"16(1) – Subject to section 15(1), the Constitution and any other law –*
> *(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted –*
> *(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of the Division, depending on the direction issued in terms of section 17(6); or…"*

3. The CPA does not set out the procedure and the criminal procedural law, for refusal of bail by the High Court sitting as the court of first instance. Section 65 provides for the procedure a bail applicant can adopt in the event that the lower court refuses to admit him/her to bail. Section 65A(1) of the CPA deals with the procedure the Director of Public Prosecutions may adopt in the event that it seeks to appeal the decision of a lower court to grant bail. In the matter of ***S v Banger 2016 (1) SACR 115 (SCA)***, when the court was dealing with the issue of leave to appeal against the refusal of bail by the High Court sitting as a court of first instance, held as follows;

> *"[12] Thus, it is clear that, in respect of all appeals against the refusal of bail by the High Court sitting as a court of first instance, application for leave to appeal must be made to that court. If that court refuses leave to appeal, it may be granted by this court in terms of s 17(2)(b) of the Superior Courts Act. If the High Court consisted of a single judge, the appeal lies to a full court, unless a direction is given in terms of s 17(6) that the matter requires the attention of this court. If, as is the case here, the High Court of first instance consisted of more than one judge, the appeal lies directly to this court."*

4. Section 17 of the Superior Courts Act governs the jurisdictional factors under which leave to appeal may be granted by a judge or judges hearing a particular matter and provides;

> *"17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
>
> *(a)(i) the appeal would have reasonable prospects of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration…"*

5. In argument, Ms Kilian, on behalf of the applicant contended that the applicant relies on the provisions of section 17(1)(a)(i) in bringing this application, in that "there are reasonable prospects of success". In ***Mont Chevaux Trust v Tina Goosen and 18 Others 2014 JDR 2325 (LCC)*** at para 6, the court held that;

> *"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."*

6. In the matter of ***S v Smith 2012 (1) SACR 567 (SCA)***, Plasket AJA writing for the majority, concluded at para 7;

> *"[7] What the test of reasonable prospects of success 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 grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic*

chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

7. The applicant presented a detailed affidavit in support of the extension of his bail. The procedure of submitting affidavits in bail applications is an acceptable process. The State on the other hand did not adduce any evidence in opposing the extension of bail by the applicant.

8. Section 60(2)(c) of the CPA provides;

"(2) In bail proceedings, the court –

(c) may in respect of matters that are in dispute between the accused and the prosecution, require of the prosecutor or the accused, as the case may be, that evidence be adduced."

9. Section 60(11)(b), under which the current bail application resorts, requires the bail applicant (in this case the applicant) to adduce evidence which satisfies the court that the interests of justice permit his or her release.

10. The wording of section 60(2)(c), that evidence be adduced, should not be interpreted as a demand for the presentation of oral evidence, and I am satisfied that the applicant, by presenting an affidavit in support of the extension of bail, satisfied that requirement.

11. A question which now arises is whether the State should be held liable for its negligent failure to bring any information before me in determining the release of the applicant. This is an objective question which must be answered by looking at all the circumstances of the matter and moreover, each matter must be dealt with depending on its own facts. When dealing with this question, a fact which cannot escape one's mind is that the applicant has been convicted of two (2) counts of murder, which resorts under the provisions of section

51(1) of Act 105 of 1997, which prescribes a minimum sentence of life imprisonment, unless compelling and substantial circumstances are found to be present. The applicant has also been convicted of attempted murder, wherein a firearm was used, which in my considered view is an equally serious offence.

12. In argument, Ms Kilian referred me to the matter of ***S v Sithole and Others 2012 (1) SACR 586 (KZD)***, where the court dealt with the State neglecting to present information to the court, or simply put, failed to adduce evidence. Ms Kilian is completely correct in her contentions, but what is equally important is the fact that section 60(11)(b) requires that the applicant adduce evidence, and not the State. Also, what distinguishes this matter from the ***Sithole*** matter, is that the State did not oppose bail and filed the notice to abide. *In casu*, even though the State did not adduce evidence opposing the extension of bail, Mr Sihlangu expressed the State's desire to oppose the extension of bail.

13. In contention, Ms Kilian further criticized the court for refraining from its inquisitorial duties and enquiring from the applicant if the amount of bail were to be placed at a higher amount, whether he would be in a position to pay such bail and if strict bail conditions were imposed, whether the applicant would abide by such conditions. The assets and worth of the applicant was laid bare in the affidavit when an application for extension of bail was made, and in my mind, I was of the view that the applicant would be able to afford any amount of bail set by this court. Enquiring from the applicant whether he would be able to afford it if a higher amount was set for bail, in my considered view, was just going to be academic. The applicant has assets valued at over R30 million and he is a successful businessman.

14. Criticism was also levelled at the fact that I placed too much emphasis on the porous borders of the Republic and that if the applicant is granted bail, there is a possibility that he will abscond and not stand trial, without any evidence to this effect, that the applicant is a flight risk. When I dealt with this aspect, I was alive to the fact that the applicant had already surrendered his passport

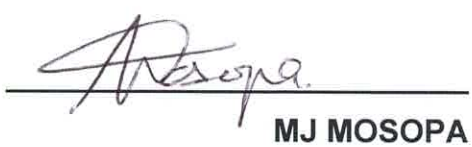
to the police. The fact that fraudulent travel documents can be procured with ease in this country cannot be simply ignored as well as the fact that there is no extradition and mutual legal assistance in criminal matters treaty between South Africa and Pakistan.

15. Based on the above, I am not persuaded that there are reasonable prospects of success in this matter and that another court will come to a different conclusion than this court. I am further not persuaded that the applicant has a reasonable chance of succeeding. It is for this reason that this application cannot succeed.

ORDER

16. The following order is made;

> [1] The application for leave to appeal against the refusal to extend the bail of the applicant pending sentence, in terms of section 58 of the Criminal Procedure Act 51 of 1977, is hereby dismissed.



MJ MOSOPA
JUDGE OF THE HIGH COURT, PRETORIA

Appearances:

For the applicant:	Adv E Kilian SC
Instructed by:	Victor Nkhwashu Attorneys Inc.
For the respondent:	Adv E Sihlangu
Instructed by:	The DPP
Date of hearing:	11 March 2022
Date of judgment:	Electronically delivered