IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: CC 16/2013
Date heard: 30 May 2014
Date delivered: 30 May 2014

In the matter between

MADODA DOPLA NUBE **Applicant**

And

THE STATE **Respondent**

JUDGMENT ON BAIL APPLICATION

GOOSEN, J.

[1] The applicant has applied for bail pending the finalisation of an appeal against his conviction on counts of robbery with aggravating circumstances, two counts of attempted murder and six counts of murder. The nature of the offences for which the applicant has been convicted is such that the applicant must show that it is in the interests of justice that he be admitted to bail. That requires that the applicant must show that there is no risk of him absconding and that there is a reasonable possibility that the appeal will succeed.

[2] It has been held in a number of cases that the mere fact that an applicant has been granted leave to appeal against a conviction does not, *ipso facto*, entitle the applicant to be admitted to bail (See *S v Bruintjies* 2003 (2) SACR 575 (SCA). A

court considering a bail application at this stage of the proceedings is required to have regard to all of the circumstances ordinarily considered, the prospects of success on appeal and then to ask itself whether it is in the interests of justice to admit the applicant to bail.

[3] The prosecution opposes the bail application on the grounds that the basis of the accused's conviction was that he was a party to a conspiracy to commit the crimes. Reference was made to the evidence at trial which demonstrates that the accused was a key initiator in the formulation of the conspiracy and that he played some role in the criminal syndicate involved in a spate of similar robberies in the Port Elizabeth area. On this basis it is contended that there is a likelihood that the applicant, if admitted to bail, could again involve himself in such criminal conduct. It is also submitted that that the basis of the conviction is such that an appeal court is likely, in the event that the applicant succeeds in his appeal, to convict the applicant of the conspiracy charge. For this reason it is submitted that bail should be denied.

[4] The former argument loses much of its force when consideration is given to the fact that the applicant was previously admitted to bail during the trial and that he honoured his bail conditions. The contention that there is a possibility that the applicant may again involve himself in criminal conduct amounts to no more than that, the assertion of a possibility. There is, however, no basis to find that there is a real probability that that may occur.

[5] Insofar as the latter argument is concerned, it is indeed so that the trial court found that the applicant was a party to the conspiracy to commit the offences and that he had played a prominent role in the initiation and execution of the conspiracy. The applicant was however not charged in the alternative and accordingly was acquitted of the charge of conspiracy, on the basis that the principal offences, those arising from the conspiracy, were found to have been proved against the applicant. It is not clear to me how, in the absence of a conditional cross-appeal,

the appeal court would return a conviction on the conspiracy charge, in the event of the appeal succeeding against the principal offences for which the applicant has been convicted. Mr. Le Roux argued that the appeal court would be entitled as a matter of law to do so on the basis that the acquittal was entered as a matter of law in order to avoid duplication of charges. I am unable to agree.

[6] This circumstance was specifically considered by the Supreme Court of Appeal in *S v Pillay and others* 2004 (2) SA 419 (SCA). In that matter the trial court returned verdicts of not guilty against an accused in respect of certain charges because a conviction "would amount to an unjustified duplication of charges" (*Pillay* supra at par 112). It was however argued on appeal that the court was entitled to substitute for the convictions set aside on appeal a conviction for those charges for which the accused had been acquitted by reason of duplication. The Court (at par 113) referred with approval to the dictum in *R v Kaseke and another* 1968 (2) SA 805 (RA) where Beadle CJ said that:

> This submission amounts to an appeal by the Crown against the acquittals on these counts and the substitution of a verdict of guilty in the place of that of not guilty. In the absence of clear statutory authority empowering the Court to adopt such a course, I cannot see how it can be allowed as it cuts across all the fundamental principles related to the doctrine of *autrefois acquit.*

[7] The court in *Pillay* went on to consider s 22 of the Supreme Court Act 59 of 1959 (now s19 of the Superior Courts Act 10 of 2013) and said the following (at par 114 – 115):

> It is clear from this section that the power to confirm, amend or set aside a judgment or order can be exercised only in respect of a judgment or order which is the subject of an appeal. In the instant case the order acquitting accused 14 on counts 2, 3 and 14 is not the subject of an appeal before us. Compare *R v Motala* 1927 AD 118.
> Section 322(1) of the Criminal Procedure Act is in the following terms:
> *'In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may –*
> *(a) Allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or*
> *(b) Give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or*
> *(c) Make such other order as justice may require.*

> The subsection clearly deals with the powers of a Court of appeal may exercise in the instance of an appeal against a conviction or where a question of law has been reserved for its consideration. It does not give a Court of appeal the power to alter an acquittal order or to substitute it with a finding of guilty.

[8] The effect of this is that I cannot give consideration to the question whether it is possible that the applicant may, notwithstanding success on appeal, nevertheless be convicted of the conspiracy charge and be sentenced to undergo a period of imprisonment. For purposes of considering whether or not to grant bail pending the appeal I must consider the matter only upon the basis of there being a reasonable possibility of an acquittal on appeal.

[9] What remains to be considered is the likelihood of success on appeal. I do not consider that there is a substantial likelihood that the appeal court will find that the applicant's conduct in informing a policeman prior to the robbery that it was to take place (accepting for the moment that that was what was conveyed to the policeman) constitutes dissociation sufficient to warrant his acquittal of the charges arising from the execution of the conspiracy. I accept however that a reasonable possibility exists that this may be so. I accept that the applicant was previously admitted to bail and that he honoured the conditions set. I also accept that there is, as the respondent concedes, no flight risk associated with releasing the applicant on bail.

[10] When all of the factors are considered in their totality and weighed against the applicant's liberty interest it is my view that it will be in the interests of justice to admit the applicant to bail.

[11] In the result I make the following order:

(a) The applicant is granted bail pending the finalisation of his appeal to the Supreme Court of Appeal.
(b) Bail is set in the amount of R10 000.00 (Ten Thousand Rand).

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Applicant
Mr. T. N. price
Instructed by Brendan Weldrick Attorneys

For the Respondent
Mr. M. Le Roux