IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION

[FUNCTIONING AS GAUTENG DIVISION PRETORIA, MBOMBELA CIRCUIT COURT]

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

DATE **SIGNATURE**

CASE NUMBER 1683/2019

DR DANIE VAN DER WALT **APPLICANT**

And

THE DIRECTDOR OF PUBLIC PROSECUTIONS MPUMALANGA **RESPONDENT**

JUDGMENT

LEGODI JP

[1] This judgment is about whether this court is competent to determine whether the applicant, Dr Danie Van der Walt, has reasonable prospects of success on appeal and is thus entitled to be released on an extended bail pending petition to the

Supreme Court of Appeal for special leave in circumstances where this court is not competent to make such a determination in an application for leave to appeal.

[2] Subject to section 15(1), the Constitution and any other law on appeal against any decision of a Division on appeal to it, lies to the Supreme Court of appeal upon special leave having been granted by the Supreme Court of Appeal[1]. Leave to appeal may only be given where the Judge or Judges concerned are of the opinion, *inter alia,* that the appeal would have a reasonable prospects of success[2].

[3] It is because of the legislative imperative referred to in sections 16(1) (b) and 17 (1) (a)(i) above that both the State and Defence in this case were requested to file written heads of argument to deal with the question as postulated in paragraph [1] above. The defence has done so and the state only in two pages filed a day before the hearing this application aligned itself with the defence that this court has the competence to entertain the application for extension of bail pending petition to the Supreme Court of Appeal for special leave, despite the imperative in sections 16 and 17 referred to in paragraph [2] above.

[4] As a background, on 27 July 2017 the applicant was convicted in the Regional Court sitting at Emalahleni Mpumalanga on a charge of culpable homicide resulting from alleged medical negligence, and was sentenced to five years' imprisonment. With the leave of the court *a quo*, he appealed to this court against both his conviction and sentence. His bail was extended by the Regional Court pending finalisation of his appeal to this court, and this the Regional Court did I want to believe, after having found that there were reasonable prospects of success on appeal, an aspect which it had the competence to pronounce itself on.

[5] The court of appeal having been constituted as Legodi JP and Mankge AJ and after having heard argument on the appeal, dismissed the appeal on both conviction on11 April 2019. On 6 May 2019 the notice by the clerk of the court, Emalahleni, which directed the Appellant to report to serve the sentence, was suspended by Brauckmann AJ pending substantial application to this court for

[1] Section 16(1)(b) of the Superior Courts Act 10 of 2013
[2] Section 17(1)(a)(i) of Act 10 of 2013

extension of bail pending the hearing of petition for special leave to the Supreme Court of Appeal. That substantial application was laid before this court on 24 May 2019 constituted as Legodi JP and Brauckmann AJ, as Mankge AJ was not available, and parties had no problem with the court as constituted for purpose of hearing the present application.

[6] The ace-card for the contention on behalf of the applicant that this court is competent to hear the present application is based on the old decision in S v Hlongwane 1989 (4) SA 79 (T). In that case the two judges who sat as court of appeal having dismissed the appeal, and application for leave to appeal in terms of the old Supreme Court Act, granted extension of bail pending petition to the Appellate Division.

[7] In doing so, the two Judges on appeal found that the standard of proof in an application for leave to appeal is higher than in an application for extension of bail pending petition for special leave to the Appellate Division. In his oral argument before us, Advocate Maritz SC, on behalf of the applicant, acknowledged that the appeal court in Hlongwane case was competent to hear the application for leave to appeal and consider the merits of the intended appeal to the Appellate Division, but that this court does not have such competence to do so.

[8] In the same breath he contended that this court is competent to hear the application for extension of bail, and consider the reasonable prospects of success on the proposed appeal, based on the following: Firstly, that this court has inherent powers to do so in common law, read with section 173 of the Constitution. Secondly, that the standard of proof on the extension of bail, as it was the case in Hlongwane matter, is low, and lastly that the Supreme Court of Appeal is not competent to deal with the extension of bail as is not a court of first instance, and that this court is and should therefore hear the application for extension of bail and pronounce itself on the prospects of success regarding the proposed appeal.

[9] In my view consideration of prospects of success by this court, in whatever form, is excluded as contemplated in section 16(1)(b) of the Act. There can never be a lower or higher standard of consideration of reasonable prospects of success seen

in the context of "reasonable prospects of success" and "in the opinion of the court" in section 17 of the Act. In fact, it would result in an untenable situation for this court to express itself on the prospects of success in the petition, or intended appeal to the SCA. That would amount to second guessing the decision of the SCA to which this court does not have the competence to pronounce itself on.

[10] Seeing this court as court of first instance on the extension of bail based on the substantive application for such extension in my view, misses the point. As a point of departure, it is not the duty or function of this court at this stage to analyse the evidence led in the court *a quo* in great detail. To do so would create an untenable situation for the court that will subsequently be dealing with the appeal[3].

[11] The substantive application, in the present proceedings, for extension of bail extensively deals with the evidence tendered in the court *a quo* to persuade this court on the "reasonable prospects of success" for which this court is not competent to do in an application for leave to appeal. To suggest that this court is a court of first instance in the extension of bail application, and therefore entitled to consider prospects of success on a "lower scale of proof" makes no legal sense.

[12] In fact what we are being asked to do, is to maintain the *status quo* by extending bail which came about because the Regional Court had the authority to extend, after having considered the prospects of success on the proposed appeal, an issue which this court does not have the legislative competence to consider. I also do not think this court has such competence, or inherent power, to do so at common law. The court in Hlongwane-matter had the competency to deal with the application for leave to appeal to the Appellate Division, and therefore there was no impediment for it in dealing with the requirement of prospects of success on appeal. I however have serious reservation whether having found no prospects of success in an application for leave to appeal, it was entitled to revisit its position purportedly on a lower standard of proof.

[3] S v Viljoen 2002 (2) SACR 550 (SCA)

[13] The introduction of reasonable prospects of success on a lower standard of proof as contended will be superfluous and out of place. '*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 would reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince 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 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*'[4].

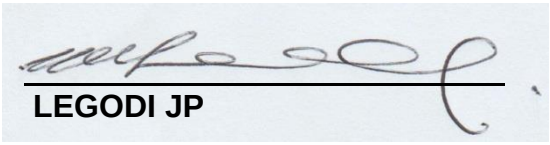
[14] In his oral argument Mr Maritz contended that 'all what we actually have to decide is: '*Are you a flight risk and is your case hopeless one, in other words, are your merits so poor, and if the merits are so poor, are they such that your case is hopeless one than we could refuse bail'.*

[15] Reasonable prospects of success on appeal as explained in the Smith case makes no such distinction, neither does it water down the explanation to sneak in competence for this court to deal with reasonable prospects of success, and grant extension of bail. In my view, to do so would be to deny, or refute the essence, and disguise the imperative in sections 16(1)(b) and 17 the Superior Courts Act. In my view, the Supreme Court of Appeal is best suited to deal with the extension of bail. For this, I do not find it necessary to deal with the merits of the application for extension of bail pending special leave to the SCA.

[16] Even if I was to be wrong with regard to the incompetence of this court to consider reasonable prospects of success on the extension of bail, I do not think that we would find otherwise in favour of the applicant. He elected not to give evidence and his challenge to the evidence up to this stage with new submissions, continues to display skirmishes and surprises in the conduct of his case.

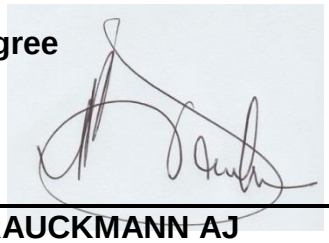
[4] S v Smith 2012 (1) SACR 567 (SCA) at para 7.

[17] Consequently the application is hereby dismissed on the basis that this court has no competence to deal with the application for extension of bail and consider reasonable prospects of success on appeal.



LEGODI JP

I agree



BRAUCKMANN AJ

DATE OF HEARING: : 24 MAY 2019
DATE OF JUDGMENT : 31 MAY 2019

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