

SOUTH AFRICA / JUDGMENT

Davis and Another v S (2888/2015)

[2015] ZAKZDHC 41 (8 May 2015)

[2015] ZAKZDHC 41**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Steyn

CASE / FILE NUMBER

2888/2015

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 2888/2015

MAGISTRATE'S CASE NO. 23/13637/14

DATE: 08 MAY 2015

In the matter between:

TEVEN DAVISFIRST APPELLANT

ANDILE BRUCE METH.....SECOND APPELLANT

And

THE STATE.....RESPONDENT

J U D G M E N T**STEYN J**

- [1] The appellants launched a bail application in the Regional Court Durban on 28 August 2014, which was refused. Subsequent to the decision of the learned regional magistrate, they brought a second application on new facts. On 14 November 2014 the Court a quo found that the appellants had failed to show the existence of new facts with the result that the earlier decision remained in force. Mr Howse, appearing on behalf of the appellants, challenged both decisions of the magistrate in this single appeal. Ms Vahed, appearing on behalf the respondent, opposed the appeal. When the matter was set down and argued, I asked both counsel to address me on the procedural issue of whether the appellants have the right to challenge the first refusal of bail in circumstances where they elected to launch a new

application on new facts. Another procedural issue also reared its head and that is that the appellants in their notice of appeal explicitly gave notice that they ‘note an appeal to the Durban Division (sic) of the KwaZulu-Natal High Court against the decision on 14 November 2014 by the learned magistrate, Ms V Armu, refusing to admit the appellants to bail’.[1] Both counsel elected to file supplementary heads and elected to make further submissions on 4 May 2015.

- [2] Mr Howse in his supplementary heads and oral submissions on 4 May 2015, conceded that the learned magistrate was correct in her finding that there were no new facts before court. He also conceded that this concession contradicts his earlier submissions in his heads of argument, namely that the learned magistrate was misdirected when she had found that the evidence does not constitute ‘new facts’. This concession accords with case law. In *S v Petersen*[2] *Van Zyl J* held:[3]

‘[57] When, as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new and, secondly, that they are relevant to purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. See *S v De Villiers* 1996 (2) SACR 122 (T) at 126e-f. The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence.

- [58] Where evidence was available to the applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence. See *S v Le Roux en Andere* 1995 (2) SACR 613 (W) at 622a-b. If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately. See *S v Vermaas* 1996 (1) SACR 528 (T) at 531e-g; *S v Mpofana* 1998(1) SACR 40 (Tk) at 44g-45a; *S v Mohammed* 1999 (2) SACR 507 (C) [1999] 4 All SA 533 at 511a-d.’(My emphasis)

- [3] The Court in *S v Le Roux en andere*[4] dealt with new facts authoratively, and I agree with the sentiments expressed therein that new facts should be facts discovered after the bail application was heard and not merely an elaboration of facts presented at the first bail application.[5] The Court a quo cannot be faulted in its finding that the facts presented were neither new nor discovered after the bail application was finalised

on 28 August 2014.

- [4] The background to this appeal is: The appellants were charged with a count of murder and attempted murder. It is common cause that the first count falls within the ambit of section 60(11)(a) read with Schedule 6 of the Criminal Procedure Act, No. 51 of 1977 (hereinafter referred to as “the Act”). The appellants had to discharge the onus of exceptional circumstances, which in the interests of justice would have permitted their release on bail. On 28 August 2014 the appellants in support of their application filed affidavits marked exhibit “A” and “B” respectively. The investigating officer also filed an opposing affidavit

which was marked “C”. In essence the appellants raised alibi defences and first appellant in his affidavit stated that he had handed to the police a video which according to him shows that he was not in the company of the second appellant at the time of the alleged offences being committed and that the State witnesses must have been mistaken when they claim that it was him and the second appellant at the scene, committing the alleged crimes.

The investigating officer in his affidavit responded to the said video footage as follows:

“This footage has been viewed and it is very unclear. You cannot identify the person in the footage and the clothes he is wearing.

It has been sent to the Pretoria lab to be analysed by experts.’[6]

Having considered the evidence adduced, the magistrate was not satisfied that the appellants succeeded in their onus and refused bail. Two months after the first decision the appellants then launched the second application based on the new facts. Mr Karim, representing the appellants in the court a quo stated the following in support of the application:

“In our application on new facts there is only one salient aspect that I want the Court to draw attention on is the strength or the weakness of the State case and obviously a defence that the applicants have before court. As much as previously intimated there are alibi witnesses and alibi evidence that was not ventilated and expressed in the initial application. A note on the affidavits by both the accused mention was made of an alibi and that was not substantiated or expatiated and the Court never had the benefit of the nature of that evidence which can be for the benefit of the accused which I verily believe. Your Worship, that is essentially the new facts they are bringing before Court.’[7]

Evidence was heard by the Court a quo and on 14 November 2014 the Court found that no new facts were tendered.

[5] The Court most certainly considered the facts and whether it favours the appellants’ release from custody. The court pertinently

approached the application as follows:

‘Having regard to all the facts of the case the Court finds that no new facts exist, the alibi witnesses were mentioned in the initial application, the CCTV footage is of no value at all at this stage as no faces can be seen. The State seems to have an extremely strong case as well as they have three independent witnesses.’[8]

[6] I shall now consider all of the proceedings, including the procedural issues in deciding upon the success of this appeal. Our bail system is undoubtedly designed to strike a balance between the interests of the offender and those of the victim, and society as a whole. These interests should be balanced within a constitutional paradigm. The present legislation[9] governing bail was challenged and found to be constitutional. Accordingly I shall consider the procedural issues as they present

themselves in this matter. After 1994 the role of presiding officers changed and each and every bail application should be decided within the prism of the Constitution,[10] coupled with the provisions of the Act. The Constitution does not grant an offender an absolute right to personal freedom.[11] Liberty is qualified and circumscribed. In my view the duty of those presiding over bail applications have become far more onerous since 1994 since judicial officers are now expressly enjoined by the provisions of section 60 of the Act to not be passive. It cannot be said, given the facts of this appeal, that the learned magistrate was not mindful of the said duties or the obligations imposed on her.

[7] Section 65 of the Act is paramount for purposes of this appeal:

‘(1)

- (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.
- (b) The appeal may be heard by a single judge.
- (c) A local division of the Supreme Court shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.
- (2) An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts.
- (3) The accused shall serve a copy of the notice of appeal on the attorney-general and on the magistrate or, as the case may be, the regional magistrate, and the magistrate or regional magistrate shall forthwith furnish the reasons for his decision to the court or judge, as the case may be.
- (4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.’ (My emphasis.)

[8] Considering the ambit and scope of section 65, it is necessary to analyse the approach adopted by our Courts. Van Dijkhorst J in *S v Vermaas*[12] stated:[13]

“Obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said the application should not be repeated and the court will not entertain it. But it is a non sequitur to argue on that basis that where there is some new matter the whole application is

not open for reconsideration but only the new facts. I frankly cannot see how this can be done. Once the application is entertained the court should consider all facts before it, new and old and on the totality come to a conclusion. It follows that I will not myopically concentrate on the new facts alleged.’ (My emphasis.)

I do not agree with the entire approach adopted by Van Dijkhorst. In my view the facts adduced at the earlier application has a limited purpose, i.e. to assist the Court in its comparison exercise with the ‘new evidence’ adduced.

[9] The boundaries of section 65 of the Act have been considered and decided in *Shefer v Director of Public Prosecutions, Transvaal and another*.^[14] I align myself with the observation by Patel J, stating as follows:^[15]

‘[27] There is no reason why proceedings in terms of s 63(1), during which an application is made for amendment of bail conditions, should not be subject to common-law review. In *Pillay v Regional Magistrate, Pretoria and Another* 1976 (4) SA 290 (T) it was accepted that a Superior Court had both common-law and statutory powers to review matters pertaining to bail. That would certainly include the review of amendment of bail conditions.

[28] When a person is lawfully arrested for the commission of a crime and released on bail on certain conditions, the question of his right to review any amendment or supplementation of the bail conditions is an aspect that is fully governed by the provisions of s 65. There is very little room for the Court’s common-law powers, except, perhaps, to the extent that such powers can be exercised within the ambit set by the Criminal Procedure Act. Where the applicant is aggrieved by the decision of the court below in declining to amend any one or more conditions of bail, then he is free to appeal against that decision in terms of s 65. If he considers that the magistrate committed a reviewable irregularity then he is free to approach the High Court in the manner

provided by Rule 53 to review the lower court’s decision. However, Stegmann J in *S v Baleka* (supra at 376F-G) warned:

“What the applicants were not free to do was simply to ignore the magistrate’s decision, to treat it as if it had never been

made, and institute a new application for bail in the Supreme Court.”

[29] Simply, in this instant case, the applicant ignored the regional court’s decision and proceeded to initiate a new application.

Further, he has not demonstrated that the regional court committed a reviewable irregularity. There were no grounds advanced to demonstrate that the magistrate took a wrong view of the matter or misdirected himself in any way.’ (My emphasis.)

[10] If the appellants had duly appealed the Court a quo’s decision, then they would have had to formulate their grounds of appeal in the notice of appeal in terms of section 65(3) and to have served it in accordance with the section on all the relevant parties. The magistrate

would then have had the opportunity to formulate her reasons in light of the specified grounds. It may be likely that the magistrate would not have wished to add anything to her reasons given on 28 August 2014. I cannot predict. Even if that is the case then I cannot simply ignore the provisions of the Act. I agree with the viewpoint of Stegmann J[16] in *S v Baleka and Others*[17] that the requirements of the section are peremptory and a court cannot introduce a procedure different to what is required by the

Act.

[11] This Court, in my view, should not allow applicants to launch a new bail application on new facts to circumvent the appropriate appeal process of the first bail decision. Allowing the appellants in casu to appeal both decisions firstly broadens the scope of the appeal and secondly would grant the appellants more rights than other appellants exercising their right to appeal a decision. In my view a bail appeal in terms of section 65 of the Act is no different than any ordinary appeal. In this case the appellants attempt to utilise the latter decision of the learned magistrate to bolster their appeal against the first judgment of the magistrate. Allowing the appeal in its present form would lead to an injustice.

[12] By entertaining both appeals as one I would create a procedural maze. What would be the consequence if I find that the

magistrate was wrong to have refused bail on 28 August 2014 (which I have not considered). In my considered view there is no basis to entertain the appeal against both bail applications.

Appellants should have appealed against the first decision if they wanted to challenge it. Mr Howse submitted that limiting the appellants to the appeal that they have given notice to, would cause them to be deprived of their right to a fair trial.[18] The submission was that barring the appellants from challenging the first refusal would be too a restrictive interpretation of Section

65. I disagree. Section 65 gives a limited scope to an appellant to challenge a court's decision on bail. One needs only to consider Section 65(4) of the Act to realise how restrictive bail appeals are. I am not persuaded that the appellants at this stage of the appeal being heard can change course and amend their notice to appeal. Allowing such an amendment would be in direct contrast to the peremptory obligations of Section 65(3). An appellant is not deprived of a right to appeal the decision of the Court when he/she adduces new facts. The Court in *S v De Villiers*[19] reaffirmed this position in stating:

‘Dit is duidelik uit die lees van art 65(2) dat ‘n persoon die reg van appel het teen die weiering van borg ten opsigte van nuwe feite slegs nadat die nuwe feite op aanvaarbare en strafprosesregtelike wyse voor die landdros geplaas was.’[20]

[13] This Court anxiously considered the fundamental right to liberty and that it should not be devalued by a too narrow interpretation of the appellants' right to appeal the decision of the court a quo, but equally gave consideration to the fact that the scale should not be tipped entirely in favour of alleged offenders. An overemphasis of their rights would not be in accordance with the legislation governing bail, nor with the guidelines set by the

Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*.^[21] Dlamini, in my view, has set the norm for individual liberty.

[14] The appellants in *casu* treated the learned magistrate's earlier decision as if it was not given when they elected to launch a new application on new facts. If they were convinced that the decision was wrong then they should have challenged the earlier decision by either lodging an appeal or if an irregularity was committed, to advance reasons for the decision to be reviewed.

[15] That bail applications are unique in nature has been acknowledged by the Constitutional Court in *Dlamini* (*supra*) when it held:

'Furthermore a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict

rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often

overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial.

In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court.

The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance.'

[16] The evidence presented by the appellants at the first bail application is important, not for the reasons listed by Mr Howse, but for the purpose of determining whether the evidence presented at the new application constituted new facts. The effect of a finding that no new facts exist is that the original refusal remains in force and undisturbed. Even if I am mistaken in my interpretation of section 65, then the appeal should still fail since it is procedurally flawed. The notice filed restricted this appeal to the decision taken on 14 November 2014.

[17] Accordingly, I am not persuaded that the magistrate's decision on 14 November 2014 was wrong and make the following order:

The appeal of both appellants is refused.

Appeal heard on : 4 May 2015

Counsel for the appellants : Mr J E Howse

Instructed by : Abdul Karim Attorneys

Counsel for the respondent : Ms Y Vahed

Instructed by : The Director of Public Prosecutions

Judgment

handed down on : 8 May 2015

[1] See page 168 of record.

[2] 2008

(2) SACR 355 (C).

[3] Para 57 - 58

[4] 1995

(2) SACR 613 (W).

[5] Supra at 622A-B.

[6] See record page 140.

[7] See record page 21 line 18 to page 22 line 2.

[8] See record page 126 lines 11-15.

[9] See the Criminal Procedure Amendment Act 85 of 1997 and the provisions introduced by it.

[10] The Constitution of the Republic of South Africa, 1996.

[11] See section 35(1)(f) of the Constitution, which reads: “Everyone who is arrested for allegedly committing an offence has the right ... to be released from detention if the interests of justice permit, subject to reasonable conditions.”

[11] See section 35(1)(f) of the Constitution, which reads:

“Everyone who is arrested for allegedly committing an offence has the right ... to be released from detention if the interests of justice permit, subject to reasonable conditions.”

[12] 1996

(1) SACR 528 (T).

[13] At 531e-g

[14] 2004

(2) SACR 92 (T).

[15] Para 27 - 29

[16] Writing for the minority.

[17] 1986

(1) SA 361 (T) at 361

[18] See Section 35(3)(o) of the Constitution that reads: “Every accused person has the right to a fair trial, which includes the right - ... (o) of appeal to, or review by, a higher court.”

[19] 1996

(2) SACR 122 (T).

[20] Supra at 126d.

[21]

[1999] ZACC 8; 1999

(2) SACR 51 (CC).

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