

SOUTH AFRICA / JUDGMENT

Doorewaard and Another v S (CAB33/2018) [2018] ZANWHC 87 (6 December 2018) [2018] ZANWHC 87

COURT

North West High Court, Mafikeng

BEFORE

Matlapeng

CASE / FILE NUMBER

CAB33/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
Case
Number: CAB33/2018
In

the matter between:

PIETER
DOOREWAARD
1st
Applicant
PHILLIPUS
LODEWYK SCHUTTE
2nd Applicant
and
THE
STATE
Respondent

JUDGMENT

Matlapeng AJ

- [1] This is an opposed urgent application brought by the two applicants to be released on bail pending sentencing proceedings. The two applicants, Messrs Doorewaard and Schutte are accused 1 and 2 respectively in a criminal trial that is currently serving before Hendricks J. They were charged with several offences which include Murder read with the provisions of section 51(1) of Act 105 of 1997. For convenience I will use the appellation that was used in the criminal court.
- [2] The matter before Hendricks J is not yet concluded but the accused have already been convicted. The accused were initially on bail. After judgment was pronounced on 17 October 2018, they were remanded in custody for the sentencing proceedings to commence on 18 October 2018. On that day, the matter could not proceed and a date of 28 January 2019 was arranged for that purpose.
- [3] Currently, Hendricks J who is seized with the matter is not available to hear this application. He is on long leave hence this application came before me.
- [4] In its opposition, the State raised the following points in limine, namely: As the accused premised their application on the basis on section 60(1)(a) and (b) of the Criminal Procedure Act 51 of 1977 (CPA):
- (i) This court has no jurisdiction to entertain this matter;
 - (ii) The trial court made a determination when it revoked the bail of the accused. This decision stands unless taken on appeal;
 - (iii) This court cannot review the decision of the trial court and proceed to hear the bail application.
- [5] The accused on the other hand submitted that their application is premised on section 58 of the CPA. This is a new application as bail which was previously granted, was revoked after conviction through the operation of law and the trial Court did not have to pronounce on its withdrawal. As a result, there is no court order to be appealed against.
- [6] After the preliminary points were argued, I requested the three Counsel who appeared in this matter to provide me with heads of argument which they kindly did. I thank them for their effort. This judgment deals with the preliminary points only.
- [7] I also raised a question whether this matter is so urgent for it to be heard in terms of Rule 6(12) of the Uniform Rules of Court having regard to the fact that the accused brought this application by way of Notice of Motion. This is ordinarily, a procedure that applies in the motion court and not in the criminal court.

- [8] An application for bail is a criminal proceeding notwithstanding the procedure used to place it before a court as it is related to the arrest, detention and prosecution of an offence. See *S v Botha en ander* 2002 (1) SACR 222 (SCA). In *Sita and Another v Olivier NO and Another* 1967 (2) SA 422 (A) at 449 B – E the court held:

“It is in my view not the form of procedure adopted but the subject matter of the proceedings which determines their character as either a civil or criminal matter . . . Nor in my view does the fact that relief was sought by way of a declaratory order, interdict and mandamus make the proceedings before the court a quo civil matter originating in that court.”

As a result, I will disregard the fact that a procedure used in the civil court was used to bring the matter to court.

- [9] Although the accused were tardy in bringing this application to court especially when viewed in the light of the fact that they were remanded in custody on 17 October 2018 and they only issued this application on 16 November 2018, this cannot be held against them as the matter remains a criminal proceeding. The defence of lack of urgency is not applicable. A bail application is always heard as a matter of urgency. This was recognised by the Supreme Court of Appeal in *Magistrate, Stutterheim v Mashiya* 2003 (2) SACR 108 SCA where the Court at paragraph [16] held:

“It is evident that finalising an application for bail is always a matter of urgency. Though the accused may not be entitled to be released – since the Constitution permits bail only if the interests of justice permit – he or she is certainly entitled at first instance to a prompt decision one way or the other.”

In my judgment this matter remains urgent as the nature of the relief sought is urgent.

- [10] The main question that needs to be answered is whether Hendricks J at the time when he remanded the accused in custody, had no choice as he was following the letter of the law or he made a determination to revoke the accused's bail.
- [11] It was strenuously submitted on behalf of the two accused that the trial court did not make a determination as to whether to revoke bail at the pronouncement of the verdict. In the absence of such pronouncement, bail was revoked ex lege.
- [12] In the present case, the accused are applying for bail pending sentence as their matter has not been finalised. They have been convicted and are waiting to be sentenced. They were previously on bail which was revoked upon their conviction.
- [13] Ordinarily an application for bail is premised on the provisions of section 60(1)(a) of the Criminal Procedure Act which provide:

“An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.” (My emphasis)

In terms of this statute, an accused may apply for bail at any stage before his or her conviction and not after conviction.

[14] The accused disavowed reliance on section 60(1)(a) of the CPA. They aver that the application is premised on the provisions of section 58 of the CPA which provide:

“The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed: Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60 (11) (a) or (b), as the case may be, and the court shall take into account-

- (a) the fact that the accused has been convicted of that offence; and
- (b) the likely sentence which the court might impose.”

[15] I am afraid that the accused's reliance on this section is misplaced. In my understanding, the section deals with the results and effect of bail that has already been granted. The question that this section is answering is; “what happens after the accused has been granted bail” and furthermore “what is the position after the accused has been convicted.” The answer is that such an accused has to be released from custody upon payment or furnishing of a suitable security.

[16] In terms of the section his release from custody will endure for as long as he adheres and complies with the conditions placed on his release. Furthermore, such release will last until a verdict is pronounced. It is clear that the bail granted will be revoked at conviction. Should the sentence not immediately follow upon conviction, the court retains a discretion whether to extend bail until sentence is passed.

[17] When a court has convicted an accused of an offence falling under schedule 5 and 6 considers whether accused's bail should be extended pending the imposition of sentence, the court will apply the provisions of section 60(11)(a) or (b) and shall take into account the proviso in section 58 namely; the fact that the accused has been convicted of that offence; and the likely sentence which the court might impose.

[18] The word “Court” is not defined in the CPA and the inquiring is to determine what a court is in terms of section 58. One of the cardinal rules of interpretation is that one has to take into account the context in which the word has been used. In my mind, the use of the word court in the context of section 58 can only mean the trial court. I am fortified in this view as the section provides that “the court in question” may extend bail if sentence is not imposed

forthwith. (my emphasis) As has been repeatedly said sentencing is within the discretion of the trial court. A court seized with a trial has first-hand knowledge of all the evidence led at the trial which may have a bearing on the sentence. A court which did not sit in judgment of an accused will not find it easy to determine the likely sentence to be imposed on the accused.

- [19] There is a dearth of decided cases on this point. None of the counsel could find a case on this point other than the cases dealing with application for leave to appeal which though related, are distinguishable from the present question. Counsel could not provide me any authority wherein it was decided that an accused whose bail was revoked after conviction and pending sentence, could apply to again be admitted to bail by another court other than the court that sat in judgment of the accused. The nearest case that I could find was *S v Engelbrecht* 2003 (2) SACR 544 (W). In that matter bail was granted by the judge presiding in the trial. As she was seized with the matter, she was in a good position to determine those factors identified in paragraphs (a) and (b) of the proviso to section 58. See too *S v DD* (K/S 46/2012 [2014] ZANHC 8 (25 April 2014) where similarly it was the trial court that dealt with the question whether to grant bail pending sentence.
- [20] In my view the trial court retained a discretion whether to extend bail or not pending sentence. By ordering that the accused to be kept in custody after a verdict of guilty, the court clearly made a pronouncement which in my mind is a court order. Such an order will stand unless challenged on appeal. The trial court is better placed to consider its decision as and when an application for the extension of bail is made.
- [21] This court cannot disregard and close its eyes the pronouncement made by the trial court and consider the bail application afresh. It simply does not have the jurisdiction or the power to do that.

Order

- [22] In the circumstances the points in limine are upheld and I decline to hear and consider the application for the accused to be released on bail.

D I MATLAPENG

ACTING JUDGE

North West Division, Mahikeng

APPEARANCES:

DATE OF HEARING:

23 NOVEMBER 2018

DATE OF JUDGMENT: 06

DECEMBER 2018

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