

SOUTH AFRICA / JUDGMENT

## DPP Limpopo v Patel & Another (REV85/2020) [2021] ZALMPPHC 29 (30 April 2021) [2021] ZALMPPHC 29

COURT

Limpopo High Court, Polokwane

BEFORE

Naude, G.C. Muller

CASE / FILE NUMBER

REV85/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: REVSS/2020

In

the matter between:

THE  
DIRECTOR OF PUBLIC  
APPLICANT  
PROSECUTIONS  
LIMPOPO  
and  
RAMEEZ  
PATEL  
1st  
RESPONDENT  
ME  
UNGERER, MAGISTRATE COURT,  
LIMPOPO  
(HELD AT POLOKWANE)  
2nd  
RESPONDENT  
REVIEW

**JUDGMENT**

NAUDE AJ:

- [1] This is a review application in terms of Section 22(1) of the Superior Courts Act, Act 10 of 2013, in terms whereof the Applicant applies for an order setting aside or reviewing the decision of the Second Respondent to admit the First Respondent to bail.
- [2] The Applicant contends that the Magistrate's Court did not have the requisite jurisdiction in order to entertain the First Respondent's renewed bail application on new facts, after the matter had been transferred to the High Court for trial and after the First Respondent had already made several appearances in the High Court.
- [3] In summary the facts are that the First Respondent was granted bail by the Second Respondent on 14 August 2020, after the First Respondent had brought several bail applications. The First Respondent's last appearance in the High Court was on 2 March 2020. The High Court then postponed the matter to 2 February 2021, with the accused to remain in custody. The following order was made:-

"1. Matter postponed to 01-12/02/2021 for trial and to 16 and 17 April for Bail Application. Accused in custody."

- [4] Several attempts by the First Respondent to be admitted to bail had been dismissed on several occasions by the Magistrate's Court. The First Respondent's bail appeal was denied twice in this division of the High Court. The First Respondent was granted bail by the Second Respondent on 14 August 2020 on his third attempt after the First Respondent had already appeared in the High Court on several occasions.
- [5] It is against this background that this Court is called upon to decide whether the court a quo had the necessary jurisdiction to hear the bail application based on new facts or whether the court should have invoked the provisions of Section 60(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Act") and refused to hear the bail application and refer the matter to the High Court where the First Respondent's matter is pending. The crisp issue therefore arising for determination in the present matter exclusively turns on a proper interpretation of the meaning of Section 60(1)(b) of the Act.
- [6] Section 60(1) of the Criminal Procedure Act 51 of 1977 provides as follows:-

"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."

- [7] Section 60(1)(b) of the Act provides that:-

"Subject to the provisions of section 50(6)(c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time." [Own emphasis]

[8] Section 50(6)(c) of the Act states as follows:-

"The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorized thereto on writing by him or her may if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court."

[9] The Applicant submits that the meaning to be attributed to the wording of Section 60(1)(b) is that, once an accused person has appeared in the High Court (or other court), pursuant to a transfer of such person from the transferring court for sentencing or trial purposes, such receiving court shall be vested with exclusive jurisdiction in respect of bail proceedings.

[10] The Applicant's counsel submitted that it should be noted that Section 60(1)(a) simply refers to "the court" as the forum empowered to release an accused on bail. It does not expressly state which court it may be in a particular instance. It was argued by the Applicant's counsel that in this, it differs from its predecessor

- the section prior to being amended provided that an accused could on his or her "first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior court, that court, to be released on bail".[11] The Applicant's counsel further referred to submissions made by John Van der Berg in *Bail, A Practitioner's Guide, Third Edition*. Applicant's counsel submits that it is clear from Section 60(1)(b) of the Act, that where the accused's matter is transferred for trial or sentence to either the Regional Court or High Court and the accused has not appeared yet, the transferring court (Magistrate's Court) still maintains jurisdiction on matters relating to bail.

[12] John Van der Berg In *Bail, A Practitioner's Guide, Third Edition* at page 49 stated as follows:-

"The provision is somewhat less clear than s 60(1) as it read before the 1995 amendment, and which provided that 'an accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior court, to that court, to be released on bail...'. This lack of express provision notwithstanding, however, it is submitted that 'the court' referred to in s60(1)(a) will of necessity be the court (and, moreover, usually a lower court) in which the accused makes his first appearance or, subsequently, the trial court (which may be a lower court or a superior court)."

- [13] The First Respondent's counsel argued that on the contrary, the exact opposite of the above contention is argued, to the extent that it is submitted that the true intention and meaning of the wording of Section 60(1)(b) intended by the Legislature constitutes and brings about the existence of concurrent jurisdiction (and no less) in relation to bail proceedings between the transferring court (in casu the Magistrate's Court) and the receiving court (in casu the High Court), once the First Respondent had made his appearance in the High Court, as opposed to the prior exclusive jurisdiction enjoyed by the lower court (prior to such transfer) in respect of bail proceedings in terms of the said section.
- [14] The First Respondent's counsel submitted that the very issue arising for determination in the present instance, i.e. the interpretation of Section 60(1)(b) of the Act, has been instructively discussed and ventilated by Van der Berg *supra* and with full acknowledgement to the learned author quoted what was stated by Van der Berg on page 49 of *Bail, A Practitioner's Guide*, as follows:-

"6.2. 1 Transfer of accused for trial or sentencing

Subject to the curtailment of the accused's right to be brought to court outside ordinary court hours, the court (usually the district court) referring the accused to another court (usually the regional court of High Court) for trial or sentencing will retain jurisdiction in respect of bail until the accused appears in such other court for the first time..

Difficulties of interpretation have arisen as a result of the amendment of s50(6), particularly when it is read in conjunction with s60(1)(b) of the Act, which provides that the court [usually a magistrate's court] referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time. [emphasis added.]

Does this mean that the magistrate's court, once it has referred an accused to the regional court of the High Court for trial, is *functus officio* with regard to the matter of the accused's bail, and retains no further jurisdiction thereanent? Or may it be said that the magistrate's court and the higher court in question hold concurrent jurisdiction once the accused has appeared in the latter court? The question is one of some importance, as it fairly frequently happens that a higher court is for one reason or another unable or unavailable to hear a bail application of an accused on trial or awaiting for trial before it. In such cases the accused's right to apply for bail speedily may be denied him if the referring lower court were deprived of its original jurisdiction. The question was considered in *Director of Public Prosecutions, Eastern Cape, v Louw NO: In re S v Makinana* 2004 (2) SACR 46 (E) where it was observed [at 56g]:

'The words 'subject to the provisions of s 50(6)(c) in s 60(1)(b) must be interpreted in conformity with, and in such a way as to promote, the values of the Constitution and the spirit, purport and objects of the Bill of Rights. It must be interpreted, in other words, so that it promotes the value of, and the right to, freedom as well as the right to be 'released from detention if the interest of justice permit, subject to reasonable conditions' and the right of access to court. More than that, it must be interpreted in such a way that it gives effect to the State's obligations, in terms of s 7(2)

of the Constitution, not only to abstain from interfering with these rights - the negative obligation to respect them - but also to positively facilitate their exercise - the positive obligations to protect, promote and fulfil them.'

In the course of granting a declaratory the court in Makinana held that the magistrate's court has exclusive jurisdiction to hear a bail application in respect of any case in which an accused person is charged

with a Schedule 6 offence (subject to a directive in terms of section 50(6)(c)) from the first appearance of the accused until he appears in such higher court to which his matter may be transferred, whereupon such other court shall enjoy jurisdiction to entertain a bail application. The court did not declare such higher court to be vested with exclusive jurisdiction to consider bail once the accused has appeared before it. [writer's emphasis]

In *S v Mzatho and Others* 2007 (2) SACR 309 (T) the court approved of the concurrent jurisdiction approach by holding that in appropriate circumstances (for instance where it would be unhealthy for an area's sole regional magistrate to hear a bail application as well as the subsequent trial) a regional magistrate could refer the matter back to the magistrate's (district) court, even though the accused had already appeared before him pursuant to a referral by the lower court."

[15] The First Respondent's counsel further argued that the above referred to approval stated in *Mzatho* (supra) was echoed and restated with approval more recently in the unreported decision of *S v Hlongwane & Others* (AR507/13)

[2015] ZAKZPHC 1 (28 January 2015) where it was stated:

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"40. In the result the court issued a declaratory order that the regional court, confronted with a bail application which in the opinion of the presiding regional magistrate it could not entertain, had the power to refer the bail application to a lower court if such referral would, in the opinion of the deciding regional magistrate, be in the interest of justice and serve to protect the fundamental rights of the applicant for bail as entrenched in the Constitution.

41. In my view similar considerations apply in the present matter for the protection of the rights of sentenced applicants for leave to appeal from the magistrates' and the regional courts in terms of section 3098, as well as petitioners for leave to appeal in terms of section 309C."

[16] The First Respondent's counsel further argued that the construction advocated for to be attributed to the meaning of section 60(1)(b) by the Applicant is to be regarded as wholly misplaced and untenable, and constitutes one that is flowing from a clear misconception of the ordinary and actual meaning thereof intended by the Legislature, which contended interpretation by the Applicant would be contrary to the very spirit of our Constitution which jealously guards, as contemplated by the Bill of Rights, over the right to freedom and the right not be detained unnecessarily when circumstances, with due regard to the interest of justice, permit.

- [17] The Applicant's counsel further argued that the Second Respondent should have considered and invoked the provisions of section 60(1)(b) of the Act and the Second Respondent should not have entertained the bail application. It was submitted that it is an unimaginable set of events that a High Court remands an accused and it orders him to remain in custody in circumstances where bail has been denied, and then the accused successfully brings an application for bail on new facts in the magistrate's court.
- [18] In this court's view the present matter should be distinguished from the Makinana matter *supra* in that in the Makinana matter the appellant first applied for bail in the Magistrate's Court. He was unsuccessful. His case was then transferred to the Regional Court for trial. He applied again for bail in the Regional Court, alleging that new facts existed to justify the granting of bail. The Regional Magistrate refused to hear the bail application on the basis that he had no jurisdiction to do so. The Makinana matter concerned a situation where, in certain circumstances, both the district and Regional Magistrates' courts were holding that they did not have jurisdiction to hear bail applications and, in so doing, effectively denying the accused the right to apply for bail.
- [19] In terms of Section 50(6)(c) of the Act, read with Section 60(1) of the Act, a Magistrate's Court has exclusive jurisdiction to hear a bail application in respect of any case in which an accused person is charged with a Schedule 6 offence (provided that the Director of Public Prosecutions does not direct otherwise in terms of the proviso of s 50(6)(c)) from the first appearance of the accused until he or she appears in any other court to which his or her matter may be transferred, whereupon such other court shall enjoy jurisdiction to entertain a bail application.
- [20] The Magistrate's Court is a creature of statute and therefore can do nothing that the empowering statute does not authorize it to do. A Magistrate is only entitled to hear a matter, he or she, in other words, only has jurisdiction, if a valid law, usually a statute, empowers him or her to do so.
- [21] It was held in paragraph 28 of *Director of Public Prosecutions v Louw NO: In re S v Makinana* that s 50(6)(c) and the 'subject to' clause of s 60(1)(b), must be interpreted restrictively (if that is reasonably possible). They must be interpreted to mean no more than that bail applications in Schedule 6 cases must be heard initially in the Magistrate's court, unless the Director of Public Prosecutions directs otherwise, but that, once such a matter is transferred to either a regional court or a High Court, that court, whichever it may be, acquires jurisdiction, as the court before which the matter is pending, to entertain any bail application that may be brought.

- [22] In the present matter, the First Respondent was denied bail in the High Court and was remanded in custody on 2 March 2020. The matter was postponed to 1 to 12 February 2021 for trial and to 16 and 17 April 2020 for a bail application in the High Court, which application was never brought, but instead the First Respondent went back to the Magistrate's Court to apply for bail, despite already having appeared in the High Court after the matter was transferred to the High Court for trial.
- [23] The Magistrate in granting bail after the High Court has made an order that the First Respondent is to remain in custody, acted irregular. The Magistrate in making the order she did, in effect sat as a court of appeal, although it was on new facts, which she could not have done. Practically this will have the effect that an accused can do forum shopping when it comes to bail applications. It could never have been the legislature's intention that an accused person can jump backwards and forwards between the court of first instance and the trial court for bail applications. In this court's view, this will create uncertainty and chaos and hamper the case flow and justice system.
- [24] In both *\$ v Mzatho and Others* 2007 (2) SACR 309 (T) and in *S v Hlongwane & Others* (AR507/13) (2015] ZAKZPHC 1 (28 January 2015) the emphasis is on the Regional Court referring a matter back to the Magistrate's Court for a bail application.
- [25] In the circumstances, considering the above case law, it is this court's view that once an accused person has appeared in another court, pursuant to a transfer of such person from the transferring court, for sentencing or trial purposes, such receiving court shall be vested to the exclusion of the transferring court, with exclusive jurisdiction in respect of bail application proceedings. In the result the application for review must succeed.
- [26] This court therefore makes the following order:-
1. The bail granted by the Second Respondent on the 14th of August 2020 in favour of the applicant is declared invalid and set aside.
  2. The Magistrate's Court did not have jurisdiction to hear the bail application on new

**facts.**

NAUDE ACTING JUDGE OF THE HIGH COURT

I AGREE:

G.C. MULLER

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON: 23 APRIL 2021

**JUDGMENT**

DELIVERED ON: 30 APRIL 2021 For the Applicant: Adv. TE Mabapa Instructed by: The Director of Public Prosecutions: Limpopo Polokwane For the 1st Respondent: Adv. JP Morton Instructed by: Rheeder Attorneys Polokwane For the 2nd Respondent: No Appearance

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Prepared on 12 October 2026 · Esheria