

SOUTH AFRICA / JUDGMENT

Mabaso v S (101/2022) [2024] ZAGPJHC 322 (28 March 2024)

[2024] ZAGPJHC 322**COURT**

South Gauteng High Court, Johannesburg

BEFORE

MA Makume

CASE / FILE NUMBER

101/2022

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Source record**REPUBLIC OF SOUTH****AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE NO:**

SS 101/2022

1.REPORTABLE:

YES / NO

2.OF

INTEREST TO OTHER JUDGES: YES/NO

3.REVISED.

In

the matter between:

MABASO

MXOLISI THULANI

Applicant

And

THE

STATE

Respondent

JUDGMENT

MAKUME, J:

- [1] This is an application by the Accused Mr Mabaso to be released on bail for which he says there are new facts in support of his request that bail be reinstated. The application is opposed by the State.

BACKGROUND FACTS

- [2] On the 21st August 2023 the Accused failed to attend Court which was a date that had previously been agreed upon as the trial date. His legal representative Adv Cindi appeared and informed the Court that he did not know where the Accused was and why he is not at Court in compliance with his bail conditions.
- [3] The State applied for Provisional estreatment of bail and that he be arrested. Adv Cindi informed the Court that he was withdrawing as his Counsel. I refused his application to withdraw and informed him that he will have to do that application in the presence of his client the Accused. I granted the State's application.
- [4] The Accused had been granted bail by the Magistrate Court in Krugersdorp and some of the conditions attached to his release on

bail was that he had to present himself at Kagiso Police Station every Monday and on every Friday between the hours of 06h00 and

08h00.

- [5] On Monday the 21st August 2023 he did not report at the police station nor did he attend Court. On Friday the 25th August 2023 he did not present himself at the police station as well as on Monday the 28th August 2023. By that time a warrant of his arrest had been issued.
- [6] It was when he went to report at the police station on Friday the 1st September 2023 that he was arrested on the basis of the Warrant that this Court had authorised on the 21st August 2023.
- [7] The Accused appeared with his Counsel Adv Cindi on Monday the 4th September 2023. Section 67 read with Section 66 of the Criminal Procedure Act reads as follows:

“67 (1) If an Accused who is released on bail:-

- (a) Fails to appear at the place and on the date and at the times:
- (i) Appointed for his trial or
- (ii) to which the proceedings relating to the offence in respect of which the Accused is released on bail and adjourned; or

- (b) Fails to remain in attendance at such trial or at such proceedings the Court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State and issue a Warrant for the arrest of the Accused.

67(2) If the Accused appears before Court within fourteen days of the issue under subsection (1) of the Warrant of Arrest, the Court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the Accused satisfies the Court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.”

- [8] Section 67(2) places an onus on the Accused to convince the Court that his failure to appear in Court on a specified day was not due to his fault. This means that such an Accused must present credible evidence in support of the reasons for his non-attendance. In *State v Porrit* (an unreported Gauteng Division Case Number 5540/2006 Spilg J held on the 21st July 2017 that Section 67(2) should be interpreted as placing an evidential burden on the Accused and not a burden of proof.
- [9] This Court at the hearing in terms of Section 67(2) only has to have a reasonable doubt whether the non-attendance of the Accused was due to his fault or not.
- [10] When the Accused appeared before this court on the 4th September 2023 he was legally represented by advocate Cindi who produced a medical certificate that indicated that the Accused had been ill on the 21st August 2023 and thus could not attend. That medical certificate went further to indicate that by the 23 August 2023 he would be in a position to continue with normal life and it stopped there.
- [11] No further evidence either oral or otherwise was presented to this Court as to what his condition was between the 23rd August 2023 until the 1st September 2023 when he was arrested.
- [12] Counsel for the Accused was asked by this Court on several occasions if the medical certificate handed in was all that he wants the Court to take into consideration the answer was yes. I then concluded that the Accused had not succeeded in placing before me evidence indicating that his absence from Court on the 21st August 2023 and his failure to report at the police station on the 28th August 2023 was not as a result of any fault on his part. In the result I made an order finally estreating his bail and made an order that he be kept in custody until the finalization of his trial.
- [13] The Accused is now before this Court and says he is applying to be released on bail based on new facts. His new facts are set out in paragraph 16 of his affidavit which reads as follows:

“Date of the 28th August 2023 I could not report at the police station due to my illness, see attached medical record annexure “A”

- [14] Annexure “A” is a medical certificate issued by either Dr M Kayeye or Dr LMillea Liyologo it is dated the 30th August 2023 and it records that the Accused was examined on the 28th August 2023 as well as on the 30th August 2023 and was found to be unwell on both dates due to a “medical condition”. The medical certificate is dated the 30th August 2023.
- [15] When the Accused appeared before this Court on the 4th September 2023 this last mention medical certificate was never placed before Court even though he had it in his possession. There is no explanation why it was not presented as a reason why he did not report at the police station on the 28th August 2023.
- [16] When he was arrested on the 1st September 2023 he did not produce to the Investigating Officer this second certificate. I have serious reservations about the authenticity of this last medical certificate it was an after thought and only acquired after the Accused had been arrested and placed in custody.
- [17] The State in opposing bail on new facts he set out the history of this matter. The Accused is standing charged on the following counts:
- (a) 1 Count of Housebreaking with the intention to commit murder
 - (b) 2 Count of Murder read with Section 51(1) of Act 105 of 1977
 - (c) 7 Counts of Attempted Murder
 - (d) 1 Count of Malicious Damage to Property
 - (e) 2 Counts of unlawful Possession of Ammunition.
- [18] On the 20th August 2021 he was released on bail of R10 000.00
- [19] Whilst he was out on bail he committed other offences that included murder committed on the 7th February 2022 which is a period of six months after having been released on bail. He was arrested on the 27 February 2023 a year later. He was once more released on bail of R30 000.00 to which was attached bail conditions which have relevant in this matter.
- [20] At the hearing on the 4th September 2023 it was brought to the attention of this Court that the Accused had a previous Counsel Adv Nel who had to withdraw because of lack of funds. At all this times witnesses had been coming to Court and the matter had to be postponed.
- [21] On the 23rd February 2024 when the Accused and his Counsel appeared before me on new facts for bail and presented the second medical certificate this Court directed that the medical practitioner who issued the second medical certificate be called to come and present evidence. It was left to Counsel for the Accused to arrange that on his request. The matter was then postponed sine die.

[22] After the matter was postponed I sent out an email to both the State and the Defence Counsel to indicate to me by not later than the 15th March 2024 as to a suitable date to hear further evidence and that if I do not get any indication by then I will assume that the Applicant (the Accused) has closed his case and will proceed to hand down my judgement on what had been placed before me.

[23] I received no communication from either Counsel. I have considered the affidavit by the Accused as well as heads of argument by both the State and the defence and now present herewith my judgment and reasons thereto.

[24] It is trite law that cancellation of bail does not preclude an Accused person from launching another application based on new facts

however, the earlier cancellation is a relevant fact to be considered in the new application.

[25] The Accused submitted evidence by way of an affidavit supported by heads of argument. The State in opposing bail submitted heads of argument. In his affidavit the Accused says the following:

“Date of the 28th August 2023 I could not report at the police station due to my illness see attached medical record annexure “A”:

I contacted the investigating officer and informed him that I will be able to report on the 1st September 2023. Indeed on the said date I went to the police station to report and I was subsequently arrested and detained until to date. I was not aware that on the 21st August the Warrant of arrest was immediately issued and execution because I should have come to Court and explain. I attended Court on the 4th September from custody and on that day the bail was finally forfeited to the state.”

[26] Annexure “A” is the Accused medical certificate dated the 30th August 2023 a day before his arrest. That medical certificate mentions that he was examined on the 28th August 2023 and on the 30th August 2023. He was declared unfit for work for the period 28th August 2023 up to and including the 30th August 2023.

[27] The medical certificate submitted to this Court on the 4th September 2023 contradicts Annexure “A” in material aspects. Firstly, that certificate indicates that the Accused was

examined on the 21st August 2023 and was declared unfit until the 23rd August 2023 which meant that he should have presented himself to Court or to the Investigating Officer any time from the 24th August 2023 Annexure “A” now mentions the 28th August 2023 as a period of his incapacity. When he appeared in Court on the 4th September 2023 he did not present Annexure “A” which must have been in his possession as it had been issued to him on the 30th August 2023. He and his Counsel could not explained to this Court on the 23rd February 2024 why Annexure “A” was not placed before this Court on the 4th September 2023.

[28] Annexure “A” says nothing about the 21st and 23rd August 2023 it also says nothing about the 25th August 2023 which is a date on which he had to have reported at the police station. If Annexure “A” is a genuine medical

certificate which I doubt that it is then the Accused should have at least presented himself to Court or to the Investigating officer on the 31st August 2023. He did not do so.

[29] In this Court’s ruling of the 4th September 2023 I accepted that the Accused was medically incapacitated between the 21st to 23rd August 2023 in accordance with the medical certificate handed in. There was no explanation what happened from the 24th August 2023 until the 1st September 2023. It was on that basis that this Court ruled that the Accused contravened his bail conditions and deserves to be held in custody until the case against him is finalized.

[30] The evidence presented to this Court in the renewed bid to be released on bail is to say the least insufficient and, in my view,

fabricated to mislead this Court and I rejected same.

[31] It is trite law that each application for bail must be considered against the background of all circumstances prevailing at the time it is heard and that a Court hearing such application must exercise its discretion judicially taking into account the totality of the evidence and circumstances.

[32] On the 21st August 2023 Counsel for the Accused did not know where the Accused was hence he wanted to withdraw. The Accused should have called his legal representative and inform him of his whereabouts.

[33] On the 4th September 2023 the State Counsel also brought it to the Court’s attention that the Accused previous Counsel had to withdraw because of lack of funds that led to the hearing being postponed to the 21st August 2023. Witnesses were Subpoenad and attended Court only to be excused once again.

[34] A bail application on new facts is not merely an extension of the initial bail application. This Court which is entertaining the new bail application must consider whether there are in fact new facts viewed in the light of the facts placed before this Court on the 4th September 2023.

[35] In *S v Vermaas* 1996 (1) SACR 528 (T) at 531 e-f, Van Dijkhorst J set out the applicable approach in the following terms:

“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.”

[36] It is an old and new fact that the Accused is facing serious charges which carry the minimum sentence on conviction. There are two dockets in this matter the first is Kagiso Cas 351/05/2021 on which the Accused was released on bail of R10 000.00 on the 20th August 2021. The second docket is still Kagiso Case 163/02/2022 which also includes murder and for which the Accused was released on bail of R30 000.00 on the 10th May 2022.

[37] The State submitted in their heads that the Accused committed the offences detailed in docket number Kagiso Cas 163/02/2022 whilst on bail of R10 000.00. He clearly failed and grossly violated the conditions of his bail.

[38] In *S v Rudolph* 2010 (1) SACR 262 (SCA) Snyders JA found (at par 15) that:

“The Appellant had not addressed his propensity to ignore Court orders illustrated by his past behaviour. He had also not furnished any evidence despite the onus being on him that he was unlikely to behave with the same disregard in the future. He had therefore not addressed the evidence that his release would undermine or jeopardise the objection on the proper functioning of the criminal justice system including the bail system as contemplated in S60 (4)(d) of the Act.”

[39] I am not persuaded that there are any new facts submitted before this Court to enable this Court to consider the release of the Accused on bail. The Accused by his conduct present and past undermined the administration of justice. He has successfully abused the freedom of being on bail and in the process has caused this matter to be postponed on at least two occasions on clear tactics to discourage witnesses from coming to testify. Justice delayed is justice denied and that applies not only to the Accused but to the victims as well.

ORDER

[40] In the result the application to be released on bail is dismissed. It is ordered that the Accused be held in custody until the charges against him shall have been finalized.

Dated at Johannesburg on this 28th day of March 2024

MA MAKUME J

ACTING JUDGE OF THE HIGH COURT

Appearances:

DATE OF HEARING: 23 FEBRUARY 2024

DATE OF JUDGMENT: 28 MARCH 2024

FOR APPLICANT:

ADV S SIXHIBA

FOR RESPONDENT: ADV N ZUMA

INSTRUCTED BY:

OFFICE OF THE DPP, JOHANNESBURG

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