

SOUTH AFRICA / JUDGMENT

Mabuza v S (BA05/2024) [2024] ZAMPMBHC 26 (13 March 2024)

[2024] ZAMPMBHC 26

COURT

Mbombela High Court, Mpumalanga

BEFORE

Roelofse

CASE / FILE NUMBER

BA05/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION (MAIN SEAT)

Case

Number: BA05/2024

1.

REPORTABLE: YES/ NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED.

DATE:

13 March 2024

SIGNATURE:

[SIGNED]

In

the matter between:

SIBISISO

MABUZA

Appellant

and

THE

STATE

Respondent

This

judgment is handed down electronically by distributing same to the parties by email and by publication on SAFLII. The date

and time of

the delivery of this judgment shall be deemed to be at 11:00 on 13

March 2024.

JUDGMENT

Roelofse AJ:

- [1] The appellant, Mr Sibisiso Mabuza first appeared on 9 February 2023 in the Nelspruit periodical court with eleven other persons on a charge of housebreaking with intent to steal and theft.[1]
- [2] Mr Mabuza (and the other accused) was released on bail on condition that (amongst other conditions) Mr Mabuza:
- “....does not communicate with witnesses for the prosecution.....Complainant or other s/w [state witnesses] not disclosed”.*
- [3] While on bail, and on 11 January 2024, Mr Mabuza was arrested on a warrant that was issued on the strength of section 68 of the Criminal Procedure Act[2], hereinafter referred to as “the Act”. Mr Mabuza appeared in court on the same day. The matter was postponed to 12 January 2024 “....for application for cancellation of bail”.
- [4] The Magistrate heard evidence on the cancellation of Mr Mabuza’s bail and the forfeiture of his bail money. Evidence was led by both the state and the accused. On 22 January 2024, the Magistrate found that Mr Mabuza has contravened his bail conditions,
- cancelled Mr Mabuza’s bail and declared the bail money he has paid forfeited to the state (“the order”).
- [5] Mr. Mabuza seeks to appeal the order in terms of section 65.
- [6] The first question to be answered is whether the order appealable. My conclusion will be that the order is not appealable in terms of section 65. As will appear from what is set out below, I come to this conclusion after examining the relevant scheme of the Act insofar as sections 65, 66 and 68 is concerned.

- [7] The appellant argues that the order was made in terms of section 68 after the court engaged in section 66 proceedings. Therefore, so it was argued on the appellant's behalf that, referring to authorities I set out below, the order is open to this appeal in terms of section 65 of the Act. In the alternative, it was argued on the appellant's behalf that it would be on the interest of justice to, even if the order is not appealable, nonetheless set aside the order on review.
- [8] The appellant argues that the magistrate ".....stressed the fact that the bail was cancelled in terms of section 68" and that "....It must thus be accepted that the bail was cancelled in terms of section 68."
- [9] This is unfortunately a misconception of the Magistrate's approach for in the first sentence of the Magistrate's judgment, the Magistrate says:
- "This is an application in terms of Section 66 of Act 51 of 1977 and further Section 68 of Act 51 of 1977 as amended"[3]*
- "My point of departure is that I have considered in details [sic] the application by the state in as far as both sections mentioned above or earlier that is Section 66 as well as Section 68....".[4]*
- [10] The answer to what I have to decide does not lie in what the Magistrate perceived as the basis for his decision. It lies elsewhere.
- [11] In the main, the state relies on one authority[5] for its submission that the order is not open to an appeal but a review.

Is the order appealable?

- [12] In order to determine whether the order is appealable, sections 65, 66 and 68 of the Act, more particularly the relationship between the sections, must be considered and analyzed in their proper context.
- [13] Section 65 provides for appeals to a superior court if bail is refused or the accused is dissatisfied with a bail condition(s) and

provides for the procedure of such appeal. Section 65 reads:

"(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.”

[14] Section 66 deals with a failure by an accused to observe his/her conditions of bail and the procedure to be followed to sanction this remiss. I shall refer to the procedure in section 66 as “the section 66 inquiry”. Section 66 reads:

“(1) If an accused is released on bail subject to any condition imposed under section 60 or 62, including any amendment or supplementation under section 63 of a condition of bail, and the prosecutor applies to the court before which the charge with regard to which the accused has been released on bail is pending, to lead evidence to prove that the accused has failed to comply with such condition, the court shall, if the accused is present and denies that he or she failed to comply with such condition or that his or her failure to comply with such condition was due to fault on his or her part, proceed to hear such evidence as the prosecutor and the accused may place before it.

- (2) If the accused is not present when the prosecutor applies to the court under subsection (1), the court may issue a warrant for the arrest of the accused, and shall, when the accused appears before the court and denies that he failed to comply with the condition in question or that his failure to comply with such condition was due to fault on his part, proceed to hear such evidence as the prosecutor and the accused may place before it.
- (3) If the accused admits that he failed to comply with the condition in question or if the court finds that he failed to comply with such condition, the court may, if it finds that the failure by the accused was due to fault on his part, cancel the bail and declare the bail money forfeited to the State.
- (4) The proceedings and the evidence under this section shall be recorded.”

[15] Section 68(1) gives power to any court before which a charge is pending in respect of which bail has been granted to an accused to

cancel an accused's bail. This court may do, whether the accused has been released or not, upon information on oath that the accused has contravened his or her bail conditions (also in the interest of justice), issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.

[16] Section 68(2) authorises any Magistrate to, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection 68(1), upon the application of any peace officer and upon a written statement on oath by such officer that an accused has contravened his/her bail conditions, or in the interest of justice, to issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail (my emphasis).

[17] The differences between section 68(1) and section 68(2) are immediately apparent. Section 68(1) gives the power to any court before which the charge is pending while section 68(2) gives this power to any magistrate; section 68(1) requires information on oath whereas section 68(2) requires a peace officer to make a written statement on oath; Section 68(2) gives the power to the court before

which the proceedings are pending, to reinstate the bail whereas section 68(1) is silent on the reinstatement of an accused's

bail. The reason for the silence on the issue of the reinstatement of bail section 68(1) is obvious. In section 68(1) the accused who was arrested is brought before the court where the proceedings are pending.

[18] Section 68 therefore permits the immediate arrest of the accused if one or more of the jurisdictional requirements in section 68 are met and also the power to order an accused's further detention until the criminal proceedings have been concluded. Importantly, section 68(2) makes it clear that the court before whom the proceedings are pending, and not the court that orders the accused's further detention in terms of section 68(1), may reinstate an accused's bail.

[19] Section 68 provides for the cancellation of bail under certain circumstances including (as in this matter) if the accused has interfered or threatened or attempted to interfere with witnesses. It gives power to the court to cancel an accused's bail forthwith

and provides for the procedure to get the attendance of the accused at court. Section 68 therefore lays down the jurisdictional

facts

that must be present before an accused who is on bail may be arrested, upon what information he is arrested. and to summarily

cancel an accused's bail and to forfeit the bail money to the state or, reinstate the accused's bail if the accused was brought before court in terms of section 68(2). The fact that section 68(1) is silent on the reinstatement of an accused's bail must be understood in the context that the accused whose bail has been cancelled in terms of section 68(1) will then in any event appear before the court where his or her criminal proceedings is pending.

[20] The procedure whereby it is decided whether to confirm or set aside the accused's continued detention in terms of section 68

is provided for in section 66. Sections 66 and 68 therefore do not operate in tandem. The section 66 inquiry follows upon an arrest and appearance in terms of section 68.

[21] Orders open to an appeal in terms of section 65 are the refusal of bail and a challenge to a bail condition. Section 65 does not once refer to the cancellation of bail as a basis for a challenge on appeal.

[22] In the unreported judgment in D[...] v S[6] Mudau J said:

"[21] That the judgment and order of the Magistrate in terms of section 66(3) is not appealable and could only be challenged on review has been the subject of judicial consideration in a number of matters. In this division, in Pillay v Regional Magistrate, Pretoria, and Another, the full bench held that, a withdrawal of bail does not amount to 'refusal' of bail and the matter cannot therefore be brought under s 65 by way of such artificial reasoning.

[22] From the above judgments, it is clear that the weight of authority favours the view that the proceedings in terms of s 66 are only reviewable and not appealable." (Footnotes omitted)

[23] Inasmuch as Mudau J, in D[...] v S, differentiated between the procedures in sections 66, 67A and 68 and found that "The procedures referred to in sections 66, 67A and 68 of the CPA are distinct", the accessory relationship between sections 66 and 68 was not considered as I do in this judgment.

[24] In S v NKOSI EN ANDERE[7], Harms J, in respect of section 67, that provides for the cancellation of bail should an accused fail to appear at a hearing, said:

"Dit volg uit voorgaande dat ek van oordeel is dat 'n intrekking van borgtog en verbeurdverklaring van borggeld ingevolge art 67 nie 'n nuwe aansoek om borgtog ingevolge art 60 onontvanklik maak nie. Die feit dat die borgtog ingetrek is sal natuurlik 'n relevante feit wees wat in aanmerking geneem kan word by die oorweging van die nuwe aansoek om borgtog."

[25] In terms of section 67, bail is provisionally cancelled and bail money is provisionally forfeited to the state pending the accused satisfying the court that his or her failure to appear or to remain in attendance was not due to fault on his part. If an accused

does so, his or her bail is restored and he or she does not forfeit the bail money. If not, the accused's bail is finally cancelled and his or her bail money forfeited to the state.

[26] In my view there is no difference between section 66 and section 67 in respect of the cancellation of an accused's bail save for in section 67 the order may be provisional and in section 68, the order may become final after the accused had an opportunity

to be heard during the trial court's section 66 inquiry.

[27] As soon as a person is arrested and taken into custody, such person may apply to be released on bail in terms of section 59 or section

60. Section 60(1) provides that an accused is entitled to be released on bail at any stage preceding his or her conviction in respect of an offence, if the court is satisfied that the interests of justice so permit. If an accused's bail is cancelled in terms of section 66, he or she remains in custody. The accused is in no different position as a person who is under arrest. Therefore, he or she can once again apply for bail afresh.

[28] The appellant's reliance upon *PORITT v S* [8] does not assist for in *PORRITT*, the place and purpose of section 66 in the Act was not considered. Same applies to *S v NQUMASHE*[9], also relied upon by the appellant.

[29] I am mindful of *S v NQUMASHE*, where at 313B-E where it was found that:

"[13] Soos blyk uit die voorafgaande, kon ek geen gesag vind in die tyd tot my beskikking dat 'n bevel ingevolge art 68 van die Wet waarvolgens 'n laer Hof 'n beskuldigde se borgtog intrek wel appelleerbaar is nie. Ek is dit egter eens met beide mnr Robertson en me Van Dyk dat dit wel, anders as die mening voorgehou in Hiemstra, appelleerbaar is en verder dat sodanige reg van appèl outomaties is. Ek kom tot hierdie bevinding omrede:

13.1 Die intrekking van borgtog het, soos die weiering van borgtog, die effek dat 'n individu se vryheid van hom/haar ontnem word. Só beskou, behoort dieselfde gevestigde beginsels tog te geld by die oorweging van die intrekking van borgtog as wat sou geld by die weiering van borgtog. Sien *S v Kyriacou* (supra te 711b)."

[30] In *NQUMASHE*, the court did not refer to nor did it consider *S v NKOSI EN ANDERE* where it was found that the cancellation of bail does not exclude a fresh bail application, albeit that the cancellation of the accused's bail will be a consideration in such fresh bail application. In addition, the court in *NQUMASHE* considered the cancellation of bail in terms of section 68 of the Act and not a cancellation following a section 66 inquiry, as in the present matter. The court therefore considered section 68 as the final procedure to determine the accused's further detention whereas, as I have set out above, section 68 is the precursor to section 66 where the accused's further detention

or release is considered through a section 66 inquiry.

[31] I therefore find that no appeal lies against the cancellation of bail or the forfeiture of bail money in terms of section 56. An

accused's remedy under these circumstances lies in a new bail application or in a review of the decision to cancel the bail and/or to forfeit the bail money to the state.

[32] In the event that I am wrong in this regard, I proceed to deal with the merits of the appeal.

Merits of the appeal

[33] The appellant's grounds of appeal mainly challenge: the magistrates' finding that Mr Mabuza has contacted a state witness in circumstances where the identities of the state witnesses were not disclosed as part of the bail conditions; the state relied

upon evidence on affidavit whereas Mr Mabuza testified viva voce, consequently more weight had to be given to Mr Mabuza's

testimony which was open to a challenge under cross examination; the time delay between the phone call to the state witness and the application for Mr Mabuza's warrant of arrest; Mr Mabuza and the state witness had known each other for a long time and had regular contact prior to Mr Mabuza's arrest; and, the Magistrate has failed to consider the forfeiture of Mr Mabuza's

bail money as a separate issue.

[34] I find that the grounds of appeal are meritless.

[35] First of all, it was not disputed that the persons who were allegedly called by were indeed a state witnesses, one of which

was the complainant. This, coupled with the evidence of the content of the threat that the witness would be killed and his and other persons' homes. There would be no other plausible reason to call the witness and make the threats if Mr Mabuza had not known that the witness was a witness or a potential witness in the pending criminal proceedings. This is reinforced by the fact that Mr Mabuza also called and threatened the complainant in the criminal proceedings.

[36] Secondly, the state did not only rely on affidavit evidence of the witness and the complainant. The investigating officer and a colonel who works with the investigating officer and who is involved on an anti-gang unit testified viva voce. They interviewed the witness and the complainant. To the extent that the colonel's testimony over the calls and the threats may be hearsay, same is corroborated by the affidavits of the witness and the complainant.

[37] Thirdly, the mere fact that Mr Mabuza and the witness know each other rather confirms that Mr Mabuza exactly knew who the witness was and where and how to contact him.

[38] Lastly, in my view, the Magistrate had considered the issue of the forfeiture of the bail money as part of the section 66 inquiry.

[39] The appellant had to establish that the Magistrate was wrong[10] in cancelling his bail and forfeiting his bail money. This the appellant failed to establish. There is no reason for this court to interfere.

[40] In the premises, I made the following order:

The appeal is dismissed with costs.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 08 March 2024 DATE OF JUDGMENT: 13 March 2024

APPEARANCES

For the Appellant, Mr Du Plessis on instructions of Coert Jordaan Attorneys. For the state, Mr Shongwe.

[1] However, the evidence of the investigating officer who testified in the proceedings that are subject to this appeal that Mr Mabuza is charged with kidnapping and attempted murder.

[2] 51 of 1977. All sections referred to in this judgment are sections of this Act.

[3] Record at page 206 lines 1-3.

[4] Record page 206 lines 6 – 10.

[5] See the authority upon which the state relies in para. 20 below.

[6] (A53/2021) [2021] ZAGPJHC 71 (25 June 2021).

[7] 1987 (1) SA 581 (T) at 586A-B.

[8] (A202/2018) [2018] ZAGPJHC 698 (10 December 2018).

[9] 2001 (2) SACR 310 (NC).

[10] See section 66(4) which reads: “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.”

[10] See section 66(4) which reads:

“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.”

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