

SOUTH AFRICA / JUDGMENT

Mathibela v S (CC149/16) [2020] ZAGPPHC 243 (18 March 2020)

[2020] ZAGPPHC 243

COURT

North Gauteng High Court, Pretoria

BEFORE

BAM

CASE / FILE NUMBER

CC149/16

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: CC149/16

In the matter of

VUSI REGINALD MATHIBELA

Applicant

vs

THE STATE

Respondent

(In re: The State v VR MATHIBELA- BAIL CANCELLATION)

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

BAM, J

Appearances: For the Applicant : Adv JJ Hattingh SC.

For the State: Adv A Fourie.

1. The applicant is standing trial on several charges, including murder. The trial commenced in July 2017 and is presently partly heard before another judge, Masopa, J.

2. The applicant was granted bail of R50 000,00. On 20 June 2019, following upon an application by the State to cancel the applicant's bail due to the alleged violation of several bail conditions, I made the following final order:
 1. The respondent's bail is cancelled - the provisional order cancelling respondent ' s bail is confirmed and made final.
 2. The bail amount of R50 000 , 00 is forfeited to the State.
 3. Since the order was made the trial of the applicant was proceeded with and postponed from time to time. It will again proceed in July 2020.
 4. . When the application for the cancellation of the applicants bail was heard, the applicant was represented by a firm of attorneys, and in this court by senior and junior counsel.
 5. The applicant now firstly applies for condonation for his failure to lodge his application for leave to appeal timeously, after the expiration of more than 8 months.
 6. In his founding affidavit in support of his condonation application , the applicant lamented that he was incarcerated even before, and since the order cancelling his bail was made, and that he experienced a "sporadic decline in his financial resources."
 7. The applicant further remarked that his trial before Masopa J continued during 2019, and up to January 2020, and that it has now, as mentioned above, been postponed to July 2020. The applicant further stated that he "inevitably incurred further legal expenses with regards to the prosecution of my defence against the charges in the main trial."
 8. The applicant also stated that he had to appoint another attorney, his present attorney, Ms Hitge, due to the fact that his legal expenses "raised to an astronomical amount."
 9. The applicant proceeded to state that when his present attorney provided him with the estimated costs of this application , he had insufficient funds, and that it was only on or about December 2019 that he managed to raise sufficient funds.
 10. It is unfortunate that the applicant failed to address, and explain, whilst he was at all relevant times legally represented before this court, on several days, by an attorney and senior and junior counsel, and that he is legally represented at the trial before Masopa J, why he did not seek legal advice, and instruct his legal team, to lodge the application. Taking into account that the applicant was vigorously represented in this court by senior and junior counsel, and that his attorney even testified on his behalf, it is only reasonable to assume that the aspect of appeal was indeed discussed and decided upon .
 11. The applicant also failed to record when, in relation to the expiration of time, his present attorney, Ms Hitge, came on record.

12. In respect of the mentioned two aspects, Mr Hattingh, appearing for the applicant conceded that the applicant was obliged to address those aspects, but submitted that this court should take into consideration that the applicants prospects of success on appeal are good, and that the condonation and leave to appeal be granted.
13. Mr Fourie, appearing for the State, opposed both applications.
14. In respect of the merits, the prospects of success on appeal as envisaged by section 17 of the Superior Courts Act No. 10 of 2003, Mr Hattingh conceded that the test to be applied is whether the appeal would have a reasonable prospect of success.
15. Mr Hattingh submitted comprehensive heads of argument addressing condonation and the basis of the application as set out in the Notice of Appeal. Save to remark that Mr Hattingh emphasised several issues he regarded as more prominent than the rest, I do not deem it expedient to repeat his contentions apart from referring to the passport issue which was prominently material.
16. The relevant bail condition provided that the accused should hand over his passport to the investigating officer within 48 hours. According to Mr Makhabela, the applicant's attorney, the applicant's passport was given to the investigating officer in court. This was denied in evidence by the specific police officer. Subsequently the applicant, using the very same passport, travelled out of the RSA. Mr Makhabela testified that the specific policeman, before the applicant left the country, on his request returned the passport to the applicant. This was also denied by the policeman. However, the applicant did use his passport to leave the country, and when the applicant returned from his journey, he kept possession of the passport, and later locked it up in a safe deposit

box in a hotel in Johannesburg. It was common cause that the applicant left the passport there, where it was later, after his arrest, retrieved by the police. (In my judgment I address the issue that the specific policeman was probably in cahoots with the applicant.)

It was not in dispute that the bail condition that the passport should be handed to the police was never amended.

On behalf of the applicant, it was, however, contended, during the application, and in argument by Mr Hattingh, that the investigating

officer was entitled, of own volition, to return the passport to the applicant to use to travel out of the country. (This was also denied by the police officer when he testified.)

17. In this regard Mr Hattingh submitted that the bail condition that the applicant should surrender his passport to the police is vague and did not specify that the applicant may not leave the country. Mr Hattingh further contended that if the applicant travelling out of the country was indeed prohibited, the magistrate, imposing the bail condition should have included it in the said condition. I regarded this argument as fallacious. Logic dictates that

once a person is deprived from being in possession of his passport by way of a court order, in the form of a bail condition, it is impossible for that person to leave the country lawfully. A bail condition can only be amended by way of another court order.

18. In any event, Mr Hattingh was at loss to advance any explanation why and in what circumstances the passport ended up in the safe deposit box in a hotel room in Johannesburg , instead with the investigating officer. The accused, although he testified in the application, did not care to explain that. Mr Hattingh submitted that the applicant was arrested when he intended to travel to Dubai. This contention, however, made the applicant's situation even worse, because the passport was at the time of his arrest still in the safe deposit box at the hotel. The question arising is how did he intend to leave the country lawfully. Mr Hattingh was unable to explain the circumstances.
19. I have addressed all relevant aspects pertaining to the merits in my written judgment, to which I wish to refer.
20. In respect of a condonation application , it is trite that condonation is not just there for the asking. The applicant should be candid and honest in respect of the grounds upon which the application is based. I have already referred to the applicant's lack to address two very prominent issues, of which there was no explanation , or even argument. It is however incumbent on the court to consider whether there are indeed reasonable prospects that the appeal would succeed. See *S v Van Der Westhuizen* 2009(2) SACR 350 SCA, par [4].
21. After having heard argument I arrived at the conclusion that there is no reasonable prospect that the appeal would succeed.
22. The condonation application is dismissed.

AJ BAM

JUDGE OF THE HIGH COURT

18 March 2020

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