

SOUTH AFRICA / JUDGMENT

Mhlanga v S (56/2025) [2025] ZAMPMHC 3 (17 January 2025) [2025] ZAMPMHC 3

COURT

Middelburg High Court, Mpumalanga

BEFORE

Phahlamohlaka

CASE / FILE NUMBER

56/2025

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IN THE HIGH COURT OF
SOUTH AFRICA
MPUMALANGA DIVISION,
MIDDELBURG

CASE NO: 56/2025

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE 2025/01/17

SIGNATURE

In the matter between:

MHLANGA SBUSISO

JOSHUA

APPLICANT

and

THE

STATE

RESPONDENT

Delivered: This

judgment was handed down electronically by circulation to the parties' legal representatives by email. The

date and time of

hand-down is deemed to be at 14:00 on 17 January 2025.

JUDGMENT

Phahlamohlaka AJ

Introduction

[1] The applicant launched an urgent application in terms of Rule 6(12) of the Uniform Rules of Court seeking the relief in the following terms:

1.1 That in terms of Rule 6(12) of the Uniform Rules of Court, the usual forms and requirements pertaining to service and time periods are dispensed with and the matter is hereby treated, enrolled and heard as an urgent application.

1.2 That the court review and set aside the decision or order of the learned magistrate Kente, sitting magistrate in the district of Thembisile Hani, Kwa-Mhlanga under case B53/2024, on 23 July 2024, cancelling bail of the applicant as grossly irregular and invalid.

1.3 That the court review and set aside the decision or order of the learned magistrate Kente, sitting magistrate in the district of Thembisile Hani, Kwa-Mhlanga under case B53/ 2024, on 9 December 2024, rejecting bail application on new facts in favour of the applicant to be released after the cancellation of bail on 23 July 2024.

1.4 Consequent to the above order, the decision or order of the learned magistrate Kente, magistrate sitting in Magisterial district of Thembisile Hani, Kwa-Mhlanga under case number B53/ 2024, on the 23 of July 2024, forfeiting the applicant's bail amount of R12 000 to the state is hereby reviewed and set aside.

1.5 That the applicant bail in the amount of R12 000 is hereby reinstated forthwith.

1.6 That the police officials or state officials responsible for the applicants holding in the prison cells are hereby authorized and directed to release the applicant forthwith.

1.7 That the respondent be ordered to and directed to pay the cost of this application in the event of opposition.

1.8 Further and/ or alternative relief be granted to the applicant.

[2] The application is opposed.

Factual Background

[3] The applicant was arrested on 21 February 2024 on charges of murder, arson as well as possession of unlicensed firearm and ammunition. On 4 April 2024, the applicant was release on bail subject to certain conditions.

[4] On 23 July 2024, the applicant was rearrested, and his bail was revoked on the basis that he violated his bail conditions. On 22 November 2024, the applicant applied for bail on new facts and his application was dismissed on 9 December 2024.

[5] Aggrieved by the decision and order of the court a quo, the applicant approached this court on urgent basis for the relief set out in the notice of motion.

The Application

[6] The matter served before me as a review application to set aside the order of the court a quo on the basis that it is grossly irregular and invalid. At the commencement of the hearing I asked counsel for the applicant to clarify what is serving before me. Counsel responded by submitting that what is serving before this court is an appeal against the court a quo's order refusing to grant the applicant bail on new facts.

[7] I tried to ascertain if counsel for the applicant could distinguish between a review procedure and appeal procedure, but his argument left me none the wiser. Counsel submitted that I should regard the application before me as an appeal in terms of section 65 of the Criminal Procedure Act 51 of 1977("the CPA"), because it is an appeal that was brought on urgent basis. Bail proceedings are in their nature urgent and because they deal with deprivation of liberty of a person.

[8] The procedure to bring review applications is distinctively different from the appeal procedure.

[9] In the appeal, the high court will look at the application and the interpretation of the law to the facts, whereas reviews concern the procedures followed that could have led to failure of justice. A review in this context will therefore be against irregularities in the court a quo.

[10] From the heads of argument as well as the submissions made in court, it became clear that the applicant meant to appeal the decision of the court a quo in terms of section 65 of the CPA. However, it is inexplicable why the applicant approached this court by way of motion procedure. The explanation that was given by the applicant's counsel that the appeal was launched by way of motion procedure because it is urgent is not cogent to say the least.

[11] In *S v Khomo and Others*[1] the court held that:

"[15] ... High courts should not be burdened by unmeritorious matters which are not properly brought before them and judicial heads of courts in the magistrate's court should guard against disguised 'appeals' like this one. Any matter that is referred to the High Court on special review ought to be sent under the covering letter of the judicial head of court who would have satisfied himself/ herself that indeed the matter is one for special review. It cannot be correct that whenever a party is aggrieved by the magistrates' judgments then matters are forwarded to the high

court willy-nilly as it happened in this case."

- [12] Litigation in South Africa is very expensive and therefore litigants must get proper advice from the legal practitioners. I cannot say the applicant was properly advised in these proceedings. Both the attorney and counsel representing the applicant must be seriously reprimanded for badly advising the applicant.
- [13] The applicant's counsel concede that the applicant should not be left out of pocket as a result of wrongs of his legal representatives. I agree that this is a classical case where the legal representatives of the applicant should not be entitled to fees and if the applicant has paid those fees same must be refunded.

Urgency

- [14] The requirements for urgent applications are found in rule 6(12) of the Uniform Rules of Court. For the applicant to succeed in the urgent application, the applicant must fully satisfy the provisions of rule 6(12)(b), which provide as follows:

"In every affidavit filed in support of any application under paragraph

- (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."

- [15] In *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd*,^[2] the court held that:

"Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief."

- [16] Accordingly, an applicant seeking urgent redress from the court must make out a case for urgency in the founding affidavit. This aspect was well articulated in the case of *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*,^[3] where the court held as follows:

"The degree of relaxation should not be greater than the exigency of the case demands... Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

- [17] The applicant avers in the founding affidavit that the matter is urgent for the following reasons:

17.1 The decision to cancel his bail was taken on 23 July 2024 and on 24 July 2024, and the application for bail on new facts was refused on 9 December 2024.

17.2 The requisition for the transcripts of denial of bail hearing and judgment was done on 10 December 2024, immediately after the court declined the applicants bail application on new facts.

17.3 The transcript records were received on 18 December 2024, after few delays due to festive season holidays.

17.4 The applicant was advised that counsel was only available and able to review the records and comments with drafting of this application on 23 December 2024.

17.5 The applicant was further advised that the Superior Court will be on recess from 9 December 2024 to 19 January 2025, that was the cause of the slight delay in the matter being served before the court earlier.

17.6 The applicant was not dilatory in bringing the application because there have been a few predicaments that had to be sorted out first.

[18] The applicant further states that the application ought to be heard on an urgent basis because, since he has been arrested, his shop was burned and there has not been any source of income for him to feed his two minor children whom he was supporting with the assistance of his mother who passed away whilst he was arrested. Secondly, the applicant's bail was cancelled a month after he buried his biological mother, to whom he is the surviving son who must handle her estate because she had an estate as she was working as a councillor, serving as a chief whip at the Nkangala district municipality. Evidence was presented before the court a quo that the applicant's shop had been burnt long time ago.

[19] The applicant emphasizes that he has two minor children that he is providing for as their biological father, even though they reside with their mothers, he is the one taking care of their financial needs and his arrest and denial of bail prejudices the minor children. He further states that he has a medical procedure that he has to undertake, and he informed the court a quo during his bail application for bail on new facts. However, he did not disclose what kind of a medical procedure he has to undergo. The applicant failed to aver in his founding affidavit why he could not be afforded a substantial redress at a hearing in due course.

[20] What is confusing in this application is that on paragraph 38.5 of the founding affidavit, page 27 of the record, the applicant says "I have to say that my bail was cancelled without evidence, I respectfully demand an urgent bail appeal for the court to grant a decision that will be fair and just considering it adversely affects and infringes upon my constitutional rights, which includes but not limited to the following:

- (a) Right to liberty and freedom of movement.
- (b) Right to be arbitrarily deprived of freedom of movement.
- (c) Right to bail.
- (d) Right to dignity, security and privacy.
- (e) Freedom of speech."

- [21] According to the notice of motion as alluded to earlier, the application that is serving before me is a review application to set aside the court a quo's decision of cancelling the applicant's bail on 23 July 2024 is irregular and invalid. Further, the application is for the review and setting aside of the court a quo's decision of refusing bail on new facts against the applicant on 9 December 2024. However, according to the paragraph that I referred to earlier, the applicant is now appealing against the order of the court a quo.
- [22] In the heads of argument, counsel for the applicant submitted that "this is an application of an appeal in terms of section 65 of the Criminal Procedure Act 51 of 1977, which deals with the appeal of bail denied at lower courts."
- [23] Counsel for the applicant, however, correctly quotes the section which deals with appeals, and not review applications. Counsel must have been aware that the procedures for review applications and those of appeals are different and a litigant cannot cook both in one pot.
- [24] The applicant concedes that there was a delay in bringing the urgent application. The courts will not hear applications on urgent basis only because those applications are serving before the courts. An urgent court is like a fire extinguisher, and it deals with matters that truly need the urgent attention of the court. The delay, therefore, in bringing an urgent application must be explained by the applicant in order for the matter to be heard. The applicant in these proceedings attempted to explain the delay between 9 December 2024 when the application for bail on new facts was refused and the date on which this application was filed. However, what delayed the applicant from 23 July 2024 when his bail was cancelled is inexplicable.
- [25] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*,^[4] the court held as follows:
- "[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at the hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand, a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto."*
- [26] In his founding affidavit, the applicant has not averred why he is of the view that he will not be afforded a substantial retrial at a hearing in due course. In fact, the applicant according to the founding affidavit was rearrested in July of 2024. He avers that the court a quo applied a wrong section when his bail was cancelled. Instead, the applicant applied for bail on new facts. The decision and order dismissing his application for bail on new facts was made on 9 December 2024. Aggrieved by the order of 9 December 2024, the applicant launched the current application for reviewing and setting aside of the court a quo's decision. But what is concerning is that the applicant is complaining about the decision of the court a quo dated 23 July 2024.

[27] Surely the applicant could not explain why he waited for more than six months to launch the current application on an urgent basis. This is no more than an abuse of the court processes and the court must register its displeasure. Therefore, the applicant, in my view, has failed to satisfy the requirements of rule 6(12)(b).

Conclusion

[28] The applicant burdened the urgent court with a matter that does not belong to this court. This behaviour must be frowned upon and discouraged. Consequently, the application stands to be struck off the roll for lack of urgency and for following the wrong procedure.

[29] This brings me to the issue of costs. It is an accepted principle of our law that costs should follow the successful party. However, in these proceedings, the respondent has not asked for costs. I am particularly concerned as to why the applicant should be burdened with costs as a result of his legal representatives failing him. I cannot find any reason why both the attorney and counsel that represented the applicant should be paid by the applicant. The Respondent has not asked for costs and therefore I will not make a costs order in its favour.

Order

[30] In the result, I make the following order:

30.1. The matter is struck off the roll for lack of urgency;

30.2. No order as to costs;

30.3. The applicant's attorney and counsel shall not recover any fees from the applicant, and if the applicant has already paid the fees same shall be refunded.

KF PHAHLAMOHLAKA

ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicants: Adv B W M W Maila Instructed by: Mahoko DC Attorneys Inc. Email: legal@rebirthlegal.co.za For the Respondent: Adv L T M Motheogane Director of Public Prosecutions Mpumalanga, Middelburg Email: Lmotheogane1@npa.gov.za Date judgment reserved: 16 January 2025 Date judgment delivered: 17 January 2025

[1] [2023] ZAFSHC 385 ; 2024 (1) SACR 73 (FB) para 15.

[2]

[2006] ZASCA 51; 2006

(4) SA 292 (SCA) para 9.

[3] 1977

(4) SA 135 (W) at 137F.

[4] [2011] ZAGPJHC 196 para 8.

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