

SOUTH AFRICA / JUDGMENT

Mhlongo v S (A54/2019) [2020] ZAMPMHC 6 (20 May 2020) [2020] ZAMPMHC 6

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

A54/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION MIDDELBURG (LOCAL SEAT)

CASE

NO: A54/2019

BEFORE

THE HONOURABLE JUSTICE: BRAUCKMANN AJ

DATE:

20 MAY 2020

In

the matter between:

ABRAM

THEMBA

MHLONGO APPELLANT

AND

THE

STATE

RESPONDENT

JUDGMENT

- [1] This is a bail appeal where the appellant noted and appeal in a 2017 already. For some reason unbeknown to the court this appeal was never prosecuted or enrolled. The matter was case managed in terms of a judicial pre-trial that served before me on 24 October 2019 where 5 June 2020 was allocated as date for hearing and different dates were determined and so directed for heads of argument to be filed.
- [2] After the matter was allocated, and upon perusal of the file, it became apparent that it was not an ordinary appeal but a bail appeal which should have been dealt with by the court in a 2017 already. It is clear that an injustice was done by not enrolling at this matter earlier. The court asked itself why the appellant's own attorneys, the Legal Aid South Africa, did not realise that they forsake their own client by not urgent enrolling the matter. Bail appeals are inherently urgent, and attorneys launching such appeals should insist that the matters be heard as soon as possible as the appellant's liberty is involved.
- [3] The accused ("Mr Mhlongo") is charged with housebreaking with the intent to steal and theft in that on or about 18 December 2016 he unlawfully and intentionally and with the intent to steal break open and enter the house of a Betty Masango and did there steal property that was the lawful property of Masango to the value of R 60000.00. Mr Mhlongo was one of three accused that appeared in the Belfast Magistrates Court, and only he applied for bail.
- [4] The crime that Mr Mhlongo is accused resorts under schedule 1 of the Criminal Procedure Act ("The CPA")[1]. The state bears the onus to prove that it will not be in the interest of Justice to release the accused on bail. On behalf of the state the prosecutor read into the record, and handed up an "affidavit" by the investigating officer ("The IO"), Constable Sindane. The affidavit by the IO was the only evidence tendered by the state.
- [5] The IO stated that the crime of which the accused is charged is a schedule 1 crime of being in possession of items that was presumably stolen. This is an obvious error by the IO, and as will later appear, the prosecutor who inadvertently drafted the statement. He further stated that Mr Mhlongo has a previous conviction of a rape and was serving a 12-year jail sentence at the time of the bail hearing.
- [6] Mr Mhlongo was sentenced to 12 year imprisonment after being found guilty of rape. He was released on parole but due to his arrest on the current charge he was re-arrested and his parole was revoked. He is currently still serving the balance of his sentence, and will only be released in 2022. The IO stated that they found items in Mr Mhlongo's possession which were identified by the complainant as her property. The IO stated that the state has a good and strong case against the accused in the matter.

- [7] The affidavit by the IO was drafted on a letterhead of the National Prosecuting Authority of South Africa (“The NPA”), signed by the IO and the commissioner of oaths was Shirley Manzini. She is a public prosecutor employed by the NPA. According to the transcript she was also the prosecutor that appeared on behalf of the state in the bail application on 20 February 2017.
- [8] The prosecutor read the “affidavit” into the record and handed it in as Exhibit A. The affidavit was commissioned on a 20 February 2017. A report by Correctional services was also handed in as Exhibit B. In terms of the report the accused was ordered to serve the balance of his sentence of 12 years, the reason being that the accused committed a crime while on parole. The crime he allegedly committed, and that resulted in his parole being revoked is the current crime that he was charged with. Needless to say, the alleged crime has not been proven at all and there was no trial in respect of the charges against the accused.
- [9] Mr Mhlongo’s attorney called him to the witness stand to testify in his own application for bail. He confirmed that he had indeed been released on parole and because of his arrest in this matter his parole was revoked. He testified that he is 35 years old, do not have children and was employed on the farm Elandsfontein at the time of his arrest. He earned a salary of R 1200.00 per month and was residing with his brother on the farm where he was employed. He believed that the employer would keep his employment for him despite the lapse of some time since his arrest.
- [10] He further testified that he used his salary to buy food and cosmetic for himself. Mr Mhlongo was questioned by the prosecutor, and the Magistrate about his a previous conviction and sentence. He testified that he spent six years in prison before he was released on parole. He was arrested 29 September 2016 and as a result his parole was revoked. He testified that the only pending case against them is the one that he appeared for the application for bail, and that he did not know any of the witnesses in the case. He could therefore not interfere with or intimidate the witnesses. Mr Mhlongo does not have a passport and was healthy. He would be able to pay an amount of R 1000.00 bail if the court set bail and his brother would assist him in obtaining the amount. Under cross examination the prosecutor mainly concentrated on the accused employment and the loss thereof due to the fact that he was arrested in September already, and remained in custody.
- [11] Mr Mhlongo testified that if he was granted bail his parole would be reinstated. It was put to him that he is not a suitable candidate for bail because there is a possibility that he may commit another schedule 1 offence while outside. He denied having committed any offence.
- [12] The Magistrate then questioned the appellant about his parole. On a question whether he was aware of the fact that if he committed a crime whilst on parole, he would be re-arrested and would then have to serve the balance of his sentence for rape. Mr Mhlongo acknowledged that he was aware thereof.

[13] Both representatives addressed the court. Mr Mhlongo's attorney, Me Hlololo, argued that the affidavit did not constitute an affidavit as it was commissioned before a prosecutor, and more specifically the prosecutor in the case on the day of the bail

hearing. According to Me Hlololo the prosecutor had an interest in the matter and could therefore, in terms of the JUSTICES OF THE PEACE AND COMMISSIONERS OF OATHS ACT ("The Act") and regulations regulating commissioners of oaths, not have commissioned the affidavit by the IO[2]. Accordingly, so goes her argument, there was no affidavit before court and only a statement which had no evidentiary value. The only evidence before the court a quo, according to Me Hlololo, was that of Mr Mhlongo and on that evidence bail must be granted by the court as the state who bore the onus failed to acquit the onus.

[14] The court a quo, in its ruling correctly stated that the accused was charged with housebreaking with the intent to steal and theft, and not of possession of stolen property as incorrectly reflected in the IO's statement. He incorrectly found that the bail application was brought in terms of section 60 (11) of the CPA[3] in terms whereof an applicant have to satisfy the court that it is in the interest of Justice that he be released on bail. Ordinarily in schedule 1 offences applicants ought to be released on bail unless the state advised the court that they are opposed to that applicants bail.

[15] If the state is opposed to bail it has to adduce evidence which satisfies the court that it is not in their interest to release the accused on bail. Against that background the court was of the view that the bail application was actually brought in terms of section 60

(1) of the CPA[4]. The state has the duty to begin and advance reasons why it is opposing the bail application by the applicant. The court found that the state relied on the affidavit by the IO and the report from the Department of correctional services indicating that the applicant has violated his parole conditions by committing this offence while he was on parole.

[16] Neither the court a quo nor this court has to decide on the legality of the release of the appellant on parole or the revocation thereof. That is for the

Department of Correctional Services to decide in terms of the legislation regulating parole. The court a quo correctly found that the statement by the IO is not an affidavit. It did not comply with the legal requirements laid down in the Act and regulations. In *Absa Ltd v Botha and Others*[5] the court was called on to deal with the compliance of with the act. Although in a different context, the court in *Botha* was also called upon to decide whether a document that purported to be an affidavit was indeed an affidavit and whether it complied with the requirements of the act. In paragraph 10 of the judgment the following was stated, and I find it very helpful in this regard:

"Thus if the deponent is a female the Commissioner of Oaths would be required to use the pronoun she and if the deponent is male the Commissioner of Oaths would be required to use the pronoun he."

In a case such as this where the Commissioner of Oaths certifies that the deponent has acknowledged that he knows and understands the contents of the declaration but from the declaration itself it is apparent that the deponent is a female because she declares as much then

the court would be unable to place reliance on the certification of the Commissioner of Oaths because ex facie the affidavit it would be unknown whether the deponent is male or female hence the court would be unable to give effect to the presumption of regularity for purposes of assuming that the declaration was sworn to or affirmed and signed in the presence of the Commissioner of Oaths.”

In the end the court in Botha found that the document relied upon, as an affidavit, did not constitute an affidavit and dismissed the application for summary judgement.

- [17] In this matter the prosecutor acted as the commissioner of oaths. The act and its regulations regulates how an oath should be taken and what the requirements of an oath is. In terms of regulation 7 (1) a commissioner of oaths shall not administer and oath or affirmation relating to a matter in which he/she has interest. The only exception to this regulation is an attorney who is required to commission documents for the purposes of obtaining registration in a deeds office.
- [18] The court then, for some reason proceeded to refuse bail to Mr Mhlongo despite the fact that the state presented no evidence at all. Only oral argument was presented by the prosecutor, but that does not constitute evidence. The court could never, in the light of the evidence by the appellant, have a refused bail. The evidence by Mr Mhlongo was not seriously attacked during cross examination and the only version before the court a quo was his undisputed version.
- [19] Mr Mhlongo denied that he was involved in the crime and stated that he would attend court as he did with his previous rape trial. Although his address was allegedly not confirmed by the IO, the allegation was not contained in an affidavit before the court a quo, and there was no admissible evidence contradicting his version of his address. The only information and evidence that the court a quo had before it was that of Mr Mhlongo. His version was not attacked by the state and the only aspect that was seriously disputed was whether the accused employment was still available should he be released on bail.
- [20] Whether Mr Mhlongo was re-arrested for the alleged breach of his parole conditions was irrelevant to the bail application. The court a quo incorrectly found that there was a likelihood that if the appellant was granted bail he would commit a schedule one offence because he had a previous conviction of rape “which falls in schedule 1”. Rape does not fall within schedule one but is a schedule 5 offence[6].
- [21] The court a quo found , without providing any reason for its finding, that Mr Mhlongo’s the employer is unlikely to take him back in his employ. There was no evidence tendered before the court that Mr Mhlongo’s employment was terminated at all. The court a quo therefore erred in its finding as it was not based on any factual evidence before him. The fact that Mr Mhlongo was on parole also is of no moment. The court then made the following finding:

“If he is granted bail there is nothing that would prevent him from committing other offences”.

[22] The Magistrate, by making this finding, erroneously made the inference that the appellant was guilty of the offence that he was charged with. The appellant was not found guilty of any offence and the purpose of the application for bail is also not to try an applicant for the alleged offence. The court a quo's error appears from the record where it stated:

"Whether it is in possession of suspected stolen property or housebreaking with the intent to steal and theft he committed and offence will he was on parole". [Own emphasis] None of the factors listed in section 60 (4) (a) to (e)[7] of the CPA were present

[23] It is trite that this court may not set aside the decision of the court a quo unless this court is satisfied that the decision was wrong. Section 65 (4) of the CPA stipulates the requirements for setting aside any ruling on bail. The section reads as follows:

"The court or judge hearing the appeal shall not set aside the decision against which an appeal is brought unless such court or judge is satisfied that the decision was wrong, in which event the court shall give the decision which in its or his opinion the lower court should have given."

[24] A court hearing an application for bail will always grant bail unless it is clear that the interest of justice will be prejudiced by an order of granting bail[8]. As stated earlier there is no evidence tendered by the state that justified the conclusion and findings by the magistrate. The only evidence before the court was the evidence by Mr Mhlongo. The evidence was sufficient to rebut the oral argument by the prosecutor

on behalf of the State.

[25] The magistrate therefore erred in various respects. There was no evidence before him that a likelihood existed that Mr Mhlongo would commit any offence if released on bail. The fact that he was serving the balance of his sentence of 12 years for rape should not have played a role in his adjudication. This court can therefore come to no other conclusion that the decision by the magistrate was clearly wrong and must therefore be set aside and replaced with the following:

[26] The appeal against the refusal of release on bail of the appellant ("Abraham Themba Mhlongo") is hereby upheld.

[27] The refusal of his release on bail is hereby set aside and substituted as follows:

[27.1] Abraham Themba Mhlongo ("Mr Mhlongo") is hereby granted bail on the following conditions:

[27.1.1] That Mr Mhlongo pay an amount of R 3 000.00 cash as bail money;

[27.1.2] That Mr Mhlongo shall be released upon payment of the amount in [27.1.1] hereof and that he shall reside at the Farm Elandsfontein; and

[27.1.3] Mr Mhlongo will only be allowed to change his residential addresses in exceptional circumstances, with the prior approval of the investigating officer. Such request from Mr Mhlongo shall be in writing and the investigating officer's reply thereto shall also be in writing and must be retained in the case-docket.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

(Judgment sent electronically to the parties due to Covid-19)

HEARD AND DELIVERED ON 20 MAY 2020.

[1] Act 51 of 1977

[2] Act no 16 OF 1963 regulation 7 (1).

[3]"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to— (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release; (b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release." [4]60. Bail application of accused in court.—(1)(a) 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.

[3]"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—

- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
- (b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release."

[4]60. Bail application of accused in court.—(1)(a) 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.

[5] 2013 (5) SA 563 (GNP)

[6]“ SCHEDULE 5(Sections 58 and 60 (11) and (11A) and Schedule 6) [Schedule 5 added by s. 14 of Act No. 75 of 1995, substituted by s. 9 of Act No. 85 of 1997, amended by s. 36 (1) of Act No. 12 of 2004 and by s. 27 (1) of Act No. 33 of 2004, substituted by s. 68 of Act No. 32 of 2007, amended by s. 48 of Act No. 7 of 2013, by s. 4 of Act No. 18 of 2015 and by s. 12 of Act No. 8 of 2017.] Wording of Sections Treason. Murder. Attempted murder involving the infliction of grievous bodily harm. Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Schedule 6.” [7] “Section 60 (4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds

are established:

[6]“ SCHEDULE 5(Sections 58 and 60 (11) and (11A) and Schedule 6)

[Schedule 5 added by s. 14 of Act No. 75 of 1995, substituted by s. 9 of Act No. 85 of 1997, amended by s. 36 (1) of Act No. 12 of 2004 and by s. 27 (1) of Act No. 33 of 2004, substituted by s. 68 of Act No. 32 of 2007, amended by s. 48 of Act No. 7 of 2013, by s. 4 of Act No. 18 of 2015 and by s. 12 of Act No. 8 of 2017.]

Wording of Sections

Treason.

Murder.

Attempted murder involving the infliction of grievous bodily harm.

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Schedule 6.”

[7] “Section 60 (4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds

are established:

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to

conceal or destroy evidence; or (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;” 8 S v Smith 1969 (4) SA175 (N) at 177 E-F

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence;
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;”

8 S v Smith 1969 (4) SA175 (N) at 177 E-F

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