

SOUTH AFRICA / JUDGMENT

Mkhatshwa v S (A112/21) [2021] ZAGPPHC 354 (27 May 2021) [2021] ZAGPPHC 354

COURT

North Gauteng High Court, Pretoria

BEFORE

Msibi

CASE / FILE NUMBER

A112/21

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NO: A112/21

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

REVISED

27 MAY 2021

In the matter between:

JULY

EMMANUEL

MKHATSHWA

Appellant

and

THE

STATE

Respondent

JUDGMENT

MSIBI, AJ:

- (1) The appellant launched an initial bail application in the Tshwane South district Court (the Court a quo) on 20 December 2019. The application was refused by the Magistrate.
- (2) Subsequent to such refusal, the appellant lodged an appeal to this Court against the order of the Court a quo. The said appeal was dismissed by the Honourable Madam Justice Mngqibisi-Thusi on 9 April 2020.
- (3) On 17 February 2021, appellant brought a second bail application before the Magistrate on what he perceived to be new facts. The court a quo found that he had failed to show the existence of new facts with the result being that the initial decision remained in force.
- (4) The appellant before me is appealing against the Magistrate's decision that was handed down on 17 February 2021, dismissing his bail application on new facts. Advocate Pistorius who appeared on behalf of the appellant challenged the decision of the Magistrate while Advocate Marriot, who appeared on behalf of the respondent, opposed the appeal.
- (5) The background of this appeal is as follows: The appellant and others were charged with robbery with aggravating circumstances, the aggravating factor being the use of firearms. The investigating officer Captain Muller, stated in her affidavit that on 28 October 2019, employees of the Fidelity Cash Solutions were accosted by a group of 10 armed men while they were busy replenishing a Capitec Bank ATM at Batho Plaza Shopping Centre in Soshanguve.
- (6) Cash amount R580 000.00 was taken during the robbery. From reliable information received, Mr Leotlela who was employed by Fidelity Cash Solutions and part of the Fidelity crew that were replenishing cash in the ATM; was involved in the robbery. After his arrest he made a confession, which led to the arrest of the appellant. The getaway vehicle that was used during the robbery was found within the residential premises of the appellant. It was confiscated by the police. The appellant thereafter made a pointing out which was challenged by his attorney, Mr Mapekula, as having been obtained after he was assaulted by police. It is common cause that the charge falls within the ambit of s 60 (a) read with Schedule 6 of the Criminal Procedure Act 51 of 1977 (the CPA).
- (7) The appellant had to discharge the onus of exceptional circumstances,

which in the interest of justice would have permitted his release on bail. The Magistrate was not convinced that the appellant had succeeded in proving the existence of exceptional circumstances justifying his release on bail. She dismissed his application.

NEW FACTS BEFORE THE MAGISTRATE

- (8) During the appellant's second application for bail on new facts at page 165 of the paginated file, the appellant stated that he had contracted asthma while in custody and was not receiving proper

medical care.

- (9) He suffers prejudice due to non-completion of investigations or delays in setting the matter for trial, which was aggravated by the addition of more accused persons in the criminal case against him.
- (10) The SAP 69 records show that he has no previous records.
- (11) He is suffering financially since he can no longer generate the income that he used to make from selling clothes with his wife. His wife's application for social grants for their children is still pending.
- (12) In response to these facts the prosecutor responded as follows: "Your worship I did get in touch with the arresting officer, basically what she had explained was that after bail was denied, investigations were finalised. The matter was transferred to the Regional court and disclosure was provided to the defence attorney: However, there were outstanding suspects who were eventually arrested and added to the charge. Hence further investigations were required being the 205 cell phone records, completed cell phone mapping and ballistic reports. Most of these investigations are because of the two added accused persons your worship".
- (13) The prosecutor further added that Covid 19 has had a negative impact on the investigations, causing delays that were out of the ordinary. The magistrate considered these facts and found that the facts brought before her were not new facts and did not prove the existence of exceptional circumstances. The application on new facts was, on that basis, dismissed.
- (14) I shall now consider all proceedings in deciding upon the success of this appeal. Section 65(f) of the CPA provides as follows:
- "The court or Judge hearing the appeal shall not set aside the decision against which 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 opinion the lower court should have given".*
- (15) In the appellant's grounds of appeal on new facts, it was stated that the Magistrate misdirected herself in holding that bail on new facts as well as exceptional circumstances were not established in terms of section 60 (11) (a) of the CPA.

- (16) It was further stated that the learned Magistrate misdirected herself and erred by stating that appellant said that he had contracted tuberculosis and sugar diabetes in prison; whereas there is no evidence on record where the appellant made such an allegation.
- (17) Further that the learned Magistrate erred and misdirected herself in not considering the newly submitted SAP 69 record, which proves that he has no previous convictions. It is contended, on that basis, that he has not misled the court in terms of Section 60(11)(b) of the Act. It was argued that that constituted a new fact.
- (18) Further that the learned Magistrate erred by holding that the appellant could not rely on the ground of unreasonable delay in the finalisation of investigations whereas it was clearly a new fact.
- (19) It was further submitted by counsel on behalf of the appellant that pre-trial proceedings cannot be instituted in the Regional Court due to non-completion of investigations. Counsel submitted that there was an outstanding J88 in respect of the appellant which was not disclosed by the state (respondent). Further, that despite the court's finding that he was not a flight risk, he was injured by police upon his arrest, the court erred in finding that he should remain in custody while awaiting the finalisation of the case against him.
- (20) During the bail appeal proceedings, I was referred an affidavit by the appellant at page 134 of the paginated record, at para 29 where he states that he was arrested in this matter after he was implicated by a detainee Papa Piet Motsepe. The matter against Mr Motsepe was never placed on the roll (p 135 para 30).
- (21) It was further argued by counsel on behalf of the appellant that the court of appeal should consider all facts cumulatively to establish the presence of new facts that will prove exceptional circumstances justifying the appellant's release on bail.
- (22) In response to the appellant's submissions, counsel for the respondent argued that the only fact that is new is the appellant's SAP 69 record, which shows that he has no previous convictions. In regard to appellant's request for a J88 from the state in the court a quo, counsel submitted that she made a follow up with investigating officer who informed her that there is no J88 that was compiled or obtained in respect of the appellant. Further adding that appellant has always been at liberty to be examined by a doctor of his choice and have a J88 be issued by that doctor. Regarding the non-completion

of the state's investigations and additional accused, who have since been arrested and necessitated investigations and disclosure;

counsel for the respondent submitted that those are not new facts but facts that were raised during the initials bail application and were dealt with by the court of the first instance and on appeal. Based on these facts, the appeal on new facts should be dismissed.

- (23) Van Zyl J in S v Petersen 2008(2) SACR 355 (c) paras [57] & [58] remarked as follows:

“[57] When, as in the present case, the accused relies on new facts which came to the fore since the past, or previous bail application the court must be satisfied that such facts were indeed new and secondly, that they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. See S v De Villiers 1996(2) SACR T.

The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence.

[58] where the evidence was available to the applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence. See *Le Roux 1995 (2) SACR 613 (W)* at 622A-B. If the evidence is adjudicated to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in the previous application. See *S v Vermaak 1996(1) SACR 528 T*.

Comrie AJA held in *S v Van Wyk 2005 (1) SACR* at 42B-D that “the function of the court on a bail application is to prima facie determine the relative strength of the state’s case and not to make a finding of guilt or innocence.

In so far as an accused person does not receive proper medical attention while on detention, he or she is entitled to other legal remedies at her disposal and, in general bail is not the remedy for the actions and omissions of the prison authorities. What remains important is in fact that the restrictions of his or her personal detention and attendance of the trial are not ideal for a person. in a weak physical condition. Naturally, the interference with his or her personal freedom is an important factor which must be given much weight when deciding on the interest of justice, but the medical condition of the accused must be weighed against other factors and must not be considered in isolation.”

(24) Section 12 (1)(a) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), guarantees everyone’s right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause. The Constitution does not create an absolute right to personal freedom. Liberty is qualified and circumscribed by Section 35(1)(f) which reads as follows:

“Everyone who is arrested for allegedly committing an offence has the rightto be released from detention if the interests of justice permit, subject to reasonable conditions”.

(25) The issue to be decided is whether the appellant has shown or proved the existence of new facts, which in the interest of justice, would justify his release on bail.

(26) I am inclined to agree with counsel for the respondent that the arrest of additional accused is not a new fact which has now delayed pre-trial proceedings and trial readiness.

(27) This is a development in this matter which was disclosed by the investigating officer in the initial bail application. Under cross examination by the appellant’s attorney at page 43 of the paginated record, the investigation officer conceded that section 205 cell phone records, SAP 69 were still outstanding. In her affidavit at page 30, the investigating officer stated that the

suspects who executed the robbery were 10(ten) in number. The applicants in the initial bail application were 2(two). The appellant was not caught by surprise when the state arrested and added more accused persons.

- (28) The SAP 69 records submitted in the subsequent bail application on new facts show that the appellant has no previous convictions. From the record of proceedings in respect of the initial bail application, Captain Shuveri testified under oath that she found information from case dockets at Loate and Laudium police stations that appellant had been convicted in certain cases, namely, house robbery. convicted on 23 October 2008. He was sentenced to 15years imprisonment. The second conviction being one of driving a motor vehicle without a driver's license in 2009. He paid an admission of guilt fine of R1000.
- (29) She further stated that in addition to these previous convictions there are five cases of possession of unlicensed firearms that were not placed on the roll. She further testified that he had been discharged on charges of business robbery house robbery, and car hijacking. Her evidence was not disputed. What the appellant did in response to the evidence was to submit SAP 69 records that do not reflect previous convictions.
- (30) After a careful consideration of the bail record, my only reasonable inference is that the SAP 69 records were not updated by the South African Police Services.
- (31) It was conceded by counsel for the respondent that when the Magistrate referred to tuberculosis and diabetes as appellant's medical conditions, it was a human error. According to the submission by counsel for the appellant, this is indicative of the fact that the Magistrate did not apply her mind to the appellant's medical condition of asthma, which is one of the comorbidities that might compromise his health.
- (32) What is of note is that the learned Magistrate referred to case law. wherein an appellant's HIV positive status was found to be common place, and not unusual, thus not warranting his release as a new fact or in the interest of justice. The dictum in *S v Van Wyk* supra finds application. I am satisfied that the Learned Magistrate applied her mind to the medical condition of the appellant. There are other legal remedies at the appellant's disposal to secure proper medical attention while in custody.
- (33) Counsel for the appellant further submitted that appellant was implicated through a pointing out which was unconstitutionally obtained, in that it was recorded in the pointing out notes that he had injuries. This is one of the issues that were brought to the attention of the Magistrate in the initial bail application and considered on appeal thereafter. The function of the court in a bail application is to determine the strength of the state's case not to make a finding of guilt or innocence *S v Van Wyk* (supra)
- (34) The investigating officer in her affidavit at page 35 of the bail record indicated that upon his arrest, the first accused person, Mr Abraham Lokela implicated himself and other suspects in this matter. She never mentioned Mr Motsepe in her affidavit nor during cross examination by appellant's attorney. Her version in this regard was never disputed.

- (35) As stated by Van Zyl J in *S v Peterson* supra the purpose of adducing new facts is not to address problems encountered in the previous application or to fill in gaps in the previously presented evidence. The evidence presented by the appellant at the first bail application is important for purposes of determining whether the evidence presented at the new application constituted new facts.
- (36) I am not satisfied that the facts raised by the appellant are new. I am also not persuaded that the Magistrate's decision dated on 17 February 2021 is wrong.
- (37) In the result I make the following order;

The appeal is dismissed.

M J MSIBI

ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPELLANT: ADVOCATE P PRETORIUS

INSTRUCTED BY MAPEKULA ATTORNEYS

ON BEHALF OF THE RESPONDENT: ADVOCATE M MARRIOT

INSTRUCTED BY THE DIRECTOR OF PUBLIC PROSECUTIONS

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