

SOUTH AFRICA / JUDGMENT

Modise v S (A13/2021) [2021] ZAFSHC 46; 2021 (2) SACR 218 (FB) (22 February 2021)

[2021] ZAFSHC 46

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman, J

CASE / FILE NUMBER

A13/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE PROVINCIAL DIVISION

Case

No.: A13/2021

In

the matter between:

MOLEFI
MODISE
Appellant
and
THE
STATE
Respondent

Coram:

Opperman,
J

Date

of hearing: 16

February 2021. The appeal was adjudicated on the Heads of Argument on application by the parties and with authorization of the Court.[1]

Delivered:

The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 22 February 2021. The date and time for hand-down is deemed to be 22 February 2021 at 15h00.

Summary:	Appeal – bail application on new facts and delayed – dismissing of appeal because success will have no practical benefit for appellant - formal ruling on onus[2] afore the bail hearing ORDER Having considered the documents filed on record for the Appellant and the
Respondent:	IT
IS ORDERED THAT:	The appeal is dismissed.

JUDGMENT

[1] This is an appeal on new facts that have become moot in the hands of the Appellant. It took him seven months to bring the appeal. On 5 February 2021 the matter served before me as an urgent application.

Counsel for both parties requested to file Heads of Argument and agreed it to be filed on 9 February 2021 and 16 February 2021. They also applied for the matter to be disposed of in terms of section 19(a) of the Superior Courts Act 10 of 2013 in that it be determined on the said Heads of Argument.

[2] The calamity is that events in the case and in life overtook the appeal. The grounds for the bail on new facts relied on by the Appellant were:

1. The delay in the finalization of the investigation;
2. the poor conditions, over-crowding and impact thereof on Covid-19 infections in prison; and
3. the inability or refusal of the prison authorities to grant the Appellant access to a psychologist.

[3] It is now common cause that the Appellant together with his co-accused; he is accused one of seven, will go on trial in May 2021 in the High Court on the charges mentioned hereunder and that the Covid-19 epidemic has altered in intensity and nature. An order of a court to avail the Appellant with psychiatric services can cure the

third ground for appeal immediately. The charges are:

1. Attempted Robbery with Aggravating Circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977;
2. Attempted Murder;
3. Murder read with the provisions of section 51(1) and Part 1 of Schedule 3 of Act 105 of 1997;

4. Murder read with the provisions of section 51(1) and Part 1 of Schedule 3 of Act 105 of 1997;
 5. Murder read with the provisions of section 51(1) and Part 1 of Schedule 3 of Act 105 of 1997;
 6. Contravention of section 3 of the Firearms Control Act 60 of 2000 read with section 51(2) and Schedule 2 Part III of Act 105 of 1997: The possession of a semi-automatic firearm without a licence;
 7. Contravention of section 90 of the Firearms Control Act 60 of 2000: The possession of unlicensed ammunition;
 8. Contravention of section 1(f)(iv) of the Firearms Control Act 60 of 2000: The possession of a prohibited firearm;
 9. Contravention of section 90 of the Firearms Control Act 60 of 2000: The possession of unlicensed ammunition.
- [4] The decision was taken by the Director of Public Prosecutions on 11 December 2020.
- [5] Imperative is the history that led to this Appeal. The Appellant was arrested on 12 June 2019 and charged with conspiracy to commit robbery, possession of a prohibited firearm (fully automatic firearm), illegal possession of another firearm and, of course, the ammunition that goes with it. He launched his first bail application on 18 July 2019 and it was dismissed on 30 August 2019. The bail application was adjudicated under Schedule 5 and his personal profile, factors in his favour and his account on the merits were duly placed on record when he testified.
- [6] On 26 June 2020 the Appellant endeavoured further to secure his release on bail based on new facts and which was turned down on 2 July 2020. This is now the case that lies on appeal; seven months later and with much of the proverbial water that had run into the sea since. The Appellant will have to take responsibility for the consequences in the delay in the filing of the Appeal. That said it remains inappropriate for a bail court to ignore extensive delays in finalising the prosecution of a trial. (*S v Mququ* 2019 (2) SACR 207 (ECG) at [16]). The Appeal Court cannot, however, ignore the later developments. In *S v Ramokhosi* 1999 (1) SACR 497 (SCA)[3] it was held that the mootness; the fact that the outcome will have no effect or practical relevance on the application might become a ground for the dismissal of the appeal.
- [7] It goes without saying that Schedule 6 will be applicable if the above charges are regarded. The Court on Appeal cannot ignore the fact that the indictment that was handed in much later in the proceedings characterizes the Appellant as nothing but an alleged contract murderer with the blood of many on his hands. It creates a conundrum on appeal that demands a renewed bail application a quo that will vent the factors regarded in the original bail application and the now formally and publicly released information.

- [8] If I am mistaken on the mootness of the appeal; the magistrate was correct in his final judgment that the Appellant cannot be released whether it be in the interest of justice or special circumstances to prevail. Reading of the record shows that:
1. The Appellant did not testify; he merely submitted an affidavit to the court wherein general remarks on the new factors were made. The allegations were not followed with prove and stands untested.
 2. The evidence adduced by the Appellant was negated by the thorough and remarkable evidence of the Investigating Officer in the case. He explained in detail how the investigation unfolded and how thousands of dockets had to be studied and investigated, ballistic test completed under the strain of Covid-19 lockdown and how he and his team worked tireless to expedite the investigations. The case was decided by the Office of the Prosecuting Authority and indictment followed without undue delay.
- [9] Section 65 “Appeal to superior court with regard to bail” reads as follows:
- “(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.”

- [10] Du Toit[4] with reference to case law surmised that an accused only has a right of appeal against the refusal of a renewed application of bail based on new facts if these new facts have actually been put before the magistrate in an acceptable and procedurally correct manner. I want to add “timeously”. A clear implication of this case is that it would always be necessary to compare the ‘new evidence’ with the evidence presented in the earlier unsuccessful bail application. On appeal, new facts cannot be introduced from the bar. (S v Mdhluli 2020 (1) SACR 98 (LP) at [27]). But what if the proceedings and events developed to the stage it did here after the bail application and before the appeal? The Court of Appeal may not ignore it. The matter will have to be referred back to the court a quo.
- [11] The torment in the case does not end in the above. There must be mention of the handling of the applicable onus in the application a quo. There is not a bail application that can commence without the Schedule applicable; and therefor the onus prescribed, having been determined. Not even a bail application on new facts, as is the situation in casu. It did not happen in this case a quo and the onus jumped from that to be applied in Schedule 5 to that in Schedule 6 and back. The magistrate applied Schedule 6 in the end but the evidence did not permit it. I repeat; all bail applications must start with the establishment of the Schedule applicable and the applicant must have a clear understanding of the issue.
- [12] In practise the court will have to probe the Schedule applicable from both parties, rule on it and explain the onus to the Applicant. Then and then only may the hearing commence. The court must rule on the Schedule because the parties might have it wrong. Bail applications are completely in the hands of the court.
- [13] Due to the conundrum in the case, I consulted with both Counsel for the State and the Appellant in chambers and it was agreed that the matter had to be adjudicated on a Schedule 5 – basis. It does however not cure the peculiar state of affairs on appeal.
- [14] The grounds of appeal relied on by the Appellant have subsided due to the delay in bringing the application forward on appeal. The alleged delay in the investigation, the Covid-19 situation and an order for psychiatric services that can be made, changed the reality. Added to this; the final decision of the magistrate cannot be deemed as a mistake notwithstanding that he applied the Schedule 6 onus erroneously. On both Schedule 5 and 6 the application stood to be dismissed. The oversight to declare the onus caused judicial irritation and concern and presiding officers must be more vigilant in this regard. Nothing prevents the Appellant from bringing another application for bail if the circumstances justify such in terms of section 65(2) of the Criminal Procedure Act. The appeal stands to be dismissed.

[15] ORDER

The appeal is dismissed.

M OPPERMAN, J

APPEARANCES

Counsel for the Appellant

Advocate R J Nkhahle

Free State Society of Advocates

BLOEMFONTEIN

C/O Henecke Attorneys

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Counsel for Respondent

Advocate LB Mpemvane

The Director of Public Prosecutions

[1] Section 19(a) of the Superior Courts Act 10 of 2013: The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law —

(a) dispose of an appeal without the hearing of oral argument;

[2] Section 60(11) of the Criminal procedure Act 51 of 1977: 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.

[2] Section 60(11) of the Criminal procedure Act 51 of 1977: Notwithstanding any provision of this Act, where an accused is charged with an

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- (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.
- [3] Dismissing of appeal because success will have no practical benefit for appellant
- Facts cognisable by Court on appeal - Events occurring subsequent to granting of bail - Such subsequent events exceptionally cognisable by Court on appeal, for limited purpose of determining whether success on appeal will have practical benefit for appellant. Bail
 - Appeal against granting of - To Supreme Court of Appeal - By Attorney - General, in terms of s 56A(2) of Criminal Procedure Act 51 of 1977 - Dismissing of appeal because success will have no practical benefit for appellant - Section 21A(1) of Supreme Court Act 59 of 1959 (which provides that civil appeal may be dismissed by Supreme Court of Appeal when judgment or order sought will have no practical effect or result) not applicable to appeal by Attorney - General under s 56A(2) of Criminal Procedure Act - Supreme Court of Appeal nonetheless competent to dismiss such appeal because success will entail no practical benefit for appellant. Headnote The right of an Attorney - General to appeal to the Supreme Court of Appeal, I against the decision of a High Court to release an accused on bail, is regulated solely by s 65A(2) of the Criminal Procedure Act 51 of 1977. Therefore, the accused (respondent) cannot during such an appeal invoke the provisions of s 21A(1) of the Supreme Court Act 59 of 1959, which provides that when the issues at the hearing of a civil appeal in the Supreme Court of Appeal are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on that ground alone. However, the Supreme Court of Appeal may still dismiss the Attorney - General's appeal on the preliminary ground - ie, without considering the merits of the appeal - that there will be no practical benefit to the appellant, should the appeal succeed. It is not open to doubt that, as a general rule, the correctness of a court's decision is to be decided according to the facts in existence at the time it is given, and not according to new circumstances subsequently coming into existence. However, the

preliminary point, whether a successful appeal will have any practical benefit for the appellant, does not have a bearing on the correctness of the judgment of the Court a quo, and new circumstances may therefore be received by the Court on appeal to

determine that point. It is necessary to emphasise, however, that the parties to an appeal on bail should not, in general, attempt to utilise the appeal procedure for the purpose of putting new facts before the Court. The remedy of an accused person who wishes to raise these facts is to do so before the court of first instance, and not before the Court of appeal. In casu, therefore, where it appeared that the accused had been released on bail by the High Court (on urgent appeal to it against a refusal of bail in the regional court) some three years before the appeal was heard in the Supreme Court of Appeal, that the accused had since being released abided by the bail conditions imposed upon him, and that he would in all likelihood, even if the appeal succeeded, again be

released on bail, the appeal of the Attorney - General was dismissed on the ground that success would have no practical benefit to the appellant.

- [3] Dismissing of appeal because success will have no practical benefit for appellant
- Facts cognisable by Court on appeal - Events occurring subsequent to granting of bail - Such subsequent events exceptionally cognisable by Court on appeal, for limited purpose of determining whether success on appeal will have practical benefit for appellant.

Bail

- Appeal against granting of - To Supreme Court of Appeal - By Attorney - General, in terms of s 56A(2) of Criminal Procedure Act 51 of 1977 - Dismissing of appeal because success will have no practical benefit for appellant - Section 21A(1) of Supreme Court Act 59 of 1959 (which provides that civil appeal may be dismissed by Supreme Court of Appeal when judgment or order sought will have no practical effect or result) not applicable to appeal by Attorney - General under s 56A(2) of Criminal Procedure Act - Supreme Court of Appeal nonetheless competent to dismiss such appeal because success will entail no practical benefit for appellant.

Headnote

The right of an Attorney - General to appeal to the Supreme Court of Appeal, I against the decision of a High Court to release an accused on bail, is regulated solely by s 65A(2) of the Criminal Procedure Act 51 of 1977. Therefore, the accused (respondent) cannot during such an appeal invoke the provisions of s 21A(1) of the Supreme Court Act 59 of 1959, which provides that when the issues at the hearing of a civil appeal in the Supreme Court of Appeal are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on that ground alone. However, the Supreme Court of Appeal may still dismiss the Attorney - General's appeal on the preliminary ground - ie, without considering the merits of the appeal - that there will be no practical benefit to the appellant, should the appeal succeed.

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[4] Du Toit: Commentary on the Criminal Procedure Act, CD-Rom & Intranet: ISSN 1819-7655 Internet: ISSN 1819-8775, Jutastat e-publications. Legislation: The legislation section in this product is updated to 30 September 2020. Commentary: Corresponds with Revision Service 64, 2020 of the loose-leaf publication, updated to 31 January 2020 at RS 64, 2020 ch9-p100.

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