

SOUTH AFRICA / JUDGMENT

S v Bogopane (HC 02/2024) [2024] ZANWHC 26 (12 February 2024)

[2024] ZANWHC 26

COURT

North West High Court, Mafikeng

BEFORE

Petersen, Reddy

CASE / FILE NUMBER

HC 02/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG
CASE NO: HC 02/2024
MAGISTRATE'S
SERIAL NO: 1/2024

Reportable:	YES/NO Circulate
to Judges:	YES/NO Circulate
to Magistrates:	YES/NO Circulate
to Regional Magistrates:	YES/NO THE STATE and REFILWE BOGOPANE ACCUSED
CORAM:	PETERSEN J, REDDY AJ REVIEW

RECEIVED: 24 JANUARY 2024
DATE OF REVIEW
JUDGMENT: 12
FEBRUARY 2024
ORDER
The request to have the
proceedings reviewed and set aside in terms of section 22 of the
Superior Courts Act 10 of 2013 does not engage the powers of review
of this Court and is declined.
REVIEW

JUDGMENT

THE COURT

Introduction

[1] The Acting Senior Magistrate, Ms Roos caused this matter to be placed before this Court, by way of special review within the purview of section 304(4) of the Criminal Procedure Act 51 of the 1977 ('the CPA'). The Acting Senior Magistrate contends that there was a gross irregularity in the proceedings as envisaged in section 22 of the Superior Courts Act 10 of 2013 ('the Superior Courts Act') and requests that these proceedings be set aside.

[2] On 4 December 2023, the accused Mr Refilwe Bogapane, duly represented by Mr Segopolo appeared before Magistrate Diale at the Magistrates' Court Rustenburg. The annexures to the charge sheet delineate that the accused was charged with five (5) counts, the first four of which were alleged to have been committed on 30 November 2023. The first

and the third counts are that of assault with intent to do grievous bodily harm. The second and fourth counts are allegations of

malicious damage to property. The fifth count of kidnapping was alleged to have been committed on 27 November 2023.

[3] The accused was arrested on Friday, 1 December 2023, at a taxi rank. As alluded to, he made his first appearance on Monday, 04 December 2023. The proceedings seemed to have been running smoothly, until it reached the point where the provisions of section 60(11)(b) of the CPA was addressed.

The basis of the transmission of the matter on special review

[4] The following transcript of the record before Magistrate Diale encapsulates the alleged gross irregularity the Acting Senior Magistrate bemoans (the reference to MALE SPEAKER is seemingly in reference to Mr Segopolo):

"COURT: Has the accused have previous pending cases?"

MALE SPEAKER: Your Worship the Sections of ...[indistinct] of Section 60(11) (b) provision of Section (11)(b) have been explained to the accused. Your Worship it is my instructions and also, Your Worship, the bail information that is in the docket, the accused has no pending cases nor does he have previous convictions. And also, Your Worship, just confirm that this is a Schedule 1 offence. Accused resides at number 1A Brink Street.

COURT: Was the address of the accused confirmed?

PROSECUTOR: Court indulgence, Your Worship. It has not been confirmed. Your Worship. It has not been confirmed, Your Worship.

COURT: When was he arrested?

MALE SPEAKER: [indistinct]....

PROSECUTOR: He was arrested on the.... [intervene]

MALE SPEAKER: The 30th.

PROSECUTOR: On 1 December, Your Worship.

COURT: It say 1 December?

PROSECUTOR: 1 December, yes.

COURT: Do you have that.... [intervene]

MALE SPEAKER: Notice of right.

COURT: notice of rights.

MALE SPEAKER: Can I just ask the accused the accused Your Worship. Your Worship, the accused informs me that he was arrested on 30 November, the, it is Friday, the police officers went to his house at number 1 Brink Street and they found his wife and did not find him, and then okay 1 December, Your Worship, my apologies. And they then went to the rank and that is where he was arrested.

COURT: Is he a taxi owner or driver?

MALE SPEAKER: He is a taxi owner, Your Worship.

COURT: [indistinct]

MALE SPEAKER: So, Your Worship, I would submit, Your Worship, that there is actually it will be misleading to suggest that his address is not confirmed. I mean he has been in custody since Friday, Saturday, Sunday. They charged him, I was with the investigating officer when he charged him on Monday, I mean on, on Sunday at the, at the police station. He could have taken the accused, Brink Street is six streets away from the police station, and they were at his house, where they found his wife, I mean, Your Worship this is just an abuse of power. It is neither there or there, Your Worship.

COURT: What is the state...[indistinct] confirm that he is facing a Schedule 1 ... [indistinct]

PROSECUTOR: Yes Your worship it.... [intervene]

MALE SPEAKER: I confirm same, Your Worship.

PROSECUTOR: ... is a Schedule 1 offence, Your Worship. Yes, Your Worship, I consulted with the investigation officer, he is here before Court. He alleges that the accused, the accused person has previous convictions, Your Worship, or pending cases, so therefore they wanted this matter to be postponed so that they can be able to obtain his SAPS 69.

COURT: Did he confirm it in the SAPS69, the previous convictions, and which previous convictions.... [indistinct]

PROSECUTOR: I doubt, Your Worship, because it seems like, according to the docket it has been dealt with by several investigating officers, the other one is saying this, this other is saying this, Your Worship.

COURT: But you know ...[indistinct] frustrate the accused person ...[indistinct] if he was arrested on 1 December, they could have access the SAP69 on the system is it not?

PROSECUTOR: Yes, Your Worship.

COURT: And even the address, was not even confirmed whereas this person he stays nearer to the police station, is it not how you dealt with your issues?

PROSECUTOR: This is how it is supposed to be. Your Worship. But in this it has not be done in, in that way Your Worship.

COURT: I am going to grant the accused bail and postpone it also for those 69's because they submitted that he does not have any pending, previous convictions.

PROSECUTOR: Court pleases.

COURT: And it will be up to the state [indistinct] others charges, failure to disclose previous conviction...[indistinct]

PROSECUTOR: Court pleases, Your Worship

COURT: How much bail can he afford.

MALE SPEAKER: R1000-00. Your Worship, as Court pleases.

COURT: Bail of R1000-00 is granted in favour of the accused, subject to condition that no communication with the complainants until this

matter is finalised, do you understand?

ACCUSED: Yes.

(emphasis in bold added)

- [5] The proceedings concluded with the matter being postponed to 19 January 2024 for the purposes of further investigation. The accused was in custody but permitted to deposit the amount of R1000-00, with a singular terse bail condition explained. The procedure is determining the bail amount whilst not raised in this review, falls foul of the peremptory provisions of section 60(2B)(a) of the CPA.[1]
- [6] Acting Senior Magistrate Roos concludes in her memorandum that the way the accused was liberated from detention fell gravely shy of apposite criminal procedure. The memorandum reads:
- “The accused was released on bail without following the correct procedure. The postponement in terms of section 50(6) of the Criminal Procedure Act 51 of 1977 was not granted and the proper schedule in terms of which the applicant should have brought this application for bail was not determined. An irregular decision was taken considering all the facts. The Presiding Officer was invited to submit comments but did not submit any. There was in terms of section 22(1) (c) of Act 10 of 2013 a gross irregularity in the proceedings and the request is that the proceedings on the 4th of December 2023 be set aside.”*
- [8] From the request for review, two issues are discernible. The first relates to the dismissal of the application for the postponement which has been identified by Acting Senior Magistrate Roos, and the second in our view relates to the misapplication of the provisions of Section 60(11B) of the CPA. Collectively neither of the issues, engages the powers of review of this Court.

The postponement application

- [9] Whilst the ruling of Magistrate Diale is not a model of clarity, it is apparent ex facie the record that the prosecutor had not presented a full and satisfactory application for a postponement to be considered by Magistrate Diale. What is clear from the record was that Magistrate Diale exercised a judicial discretion, not to acquiesce in the application for a postponement by the prosecution, to verify whether the accused had any previous convictions or pending charges. The latter undeniably may have resulted in the reclassification of the schedule and onus for the purposes of the bail application.
- [10] In Erasmus, Superior Court Practice, Vol 2, pp DI-552A, the following is said about postponements, albeit in the context mainly in civil matter, the principles which apply equally in criminal matters:
- “The legal principles applicable to an application for the grant of a postponement by the court are as follows:*
- (a) The court has a discretion as to whether an application for a postponement should be granted or refused. Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered or even when the parties have agreed to postpone the matter.

- (b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal.
 - (c) An applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons, i.e. the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case.
 - (d) An application for a postponement must be made timeously as soon as the circumstances which might justify such an application become known to the applicant. If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made.
 - (e) An application for postponement must always be bona fide and not used simply as a tactical maneuver for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.
 - (f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism.
 - (g) The balance of convenience or inconvenience to both parties should be considered: the court should weigh the prejudice which will be caused to the applicant in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.”
- [11] The application was a purported application for a postponement as it was devoid of substance. The application moved by Mr. Skosana for the postponement is all but eight (8) lines. The application standing alone is self-contradictory.
- [12] Mr. Skosana attested to the fact that several investigating officers had handled the case docket, probably from the time of arrest of the accused to his first appearance. By Mr. Skosana's own concession each of these investigating officers' instructions appear to be inconsistent. Notwithstanding this inherent knowledge, and in the absence of probable convincing facts, Mr. Skosana proceeded to move an application in terms of section 50(6)(d)(i) of the CPA.

[13] There was no firm information from the record which of these different investigating officers Mr. Skosana preferred and if so, what facts formed this preference. Absent in this “postponement application” was a plausible explanation for the failure to use the Criminal Record Centre to generate a preliminary report on the accused criminal history, which to his credit Magistrate Diale canvassed with Mr. Skosana. Decisively, Mr. Skosana did not place before Magistrate Diale what foundational facts had led to this investigating officer forming this suspicion that the accused had

previous convictions and pending cases.

[14] Taking this point to its logical conclusion, the memorandum submitted by Mr. Skosana is at odds with the court record of 04 December 2023. As per this memorandum, a Sergeant Sekanka was in court. There is no explanation as to the failure to have called the Sekanka to testify on the application for the postponement and be subjected to cross examination. It is not for the court to come to rescue of the state and summarily invoke section 50(6)(d)(i) of the CPA to fill gaping factual gaps in the prosecution’s application for a postponement. Even if Magistrate Diale had dismissed the application for a postponement, this does not engage this Court’s reviewing powers.

The misapplication of section 60(11B) of the CPA

[15] Section 60 of the CPA provides:

“60 Bail application of accused in court

(11B)

(a) In bail proceedings, the accused, or his or her legal adviser, is compelled to inform the court whether—

(i) the accused has previously been convicted of any offence;

(ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges;

(iii) an order contemplated in section 5 or 6 of the Domestic Violence Act, 1998, section 3 or 9 of the Protection from Harassment Act, 2011, or any similar order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, and whether such an order is still of force; and

(iv) the accused is, or was at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998.

[Para (a) substituted by s 4(h) of Act 12 of 2021 (wef 5 August 2022).]

- (b) Where the legal adviser of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.

...

- (d) An accused who wilfully—

- (i) fails or refuses to comply with the provisions of paragraph (a); or

- (ii) furnishes the court with false information required in terms of paragraph (a),

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.”

(emphasis added)

[16] From the extract from the record above, the accused was not called on by the Magistrate to declare whether the information regarding previous convictions or pending cases on which he has been released on bail, as submitted by Mr Segopolo, was correct or not, which is made peremptory in section 60(11B)(b) of the CPA. This in fact constitutes a material misdirection on the part of Magistrate Diale.

[17] Had the accused confirmed the information, and if same later proved to be false, the provisions of section 68 of the CPA relevant to cancellation of bail could be invoked by the prosecution. The fact that the accused was not called upon by Magistrate Diale to confirm the correctness of the submission by Mr Segopolo that he had no previous convictions or pending cases, implies that the provisions of section 60(11B)(d) of the CPA has been rendered nugatory.

[18] The relevant provisions of section 60(1)-(3) of the CPA which governs the principles of bail provides that:

“Bail application of accused in court

60(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.

(2) In bail proceedings the court—

(a) may postpone any such proceedings as contemplated in section 50(3);

(b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the

information that is needed for its decision or order regarding bail;

- (c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused,

as the case may be, that evidence be adduced;

- (3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.”

(emphasis added)

- [19] Section 50(6) of the CPA and in particular section 50(6)(d) which is referenced in section 60(1) (a) provides that:

“(d) the lower Court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or Court, for a period not exceeding seven days at a time, on the terms which the Court may deem proper and which are not inconsistent of this Act if –

- (i) the court is of the opinion that it has insufficient information disposal to reach a decision on the bail application;

(iv) It appears to the court that it is necessary in the interests of justice to do so.”

- [20] In *S v Mabena* 2007 (1) SACR 482 (SCA), Nugent JA said the following in respect of the legislative scheme for the grant of bail, whether generally or in relation to schedule 6 offences (and schedule 5, I may add):

“[7] That legislative scheme for the grant of bail, whether generally or in relation to Schedule 6 offences, necessarily requires a court to determine what the circumstances are in the particular case and then to evaluate them against the standard provided for in the Act. The form that such an inquiry and evaluation should take is not prescribed by the Act, but a court ought not to require instruction on the essential form of a judicially conducted inquiry. It requires at least that the interested parties - the prosecution and the accused - are given an adequate opportunity to be heard on the issue. For although a bail inquiry is less formal than a trial, it remains a formal court procedure that is essentially adversarial in nature. A court is afforded greater inquisitorial powers in such an inquiry, but those powers are afforded so as to ensure that all material factors are brought to account, even when they are not presented by the parties, and not to enable a court to disregard them. And while a judicial officer is entitled to invite an application for bail, and in some cases is even obliged to do so, that does not make him or her a protagonist. A bail inquiry, in other words, is an ordinary judicial process, adapted as far as need be to take account of its peculiarities, that is to be conducted impartially and judicially and in accordance with the relevant statutory prescripts.”

- [21] In *Mabena* bail was granted to the accused without the learned Judge following the correct bail procedure. In that matter, which was heard in the High Court, the State, applied for leave to appeal to the Judge concerned. Leave to appeal was required since there is no

provision dealing with an appeal against bail granted in the High Court, as a court of first instance for example. The following is said at paragraph [21] of the judgment of the SCA:

“[21] I find it necessary, for reasons that will become apparent, to deal briefly with certain subsequent events. The following week, during the court recess, the prosecution applied for leave to appeal against the order, and for the suspension of the order pending the outcome of the intended appeal. In the absence of the Judge who granted the order the matter came before the Judge President who postponed the application for leave to appeal to the next court term to enable it to be heard by the Judge who had granted the order, and meanwhile suspended the order. The application for leave to appeal was heard in the new term.”

[22] In respect of the lower courts, section 65A(1) of the CPA provides for an appeal by the Director of Public Prosecutions against a decision of a lower court to release an accused on bail, by providing that:

“65A Appeal by attorney-general against decision of court to release accused on bail 65A

- (1) (a) The attorney-general may appeal to the superior court having jurisdiction, against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail as contemplated in section 65(1)(a).
- (b) The provisions of section 310A in respect of an application or appeal referred to in that section by an attorney-general, and the provisions of section 65(1)(b) and (c) and (2), (3) and (4) in respect of an appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the attorney-general appeals in terms of paragraph (a) of this subsection.”

[23] No leave to appeal is required by the Director of Prosecutions in terms of section 65A of the CPA. It is clear from Mabena and section 65A of the CPA that the prosecution is vested with a remedy when it is aggrieved by the granting of bail by a lower court. The sentiments expressed in *S v Khomo and Others* (R33/2023(B))

[2023] ZAFSHC 195 (3 October 2023), are to a great degree apposite:

“[15] It is the duty of this court to give guidance particularly when review matters have not been handled properly like the present

case. Section 304 envisages a specific dispensation which acts as a remedy when there has been procedural irregularities that may vitiate the proceedings. In this case there was no such. Instead, the record reveals that the state was aggrieved by the decision of the magistrate which was reached after proper exercise of her discretion. The correct route for the state to have pursued was an appeal. 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 magistrate's judgments then matters are forwarded to the high court willy-nilly as it happened in this case."

[24] The combined memorandums of Mr Skosana (Prosecutor) and Mr Bekker (Senior Prosecutor) which implored the Acting Senior Magistrate to remit this matter on review, loses sight of section 65A of the CPA and the correct course to follow by the prosecution when it is aggrieved by the granting of bail by a lower court. Acting Senior Magistrate Roos as proposed in Khomo should in the circumstances have exercised more careful judicial oversight as the Judicial Head, prior to a matter being placed before the High Court within the ambit of section 22 of the Superior Courts Act. A Judicial Head should not be used as a conduit by the prosecution to submit matters on review when its remedy lies in section 65A of the CPA.

[25] Notably, Magistrate Diale appears to be a target of the prosecution for seemingly questionable decisions he has made in criminal matters before him recently. This is evident from at least two other reviews which have recently been placed before the High Court on review. This practice should be avoided unless good reason exists to burden the High Court with a review rather than allowing the matters to follow due process of law through the appeal procedure envisaged in section 65A of the CPA.

Conclusion

[26] Having considered the valid concerns raised on the conduct of the bail proceedings by the Magistrate, this Court cannot be seen to be creating a precedent by allowing matters such as the present to be entertained as appeals guised as reviews. That would have the potential of creating an opportunity for an unmitigated number of reviews being submitted when any decision of a Magistrate on bail which the prosecution is aggrieved by, being submitted on review.

Order

[27] Consequently, the following order is made:

The request to have the proceedings reviewed and set aside in terms of section 22 of the Superior Courts Act 10 of 2013 does not engage the powers of review of this Court and is declined.

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

A REDDY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

[1] (2B) (a) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in

subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate

inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum. (b) If, after an inquiry referred to in paragraph (a), it is found that the accused is —(i) unable to pay any sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail or must consider the release of the accused in terms of a guarantee as provided for in subsection (13)(b); or (ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances.”

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Prepared on 12 October 2026 · Esheria