

SOUTH AFRICA / JUDGMENT

S v Lund (A17/2025) [2025] ZAGPJHC 711 (21 July 2025)

[2025] ZAGPJHC 711

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strydom

CASE / FILE NUMBER

A17/2025

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: A17/2025

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

In

the matter between:

THE

STATE

Applicant

and

WILLEM

LUND

Respondent

JUDGMENT

STRYDOM, J

[1] This is an application for condonation for the late filing of a notice of intention to appeal pursuant to the granting of bail to the

respondent in the Regional Magistrates' Court on 27 March 2023. Should condonation be granted, the State is seeking leave to appeal against the granting of bail pending the respondent's appeal.

[2] The Criminal Procedure Act 51 of 1977 (the CPA) provides in section 65A a right to the State to appeal to the High Court against the granting of bail to an accused in the lower court. This section reads as follows:

“(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.
- (2) (a) The attorney-general may appeal to the Appellate Division against a decision of a superior court to release an accused on bail.
- (b) The provisions of section 316 in respect of an application or 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.
- (c) Upon an appeal in terms of paragraph (a) or an application referred to in paragraph (b) brought by an attorney-general, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.
- (3) If the appeal of the attorney-general in terms of subsection (1) (a) or
- (2) (a) is successful, the court hearing the appeal shall issue a warrant for the arrest of the accused.”
- [3] Section 65A(1)(b) cross references to section 310A of the CPA and this section provides as follows:

“(1) The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.

- (2) (a) A written notice of such an application shall be lodged with the registrar of the provincial or local division concerned by the attorney-general, within a period of 30 days of the passing of sentence or within such extended period as may on application on good cause be allowed.
- (b) The notice shall state briefly the grounds for the application.
- (3) The attorney-general shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by the deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused in terms of subsection (4): Provided that if the deputy sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed.
- (4) An accused may, within a period of 10 days of the serving of such a notice upon him, lodge a written submission with the registrar concerned, and the registrar shall submit it to the judge who is to hear the application, and shall send a copy thereof to the attorney-general.
- (5) Subject to the provisions of this section, section 309 shall apply mutatis mutandis with reference to an appeal in terms of this section.
- (6) Upon an application for leave to appeal referred to in subsection (1) or an appeal in terms of this section, the judge or the court, as the case may be, may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the application or appeal, taxed according to the scale in civil cases of the provincial or local division concerned.”
- [4] For purposes of a bail application the references in section 310A to ‘sentence’ should be read by inserting the word ‘bail’. In terms of this section the State, if dissatisfied by the granting of bail in a lower court, shall, within a period of 30 days of the granting of bail, or within such extended period as may on application on good cause be allowed, file a written notice of an application for leave to appeal. This application is to be decided by a judge in chambers.
- [5] In this matter the notice of appeal was not served within the prescribed period of 30 days of the granting of bail. What transpired before and after the granting of bail to the respondent on the 27 March 2023 should be briefly referred to.
- [6] On 2 March 2021 the respondent was convicted by the Regional Court Magistrate, Mr. Roux, on charges of stock theft and sentenced to 12 years imprisonment. His application for leave to appeal against his conviction and sentence was refused by the trial court. Thereafter, the respondent filed a petition for leave to appeal. He applied for bail pending the outcome of the petition but on, 10 December 2021, bail was refused.

- [7] Subsequent thereto, the respondent's petition was successful, and he obtained leave to appeal from the High Court. After this, the respondent again applied for bail pending the finalization of his appeal.
- [8] Because the trial magistrate went into retirement, the second bail application was brought before Regional Court Magistrate Mr. Pretorius. On 27 March 2023 he granted the respondent bail. The record of this bail hearing indicates that when the matter was heard for the second bail application it was on a postponed date, yet the prosecutor had no idea about the merits of the application as no transcript was available. The prosecutors who previously dealt with this bail application were not available. As the date for hearing the bail application was specifically arranged with the magistrate, he ruled that the application should proceed. He

acknowledged that the trial magistrate who refused bail pending petition went into retirement and was not available. He found that

the State had sufficient opportunity to properly oppose the bail application, based on the new fact that leave to appeal was granted

on petition. He stated on record that it seems as if the trial prosecutors are not interested in dealing with the matter. An affidavit deposed to by the respondent was handed to court. Inter alia, it was placed before court that the respondent was not a flight risk and that he stood his trial after being released on warning. After conviction he remained on warning pending sentence. The legal representative of the respondent placed on record that the bail application may resort under Schedule

5. The court concluded that it was a bail application which resorted under Schedule

1. Bail was granted in the amount of R10 000.

[9] The State was dissatisfied with the granting of bail as the Regional Court Magistrate dealt with the bail application without being provided with the record of the previous bail application. Further, as the court dealt with the bail application on the basis that the crimes on which the respondent was convicted of, fell within the ambit of Schedule 1 to the CPA and not within the ambit of Schedule 5, as the value of the stock stolen was more than R100 000.

[10] This prompted the State to apply on 16 May 2023 for special review in terms of section 304(4) of the CPA to set aside the granting of bail to the respondent. The State did not avail itself of the remedy provided to it in terms of section 65A of the CPA. Why this was not done remains unexplained. The fact is, the 30-day-period to apply for leave to appeal, provided for in section 310A, had by then lapsed.

- [11] The special review was considered by two judges in the High Court on 31 August 2023 and they set aside the bail proceedings of 27 March 2023 and thereby cancelled the bail of the respondent. He was ordered to report to the prison authorities by no later than 14 September 2023.
- [12] Dissatisfied with this outcome, the respondent filed an urgent rescission application in terms of Rule 42(1)(a) of the Uniform Rules of Court on 15 September 2023. The respondent advanced his rescission application on two bases. The first is that he was given no opportunity to make submissions to Judge Moosa and Acting Judge Africa before their decision was handed down. The second is that the court lacked the jurisdiction to set aside the granting of bail under section 304(4) of the CPA. This application came before the urgent court Judge, Wilson J, on 18 September 2023. On this day judgment was reserved but the order reviewing and setting aside the granting of bail was suspended pending judgment.
- [13] On 6 October 2023 Wilson J delivered a judgment and expressed the view that the grounds of review were both arguable. He, however, ordered that the matter be referred to a Full Court as the order in terms of which the granting of bail was reviewed and set aside was heard by two judges. The review judgment remained suspended. The costs of the urgent application were reserved.
- [14] The Full Court heard the matter on 10 February 2025 and handed down the following order:
- “1. The order given by Wilson J on 06 October 2023 suspending the order of Moosa and Africa AJ, remains in place until the matter has been dealt with by the first respondent being the State as represented by the office of the Director of Public Prosecutions, in terms of section 65A.*
2. The first respondent is given an opportunity, should they so wish, to launch an appeal against the granting of bail on 23 March 2023 to the applicant by the Regional Court Magistrate, Mr. Pretorius, which appeal must be launched within 60 days from the date of this order, being on or before 11 April 2025.
 3. The State’s application for joinder was considered and is herewith granted.
 4. The issue of cost is reserved until the bail appeal has been dealt with”.
- [15] Having regard to this order, it is my view that the Full Court acknowledged that the review application brought in terms of section 304(4), which section deals with a review of a sentence and not of bail proceedings, was irregular. The State was ordered to follow the appeal procedure as contemplated in section 65A of the CPA.
- [16] Pursuant to this order, the State, by way of a notice of motion, filed an application for leave to appeal within the mentioned 60-day period in which the application for leave to appeal had to be filed. This was met with a Rule 30 notice in terms of which it was alleged that the procedure which was followed was irregular. I do not intend to deal with this notice in any detail, as it was subsequently withdrawn. This does not mean that it was without merit. What transpired was that the application for leave to appeal as well as the Rule 30 notice

were allocated to me to decide. I called for the legal representatives of the parties to attend a case management meeting before me in chambers. After I heard the parties on procedural aspects and how the Rule 30 notice would be dealt with, I issued a directive on how to deal with the matter going forward. In this directive, which was made with the consent of the parties, the following was directed:

“2.1 Mr. Lund (the respondent) withdrew his notice in terms of Rule 30.

2.2 The State withdrew its current application for leave to appeal.

2.3 The State, if it so wishes, will file a notice of appeal pursuant to Section 65A of the CPA.

2.4 If the State files such a notice, the State will consider to bring a condonation application for the alleged late filing of the notice to appeal. This should be done by way of a notice of motion supported by a founding affidavit.

2.5 The State is afforded until the 9th of May 2025 to file the notice of appeal which would provisionally stand as such notice, pending the decision in the condonation application.

2.6 The condonation application, if any, should be filed on or before 16 May 2025.

2.7 The respondent will file his answering affidavit in the condonation application on or before 23 May 2025.

2.8 The State may file a replying affidavit on or before 28 May 2025.

2.9 The parties should file short heads of argument on the condonation application and merits of the application for leave to appeal which, as far as the respondent is concerned, would stand as a reply as contemplated in section 310A of the CPA. These heads should be filed on or before 6 June 2025.

2.10 The application will be heard in open court at 10h00am on 17 June 2025.”

[17] It should be mentioned that at a later stage I directed that the matter would not be heard in open court. This was directed pursuant to section 310A(1) which provides that the application shall be granted in chambers by a judge. On 17 June 2025, I reserved judgment in chambers as I previously stated that the matter would be heard on 17 June 2025.

[18] The order of the Full Court provided that the State had to apply for leave to appeal in terms of section 65A. The appeal had to be launched within 60 days from 11 April

2025. The application for leave to appeal was launched within this period but, on the face of it, was defective. As section 65A provided for an extension of the 30-day period mentioned in this section I directed that the State should apply for condonation for not following the prescripts of section 65A read with section 310A of the CPA.

- [19] On behalf of the State an application for condonation for the late filing of the application for leave to appeal was filed. In the founding affidavit the deponent to this affidavit dealt with the reasonable prospects of success on appeal based on the allegations that the Regional Court Magistrate hearing the bail application on new facts could not have done so without the record of the previous bail application being available. It was further stated that the magistrate applied the wrong Schedule to the CPA in his consideration on whether bail should be granted or not. It is stated that the mere fact that leave to appeal on petition was granted to the respondent should not have been the overriding factor to grant him bail.
- [20] Nothing contained in the founding affidavit even attempted to explain why the procedure provided for in section 65A, read with section 310A, of the CPA was not followed. Nothing is mentioned why a section 304(4) review was launched instead of the prescribed procedure affording the State with a right to appeal the granting of bail. It should be noted that even the review application was filed about 2 months after the granting of bail.
- [21] In the heads of argument filed on behalf of the State it is acknowledged what needed to be shown by a party seeking condonation. Reference was made to the matter of *Mogorosi v the State* (410/2010 [2010] ZASCA (29 November 2010) paragraph 3, where it was held as follows:
- “ [3]....(G)iven that the appellant was seeking an indulgence he had to show good cause for condonation to be granted. In S v Mantasha 2009(1) SACR 414 (SCA) para 5 Jafta JA stated that “good (or sufficient) cause has two requirements. The first is that the applicant must furnish A satisfactory and acceptable explanation for the delay. Secondly, he or she must show that he or she has reasonable prospects of success on the merits of the appeal.”*
- [22] All which the State tenders as an explanation for not filing an application for leave to appeal within 30 days after the granting of the bail is that the Office of the Director of Public Prosecutions only became a party to this matter when the urgent motion was filed on their offices on 15 September
2023. What is meant using the word “party” is not clear as the State was at all relevant times a party to the bail application. When bail was granted on 27 March 2023 the State was aware of the order. If the State was dissatisfied with the granting of bail, it should have taken steps to apply for leave to appeal. What is explained seems to be that the Office of the Director of Public Prosecutions only became aware of the granting of bail to the respondent on 15 September 2023, meaning that this office was not aware of what was transpiring in the Regional Court at that time. This statement is made without any explanation as to who, on 16 May 2023, on behalf of the State, decided to send the second bail application on special review in terms of section 304(4) of the CPA.
- [23] In my view this is not a satisfactory and sufficient explanation why the State has not followed the prescribed procedure within the provided timeframe, as provided in section 65(4), read with section 310A.

- [24] The State not only had to show that it has reasonable prospects of success on the merits of the appeal but also had to furnish a satisfactory and acceptable explanation for the inordinate long delay in filing a notice of application for leave to appeal. Both requirements must be met before condonation is granted. See: *S v Mansha* 2009 (1) SACR 414 SCA.
- [25] As far as the prospects of success of the bail appeal are concerned, I am not convinced that the magistrate who granted bail without the record of the previous bail application being available was wrong in his decision. The circumstances under which the bail application was heard became a relevant consideration why he proceeded with the bail application without the record being placed before him. He found that the State seemed to have lost interest in the matter. This was not the first time the matter was placed before him. Sufficient information was placed before him to consider the bail application in light of the new fact that leave to appeal was granted on a petition. He not only considered this new fact; he considered the affidavit filed on behalf of the respondent, and the notice of application for leave to appeal. He took into consideration that the respondent was previously out on warning but stood his trial and appeared in court when required to do so. Moreover, he also took into consideration that even after the respondent's conviction he appeared for his sentence still whilst on warning. The fact that he decided the bail application with reference to the wrong Schedule is, in my view, not decisive in this matter. Whether Schedule 1 or Schedule 5 was applicable, the magistrate would not have been wrong, in the exercise of his discretion, to have granted bail.
- [26] In my view the State has failed to provide a satisfactory and acceptable explanation for the late filing of the application for leave to appeal. Condonation for the late filing should not be granted. On this ground alone the application for leave to appeal should not be granted.
- [27] Both sections 65A and 310A provide that a judge may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the application for leave to appeal or appeal.
- [28] It was argued on behalf of the respondent that the State has been litigious, vexatious and tardy in its application and should be mulcted with a cost order. This was denied by the State. I agree with the submission by the respondent, except that I cannot find that the State acted vexatiously. The State was tardy in its approach by not following available remedies. When the State was faced with a suspension of the setting aside of the bail on review it persisted with the application for leave to appeal against the original granting of bail, again with a defective notice of application for leave to appeal.
- [29] In my view, unnecessary costs would have been saved if the State, within the prescribed period, proceeded in terms of sections 65A and 310A. No satisfactory explanation was provided why this was not done. The respondent was granted bail on 27 March 2023. More than two years have passed since this order but still the State persisted in obtaining leave to appeal. After bail was granted, the State should have focused more on the main appeal. If the respondent failed to pursue the appeal within the legislative framework the State has

remedies available. Moreover, on the evidence before court there was no indication that the respondent would not stand his bail and abscond.

[30] This Court is provided with a discretion to award cost against the State. It is not a punitive award for cost. It is what the section allows. I am of the view that a cost order against the State would appropriate.

[31] In this instance the only costs which can be allowed would be the costs incurred by the respondent in relation to the application for leave to appeal, including the application for condonation and the costs incurred in the Full Court, if any. It would not relate to the costs incurred in the urgent application where the issue of costs was reserved.

[32] The following order is made:

- a. The application for condonation for the late filing of a notice of leave to appeal is dismissed.
- b. The application for leave to appeal against the order of the Regional Court Magistrate Mr. Pretorius, made on 27 March 2023, in terms of which bail was granted to respondent is dismissed.
- c. The State is ordered to pay the costs of the respondent in opposing the condonation application, the costs of the application for leave to appeal and the reserved costs, if any, incurred in the Full Court Appeal, taxed according to the scale in civil cases of this division.

R. STRYDOM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Heard on:

17 June 2025

Delivered on: 21 July 2025

Appearances:

For the Applicant: Adv. E. Le Roux

Instructed by: The National Prosecuting Authority

For the Respondent: Adv. J.P. Spangenberg

Instructed by: Spangenberg Attorneys

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