

SOUTH AFRICA / JUDGMENT

Sibeko v S (BA17/ 2020) [2020] ZAMPMHC 13 (30 May 2020)

[2020] ZAMPMHC 13**COURT**

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

BA 17 / 2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****MPUMALANGA****DIVISION, MIDDELBURG****(LOCAL****SEAT)****CASE****NO: BA 17 / 2020****In**

the Bail Appeal of:

DINKY

FREEMEN

SIBEKO

APPELLANT

And

THE

STATE

RESPONDENT

JUDGMENT**BRAUCKMANN AJ**

[1] The Appellant (“Mr Sibeko”) appeals against the refusal of bail by the Magistrate, Mr Grabe, in the Magistrates’ Court of Breyten. The bail application was brought in terms of Sec 60(11)

(b) of the Criminal Procedure Act 51 of 1977 (“The CPA”).

- [2] Mr Sibeko appeared in the court a quo, charged with four (4) Counts of Stock Theft. The value of the cattle allegedly involved amount to more than R100 000.00. The prosecutor and the defence informed the court that the matter falls under schedule 5 -bail application, which meant that there is an onus on the appellant to prove that the interest of justice permits that he be released on bail. Mr Sibeko and respondent both elected not to lead any oral evidence in the application for bail, but relied on affidavits deposed to by himself and the Investigating Officer ("IO"). The learned magistrate after hearing the application from both parties concluded that it would not be in the interest of justice that the accused be released on bail.
- [3] It is common cause that Mr Sibeko was previously arrested on some of the charges he is now facing again. He appeared in court and was released on bail. It is submitted by Mr Sibeko's counsel, Advovate Kriel, that on that occasion the State did not oppose bail. After his release on bail, he appeared in court on several occasions where the matter was postponed. The matter was struck from the roll because the South African Police did not finalise their investigation. According to the IO, Mr. Sibeko was arrested on all for counts that he is charged with now, but the case appears to have been enrolled for the bail application in the court a quo with regard to count three and four only.
- [4] Section 65 (4) of the Criminal Procedure Act 51 of 1977 provides that a Court hearing an appeal against the refusal to release an applicant on bail will not set aside the decision of the magistrate unless such Court is satisfied that the decision was wrong. The proper approach to be followed is set out in *S v Barber* 1979 (4) SA 218 (D) at 220 E-G:
- "It is well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive*
- application. This Court has to be persuaded that the magistrate exercised the discretion, which he has wrongly. Accordingly,
- although this Court may have a different view, it should not substitute its own view for that of the magistrate because it would
- be an unfair interference with the magistrate's exercise of discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly . . ." See also *S v Branco* 2002 (1) SACR 531 (WLD) at 533 I
- [5] This appeal turns on whether this the learned Magistrate exercised his discretion judiciously in the light of the applicable law and the facts that were before him.
- [6] The respondent submits that Mr Sibeko failed to prove that the interest of justice permit that he be released on bail and that the magistrate correctly exercised his discretion not to release him on the following grounds:

[6.1] The respondent submit that there is a strong case against Mr Sibeko in that on 3 July 2018 he was found in possession of the stolen livestock for which he gave improbable explanation as to how he came in possession of, as opposed to the evidence of the state on the affidavits;

[6.2] livestock has been stolen from the complainants, Cornelius Van Huyssteen, Karel Landman, Coenraad Mouton and or Martin De Waal, and Alpheus Pretorius as according to the charge sheet, from 27th May 2018 until 3rd June 2018. Al of them farm owners, or their employees.

[6.4] it is further submitted that during the above period, Mr Sibeko and collaborators stole 53 branded or ear tagged livestock to wit; Cows and or Calves;

[6.5] that seven (7) stolen cattle's were also found in Mr Sibeko's kraal at Embalenhle;

[6.6] the respondent submit that the state case is strengthened by the corroboration of Mr Sibeko's and his collaborators'

movement which was linked through cell phone tracking, DNA and tracker of the vehicles used in the commission of these alleged

offences; and

[6.7] that he made a statement to Lieutenant Colonel Zulu about knowledge of stock in his possession which upon investigations proved that he allegedly operated with a syndicate.

[7] It is submitted on behalf of Mr Sibeko that the evidence clearly indicates that the he is not a flight risk and will not evade the trial in this matter as:

[7.1] he never failed to appear while on bail after his first arrest;

[7.2] he reported to the investigating officer well knowingly that there was a warrant of arrest for him;

[7.3] he has strong emotional, family, community and occupational ties within the court's jurisdiction;

[7.4] he is a well-established man with a fixed address where he have been residing for the past 30 years;

[7.5] there is no evidence that the Appellant has a passport;

[7.6] the Appellant has no family, friends or business interests outside the Republic of South Africa

[8] The Magistrate in his very terse and unhelpful ruling on bail only mentioned two grounds upon which he relied to refuse bail:

[8.1] that Mr Sibeko failed to deal with all the charges against him; and

[8.2] that the allegation of bribery is indicative of the fact that Mr Sibeko will not attend his trial.

- [9] The Magistrate missed the point when he found that Mr Sibeko only dealt with the charges relating to 10 cattle. In his affidavit he stated clearly that he intended to plead not guilty to all charges, and qualified his statement by saying that he only had knowledge of 10 head of cattle. The procedure before the court a quo was a bail application and not a trial. With respect to the allegations of bribery, it is common cause that the alleged bribery, or attempt thereof, already occurred when Mr Sibeko was arrested for the first time. The information would have been helpful to the state had they opposed Mr Sibeko's first bail application, but in the current application, reliance thereon by the magistrate was misplaced. The court says so as it appears as if the respondent does not consider this allegation seriously as no charge of bribery was ever preferred against Mr Sibeko. The fact that he attended court and reported to the IO clearly does not support the argument of the Magistrate.
- [10] The respondent drew the court a quo's attention to the fact that according to the state, has previous conviction of assault committed 1987 and negligent driving committed in 1988. It was, according to the state, important to note that Mr Sibeko was not honest about his previous convictions. In his affidavit in support of his bail application he alleged he had previous convictions. The respondent informed the court that the appellant has previous conviction of assault committed 1987 and negligent driving committed in 1988. The magistrate apparently, and correctly so, ignored this evidence. The record, according to the IO, albeit in the same first names as Mr Sibeko, bears the surname "Shabangu". It cannot safely be said to refer to Mr Sibeko at all.
- [11] The State then applied for, and obtained a J 50 warrant of arrest which was issued. The IO summoned Mr Sibeko by calling him on his mobile phone. He then went and reported to the police station where he was arrested and charged with four counts of stock theft. The application for a warrant of arrest, although prudent to do, but was not necessary in the circumstances. The respondent argues that the fact that Mr Sibeko presented himself to the IO upon receiving a call to do so, is not borne out by his affidavit evidence before the court a quo. This is hopefully due to an oversight by Adv Molokoane, as it was stated by Mr Sibeko in his affidavit. (See in this regard the record, page 8, lines 21 to 25, and page 9, lines 1 to 3.)
- [12] An applicant in a bail application is given a broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant (accused) or anything else that is particularly cogent. (See *S v Schietekat* 1999(2) SACR 51 (CC) in particular paragraphs [75] and
- [76] thereof.) Personal circumstances present to an exceptional degree, may lead to a finding that release on bail is justified. (See *S v Rudolph* 2010(1) SACR 262 (SCA).)
- [13] The CPA provides as follows:

[13.1] Section 60(4)(a) Of the CPA provides that the interest of justice does not permit the release from detention of an accused where inter alia there is a 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.

[13.2] Section 60(4)(c) provides that where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or conceal or destroy evidence.

[14] The allegation by the IO in his affidavit that a witness in the case was in protective custody, is important, but there is no evidence that Mr Sibeko knows him, or that he is aware of any of the other state witness's' addresses. The statements of these witnesses would have been obtained anyway, as it seems to be the state's case that the investigation into the crimes were finalised and that the matter is ready for trial.

[15] The Magistrate did not deal with the factors as mentioned in Section 60(4) of the CPA at all.

[16] There is no evidence to indicate a likelihood that the Appellant will influence or intimidate witnesses or that he will conceal or destroy evidence. A mere possibility or suspicion is not enough. There must be a probability. (See in this regard *S v Schietekat* 1999(2) SACR 51 (CC) Par 53). The investigating officer only mentioned possibilities and speculative arguments with regard to the

safety of possible witnesses. The Court accepts that it is highly improbable that Mr Sibeko will have the residential addresses of the witnesses.

[17] There is no evidence to indicate that there is a likelihood that Mr Sibeko's release on bail will undermine, or jeopardize, the objectives or the proper functioning of the criminal justice system, including the bail system. This is confirmed by his previous release on bail, his compliance with the bail conditions, and his immediate response when the IO called him.

[18] The IO's evidence in which he states that that the release of Mr Sibeko on bail will endanger the safety of witnesses, and that the farming community will take the law into their own hands because one farmer has enlisted the help of a private security company is not supported by any evidence. The mere fact that there were reports in the newspapers is no indication of a huge community interest.

[19] The Court's view is that the evidence by Mr Sibeko indicates that he is a well-established individual with more to lose than to gain should he not adhere, and comply with, the stringent bail conditions the court intend to lay down. The magistrate was clearly wrong in refusing bail to Mr Sibeko. He simply is no flight risk. As far as the relative strength of the state case is concerned, it might be so that the IO is of the opinion that the evidence will result in proving the offences Mr Sibeko is alleged to have committed, but it still has to be proven.

[20] Bail is not intended to punish an accused. The grounds upon which the magistrate refused bail is not supported by any evidence. One wonders whether the magistrate was involved in the same matter, and whether he applied his mind to the facts before him at all. A disconnect exists between the reasons provided by him, and the evidence contained in both affidavits. Rulings by judicial officers should provide the parties with sufficient reasons for the finding and orders made by them.

[21] *MPHAHLELE v FIRST NATIONAL BANK OF SA LTD* [1999] ZACC 1; 1999 (2) SA 667 (CC) 1999 (2) SA p667 the Constitutional court dealt with the purpose of judgments:

[12] There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of s 1 of the Constitution, the rule of law is one of the founding values of our democratic state, E and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, F why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer. [Emphasis added]

[22] The court is satisfied that Mr Sibeko, in his bail application succeeded in showing that he is not a flight risk. Further, that other than the offences he is presently facing, he has been a law abiding citizen, thus dispelling the idea of reoffending, and that his incarceration would deprive him of earning a living. The likelihood of interfering, intimidating or influencing state

witnesses was almost zero regard been had to the fact that one witnesses is apparently kept in a place of safety, and the other have made statements.

[23] Bail conditions have always served to ensure that whatever fear the state might have in the release of an accused person is taken care of. It is a necessary consideration as also envisaged in section 60(6) which provides that in considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the binding effect and enforceability

of bail conditions which may be imposed and the ease with which such conditions could be breached.

[24] Therefore the court finds that:

[24.1] the appeal against the refusal of release on bail by Mr DINKY FREEDMAN SIBEKO is hereby upheld;

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

[24.2.1] Mr DINKY FREEDMAN SIBEKO is hereby granted bail on the following conditions:

[24.2.1.1] that Mr DINKY FREEDMAN SIBEKO pay an amount of R 15 000.00 cash as bail money;

[24.2.1.2] that Mr DINKY FREEDMAN SIBEKO shall be released upon payment of the amount in [24.2.1.1] hereof;

[24.2.1.3] he shall reside at 80 FISANT STREET, KINROSS, MPUMALANGA;

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

[24.3] Mr DINKY FREEDMAN SIBEKO shall, after the lifting of the nation-wide lockdown level 4, report to the Kinross Police Station, or such Police Station as indicated by the Investigating Officer, in writing in the docket, and which address, and a copy of such endorsement by the Investigating Officer, shall be handed to Mr DINKY FREEDMAN SIBEKO, on Mondays and Fridays, between 07h00 and 17h00.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

DELIVERED VIA EMAIL DUE TO COVID-19

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