

SOUTH AFRICA / JUDGMENT

Sikhakhane v S (BA19/2020) [2020] ZAMPMHC 38 (31 August 2020)

[2020] ZAMPMHC 38

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

BA 19/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION, MIDDELBURG

(LOCAL

SEAT)

CASE

NO: BA 19/2020

In

the matter between:

THULANI

LUCKY

SIKHAKHANE APPELLANT

And

THE

STATE RESPONDENT

JUDGMENT

(BAIL APPEAL)

HANDED DOWN VIA EMAIL ON 31 AUGUST 2020

BRAUCKMANN AJ

INTRODUCTION

- [1] The Appellant (Mr Sikhakhane) is accused number one in the court a quo and appeals against the refusal of bail in the Magistrates’

Court of Amersfoort. The bail application was brought in terms of Sec 60 of the Criminal Procedure Act 51 of 1977 (“The CPA”).

- [2] At the bail application the State advised the Court a quo that the Appellant faces a crime listed in Schedule 5 of the Criminal Procedure Act, 1977 (Act 51 of 1977) (“the CPA”). The State initially opposed the bail application through the oral evidence of the Investigating Officer (“the I/O”), Siphile Ben Ndlovu, and bail was refused by the Court a quo on 22 January 2020.

- [3] In terms of Appellant’s notice of appeal dated 19 June 2020 (“The Notice”) appeal is noted against the refusal of bail by “Learned Regional Court Magistrate Mr. P Haasbroek” on “4 December 2019”[1]. The notice is accompanied by a special power of attorney[2] authorising the attorney Luando Urell Vorster (an attorney) to note an appeal against “the initial refusal of my Application for Bail by the Honourable MR. P.B. HAASBROEK on the 4th of December 2019 at PIXLEY ISAKA SEME HELD IN AMERSFOORT, under CASE NUMBER 405/17 on charges of:

‘ARMED ROBBERY WITH AGGRAVATED CIRCUMSTANCES & OTHERS (sic) CHARGES’ “[Own emphasis]

- [4] An application was brought in the Court a quo in terms whereof the Appellant, duly represented, applied for bail on so-called “new facts”. This Court previously removed the matter from the roll, as there was non-compliance with its directives, but more importantly because the transcript of the proceedings before the Court a quo on the 4th December 2019 was not available. Records have now been provided, but seems to be the incorrect record as it reflects the proceedings held on 22 January 2018 which is of no assistance to the Court. These records were filed with the registrar on 27 August 2020. I noted that the record contained a typed version[3] of the proceedings of 04 December 2019 and have decided to use those records. It is alarming that the attorneys for the appellant once again failed to file the relevant typed record of proceedings.

- [5] It appears that on the relevant day Mr Phatudi appeared on behalf of the appellant and confirmed that the appellant’s affidavit dated 20 November 2019 may be used by the Court a quo for considering the application. The State did not call the I/O to testify, but handed an affidavit by him up in court in opposition to the application. The Court could not find the affidavit as referred to in the record of proceedings filed before me. Although the typed record reflects that submissions were made by both State and Mr Phatudi on 4 December 2019, I cannot find the oral submissions in the record either.

[6] The Court a quo delivered its ruling on the 4th of December 2019[4]. The ruling is very short and dealt mainly with the “new facts” in dismissing the application.

[7] Section 65 (4) of the Criminal Procedure Act 51 of 1977 (“the CPA”) 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* [5]:

“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 . . .”

[8] 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.

[9] The Respondent submits that section 60(11) (b) of CPA stipulates that pertaining to schedule 5 offences; “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 interest of justice permit his or her release.”

[10] The standard of proof in a bail application is ‘on a balance of probabilities’, and once the bail applicant has proven that it is in the interest of justice that he be released on bail, enquiry must focus on the balance between the interest of the state as set out in section 60(4) –

(8) A of the CPA on the one hand and the appellant’s interest in his personal freedom as set out in section 60(9) on the other.

[11] Having decided that I will make use of the existing record of proceedings as bail appeals concerns the liberty of an Appellant, and having also requested the parties to see that the record of proceedings in the Court a quo is provided, it is clear that despite

the Appellant’s arguments, the Court a quo cannot be faulted for the decision it reached. The only “new fact” that was before the Court a quo was the fact that the cases against him in various other Courts had been removed from the respective rolls for some reason or the other[6].

- [12] As the records are incomplete, I cannot find that the Court a Quo was wrong in refusing the bail application on new facts. Firstly, the affidavit by the appellant is not available, and forms part of the evidence that the Court a quo considered before reaching a conclusion, and secondly, the I/O also made an affidavit, containing facts that played a vital role in the outcome of the ill-fated application to be released on bail.
- [13] If it was only the appellant's rights that were involved in this appeal, I would have considered it without the evidence, but the public has an interest as well. The appellant only has its own attorneys to blame for the fact that finality cannot be reached. Had the full record been filed, I would have been in a position to consider and rule upon the appeal. I am, for a second time, and for exactly the same reasons not in a position to consider this appeal, although I have read the papers filed.
- [14] Not only is the appellant's attorney's conduct delaying justice for their own client, but also amounts to wasting valuable resources in the form of the Court's time. A reasonable and prudent attorney would have scrutinized the Court file to ensure the record is complete, but in this matter it did not happen, and irrelevant portions of the record were filed, I suppose at great expense for the appellant. No wonder the public complains about the "legal system" that is letting them down. That while there is absolutely nothing wrong with the system, but with conduct, or lack thereof, by the actors taking part in the system.
- [15] In this appeal the appellant's attorneys drafted both the notice of appeal and power of attorney. It is pertinent that it is the Court a quo's ruling dated 4 DECEMBER 2019 is appealed. It then begs the question why, after having been reminded of the fact, did the appellant's attorneys still fail to file the relevant documentation and records. I can only conclude that it is due to their negligence and lack of dedication.
- [16] In order to do justice to the appellant, I intend making an order that will ensure that the appeal will be heard and disposed of expeditiously, as it is supposed to have been done in the first instance.
- [17] I therefore make the following order:
- [17.1] The appellant's attorneys must file the transcribed record of the proceedings dated 04 DECEMBER 2020 with the Registrar of this Court within 20 days of date of this order. The records shall include the affidavits of the appellant and the Investigating officer referred to on page 19 of the record of proceedings filed with this Court's Registrar,
- [17.2] The Registrar shall not set this appeal down before the record is properly indexed and paginated in proper chronological order, including the records referred to in paragraph [17.1] of this order.

[17.3] The appellant's attorneys, Luando Vorster Attorneys, and specifically the attorney seized with this appeal, must file an affidavit with the Registrar of this Court (and email the affidavit to:LVanstaden@judiciary.org.za) on or before 03August 2020 explaining why the appeal record is incomplete and why an order should not be made in terms whereof they are ordered to forfeit any and all fees and disbursements up and until date of this order, and why their conduct should not be reported to the relevant Legal Practice Council.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPELLANT: LUANDO VORSTER ATTORNEYS

INSTRUCTED BY: LUANDO VORSTER ATTORNEYS

luandovorsterattorneys@gmail.com

REPRESENTATIVE FOR THE RESPONDENT: ADV E.S. MALEFAHLO

INSTRUCTED BY: NATIONAL PROSECUTING AUTHORITY

fwvandermerwe@npa.gov.za; Sontago Edward SE. Malefahlo <SMalefahlo@npa.gov.za>

DATE OF HEARING: NO HEARING

DATE OF JUDGMENT: 31 AUGUST 2020

[1] Page 174 to 175 of the record.

[2] Page 176 of the record.

[3] Page 19 of the record.

[4] Page 86 of the record.

[5] 1979 (4) SA 218 (D) at 220 E-G; See also S v Branco 2002 (1) SACR 531 (WLD) at 533 I.

[6] Page 86, lines 1 to 8 of the record.

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Prepared on 9 October 2026 · Esheria