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**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**



**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case number: SS40 / 2006**

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) NOT REVISED.

**2 March 2017**

DATE

.....

SIGNATURE

**In the matter between:**

**GARRY PARTICK PORRITT**

**APPLICANT**

**and**

**THE STATE**

**RESPONDENT**

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**J U D G M E N T**

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**CORAM : RE MONAMA, J:**

## **Introduction**

[1] This is bail application. Mr Porrit seeks and order admitting him to bail pending the finalisation of his just recently started trial. He is 66 years old and is facing some extremely serious counts which include fraud, theft, tax evasion, contravention of Exchange Control Regulations, share manipulation and the contravention of the Prevention of Organised Crime Act. The offences fall within the provisions of Schedule 6 to the Criminal Procedure Act (“the CPA”). The matter has a long and quite disturbing history. The amounts herein involved are estimated to be in the region of several billions of rand. He was arrested during 14 December 2002 and some six days later on 20 December 2002 he was admitted to bail.

[2] From 20 December 2002 to date the matter has been on the criminal roll in the lower court and in this court. In this court that has been the position since 2006. Notwithstanding the said several appearances in the High Court and the Supreme Court of Appeal<sup>1</sup> the trial has just recently started. The other several appearances dealt primarily with the procedural issues and mainly at the instances of the Applicant.

[3] Notwithstanding the chequered history mentioned, I will restrict my judgment to the latest and relevant issues. Any reference to the history will only be made when it is necessary to do so. The trial is before my Brother Spilg J. The trial is proceeding but has had and continue to have several problems in the form of defaults and delays. One of those many problems is the source of this application.

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<sup>1</sup> Legal Aid Board v The State 2011(1)SACR 166 SCA

## **The current application**

[4] From 20 December 2002 until 21 July 2017 the Applicant was out on bail pending the finalisation of his criminal trial which was in progress. This is part of the presumption of innocence. During 12 and 19 June 2017 he failed to attend his trial. An inquiry was held in terms of the provisions of section 67 of the CPA.<sup>2</sup> On 21 July 2017 the court ruled that:

- The Applicant was in wilful default by not attending **The** court on 12 and 19 June 2017; and
- His bail money in the sum of R100, 000 is finally estreated or forfeited to the State.

On 6 September 2017 his application for leave to appeal the **whole judgment and order** was refused.

[5] In the interim, the matter became subject of the case management process before Judge Mokgoathheng who on **11 August 2017** issued the following directive :

“If GP Porritt (the Applicant) intends proceeding with the Appeal against the Order granted by J Spilg in the Section 67 Inquiry same shall proceed prior to the institution of the proposed Bail Application, alternatively if GP Porritt decides not to proceed with the prosecution of the Section 67 Inquiry Appeal, then the Bail Application may be proceeded with.”

On **9 November 2017**, the Applicant filed his application for special leave to appeal the **whole of the judgment and orders** in the Supreme Court of Appeal. The application is now pending.

## **The preparation of this application**

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<sup>2</sup> The Criminal Procedure Act, as amended.

[6] During 23 November 2017, the Applicant's attorney requested a bail application hearing by way of a letter. The founding affidavit used in this matter is not annexed to the notice of motion. The entire record is about 2100 pages long. The found or supporting affidavit is not dated but it is apparently commissioned by a captain in this building. Although the record was paginated there was no index. Notwithstanding my repeated requests for the **practice note** it only arrived in the morning of the hearing. The heads of argument also arrived late. This omission is unacceptable. These documents define the issues. They are necessary important in matters which are by nature urgent.

(7) The Applicant approaches this court for an order admitting him to bail. The said relief is based on the alleged “**new**” facts. These facts are repeated in paragraph 11 **below**<sup>3</sup>. The Respondent is strongly opposing the application and the relief sought. The first point raised by way of point **in limine** is the plea of **lis pendes**. The State contends that issues raised **in this** application are pending in the Supreme Court of Appeal. Accordingly, the:

“the...bail application .....cannot be proceeded with as the applicant is currently awaiting adjudication of his application for special leave to appeal.”

The State submitted that this application on the alleged “new” facts is premature and likely to cause confusion. The State also questioned the motive. They submitted that this application is nothing but a stratagem to delay the trial.

### **The freedom enshrined of the Constitution**

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<sup>3</sup> Paragraphs 111-126 on pages 38-45 of the record.

[8] Before I deal with the submissions it is apposite to reiterate the importance of any person's freedom or liberty. First, the freedom of an individual is guaranteed in the Bill of Rights<sup>4</sup>. The Constitution provides in **Section 35(1)(f)** that

“Everyone who is arrested for allegedly committing an offence has the right:.....

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”

Therefore, any arrest or detention must be considered urgent and must be treated as such. However, the detainee must assist the court. He cannot just adopt a supine attitude. Where the detainee is represented, as he is in this case, I expected a properly paginated <sup>5</sup> record in compliance with the dictates of the practice manual of this division. I also expected that prolixity will be avoided.

[9] In **S v Ho** and **S v Maliwa**<sup>6</sup> the courts emphasised that shoddy preparation will not be tolerated. The mix grill dish type preparation is contrary to what I expected. A properly prepared court file assist a great deal because this court, like any other court, is in terms <sup>7</sup>of the Constitution enjoined to adopt a position that “promotes the spirit, the purport and objects of the Bill of rights”.

[10] The court file herein was not properly arranged. The Applicant was expected to arrange for that. I was not provided with his **Practice Notice** and

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<sup>4</sup> The Constitution of the Republic of South Africa Act, 108 of 1996.

<sup>5</sup> Weiner J when addressing the Advanced Workshop in Wallengberg in Stellenbosch said the following: “ We expect attorneys and counsel to comply withal applicable rules of procedure, local rules and practice manual.”

<sup>6</sup> 1979(3) SA 734 (W) and 1986(3) SA 721(W) respectively.

<sup>7</sup> Section 39(2) of the Constitution

the heads timeously notwithstanding the voluminous record comprising five arch lever files. In the absence of the **Practise Notice** I was left to second guess the nature of this application. It was only later during the submissions that, counsel for the Applicant revealed the true nature of the application. He stated that this application for bail is based on **new facts**<sup>8</sup>. The new facts application is governed by the provisions Section 65(2) of the CPA. The Section provides that:

“ An appeal shall not lie in respect of **new facts** which arise or are discovered after the decision against which the appeals is brought, **unless such new facts** are placed before the magistrate or regional magistrate, and such magistrate or regional magistrate give a decision against the accused on such new facts.”

The section, in my view, provides a remedy for a detainee whose bail in terms of Section 60(1) of the CPA has been refused for whatever reason to approach the court again for the relief on the **new facts**.

[11] Where the bail was withdrawn, as is the position in his case, the above section does not apply. The bail was withdrawn. The withdrawal is not a bar to approach the court and launch another new application. The process has to start **de novo**<sup>9</sup>. The withdrawal will be a relevant factor to be taken into account when the matter is considered. The Applicant used the wrong approach.

### **The alleged “new” facts**

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<sup>8</sup> See Pages 38 – 45 (Paragraphs 111-126) of the founding affidavit (volume 1 of the record

<sup>9</sup> See the head note in *S v Nkosi* 1987(1) SA 581 TPD at 585 G-H where the court held that “ Die beskuldige word nie in sy vorige stand teruggeplaas. ‘n Herstel van borgtog is onder art 67 nie moontlik nie. Dit beteken egter nie dat ‘n nuwe aansoekom bortog op feite wat heers ten tye van daardie nuwe aansoek nie aangehoor kan word nie”

[12] The Applicant relies on the facts below for the relief he seeks. He alleged that his personal circumstances have changed and states that:

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1. My personal circumstances have changed in the nearly 15 years since my arrest and release on bail. I am now 66 years old and am, as a result of these criminal proceedings, unemployable in the normal course of employment and am unbankable. Nearly five years ago my wife and I separated, but we have an amicable relationship.
2. I now live on my own at [...] O. Road, Pietermaritzburg, a house built by my late father where I was born and have lived for most of my life. I look after myself. I have no domestic staff other than a gardener who caretakes the property while I am away and works part time in the garden. The gardener has worked for the family for thirty years and also works for my wife and daughter. His wages are paid by our children.
3. I also spend time at the main family farm, H., near Swartberg in Kwazulu Natal. The farm was acquired in 1980 by the Gary Patrick Porritt Children's Trust ("the children's fund"), established by Douglas Porritt, my late father, for the benefit of his grandchildren born of me. Although I was a trustee of the trust for a very short time after establishment, I have not been a trustee or employee of the trust for over thirty years I have never made any donations to the trust but have benefited from the trust as a d discretionary beneficiary. The current trustees are Bernice Porritt (the mother of our children who are beneficiaries) and Frank Cohen, a senior practicing attorney in Johannesburg. This and other farms acquired at the same time and subsequently are farmed by the children's farming enterprise which includes the farming of cattle, sheep, maize and timber.
4. I have four children and now have nine grandchildren with another grandchild on the way. The family are close and consist of:
  - 4.1 Lauren Taylor, who is 41 years old. She lives in Hilton, very near to me in Pietermaritzburg. She is married to a South African citizen, who is a chartered accountant (CA) with his own business in Pietermaritzburg, and she has her own business of a horse livery in Hilton. I have two young grandsons through Lauren and her husband.

4.2 Brett Porritt, who is 39 years old, He is married to a South African citizen, and lives close to me in Hilton with their three young children. Brett has his own business.

4.3 Greg Porrit, who is 36 years old and lives in Hilton close to me. Greg is married to a South African citizen and they have two children. Greg is the chief financial officer of the children's farming enterprise and divides his time between the farming operations in Swartberg, his office in Pietermaritzburg and his Hilton home. He is an accredited Chartered Management Accountant (ACMA) as certified by the Chartered Institute of Management Accountant (CGMA) as certified by the American Institute of Certified Public Accountants. Greg is also very involved in the livestock management and general running of the children's farming enterprise.

4.4 Murray Porritt, who is 31 years old and lives on H. farm at Swartberg with his wife and their two South African born children. They have lived at H. for 6 years. They are expecting a third child during September. Murray is principally involved with the maize operations on the farm, but also involves himself in the operations on the farm, but also involves himself in the other operations when required, particularly the infrastructure and development of the farms as well as the day-to-day farming operations.

5. Whilst three of my children have lived extensively abroad, they have all returned to live and bring up their families close to Pietermaritzburg, he is not far away at the family farms at Swartberg and the cousins frequently visit each other.
6. I have three sisters who all live in South Africa, and who all have children
7. My mother died some thirty years ago of cancer and my father died some eight year ago of skin and other cancers. During the past few years, I have increasingly had to have treatments by a dermatologist for multiple pre-cancerous growths on my skin as well as an actual cancerous growth cut out.
8. I stated in my founding affidavit in my original application of December 2002 that four generations of the Porritt family have lived in Pietermaritzburg. It is now five generations. My great-grandfather established a successful wagon and coach-building business in

Pietermaritzburg in the 1800's. My late grandfather was one of the six inaugural students of the faculty of law in the University of Natal.

9. The large extended family of my wife, Bernice Porritt (we are not divorced), has long historic ties in South Africa. I am very close to them. The vast majority of her family, including her two sisters live in South Africa. Despite separation, we have maintained an amicable relationship.
10. I have no assets, the funds raised by my children for payment of my initial R1 million bail, which the State insisted be paid in cash, was paid out of the proceeds of the sale of livestock of an entity ultimately owned by the Children's Trust, which resulted in an enormous and increasing debt due by me to them. I do not earn a salary, but am supported by my family. Although I have no management role, I contribute to the success of the farming enterprise, using my some forty-five years of experience to provide advice and assistance. My two sons, Greg and Murray, have gradually taken over roles which I previously played as I have been increasingly unavailable due to the demands of my court battle.
11. My experience in farming matters over many years has resulted in my advice and intervention being sought relating to farming issues. Not only am I involve in the criminal case in Johannesburg, but I am also involved in various ongoing civil matters in Pietermaritzburg relating to the children's farming enterprise for which my participation is crucial. This takes up considerable time and effort on my part.
12. I also have no access to any assets abroad. Despite years of diligent searching and trips to various overseas countries, the State has been unable to unearth a single cent of overseas funds to which I (or Bernice) could possibly have access, whether directly or indirectly. This is because neither or Bernice, have any such funds or access to such funds.
13. Since my arrest in December 2002, one of the farms owned by the Children's Trust, namely, Gildford, had to be sold in order to fund my legal costs. This was a key farm, the replacement cost of which would today be at least ten times the price released at the time. During the past six or seven years, four farms in the same area have been purchased by the children's farming enterprise, namely, the farms Berridale, Bellevue, Fair View and Avenue Hill.
14. As stated hereinafter, there is also a long ongoing civil dispute with SARS (who is the principal complainant and sponsor of the costs of the state in this case) to which Bennett and I are parties and which has been

taking up much of my time. The dispute relates to several unsuccessful attempts by SARS since early 1998 to prove a claim or an interest either before the liquidators or the courts in an insolvent estate of which Bennett and I are directors, namely Lamax (Pty) Limited (in liquidation) [“Lamax”]. A large counterclaim was filed against SARS by Synergy in 2000 and, for the past nearly 20 years, SARS has also prevented and delayed a distribution payment of several millions rand (currently some R15million) to Synergy (previously Accused No.4) and thereafter to the Surrey Development Trust (“Surrey”) to whom Synergy had ceded its claim over 14 years ago. (Bennett and I are trustees of Surrey, which was set up in 1993, and my children are the beneficiaries.) This matter does not relate at all to the criminal charge against Bennett and I, but it does relate to the validity of claims by SARS and the fraudulent nature of tax and value added tax assessments drawn up by SARS officials, including Boshoff who is a member of the prosecution team. It therefore goes to the heart of the credibility of the prosecution and key members of the prosecution team.

15. My health, which has previously been robust, has now started deteriorating, I have dealt with this issue more fully above.

16. I respectfully submit that in the nearly fifteen years since my first arrest, I have never had any desire or intention to leave my family behind or to endeavour to escape the criminal trial. I have made no attempt to flee from the Republic of South Africa, nor do I desire or intend to do so. At my age (66), and with no wealth, I would find it impossible to obtain employment or live anywhere else but South Africa. I am totally dependent on my children for financial support. I am besotted with my grandchildren who similarly love their “pop”. We spend as much time as possible together”.

The Applicant has adopted a wrong procedure. The approach adopted can best be described as in the form of delphic style – “heads you lose and tails I win” – in the presentation of his case.

### **The point in limine**

[13] I must first deal with the point in limine – the special plea.<sup>10</sup> For the sake of completeness I quote the defence again:

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<sup>10</sup> See paragraph 8 above.

“..the bail application cannot be proceeded with as the applicant is currently awaiting adjudication of his application for special leave to appeal.”

A plea of **lis pendes** is a special plea. Thus it must be adjudicated first. The pleasis aimed at the avoidance of duplication of actions. I am of the view that the point raised has merit. There is currently a pending action between these parties in the Supreme Court. That is common cause and the action is pending at the instances of the Applicant. The subject-matter in that case is the liberty of the Applicant. In the case before me the same parties are involved. The subject matter is the liberty of the Applicant. The **fora or forum** may have changed but the appeal on the same basis as stated above is still pending nonetheless.

[14] The Applicant was aware of the difficulties. Consequently, he devised the so-called new facts approach in order to circumvent the problems of the stated special plea. The adopted approach is not a mistake. This is consistent with the attitude adopted by the Applicant in numerous cases before our court. He commenced this application with the full knowledge of the pending case elsewhere and with the full knowledge of the spirit of the directive of Judge Mokgoathleng<sup>11</sup>. In my view, his conduct is **prima facie** vexatious.

[15] The Applicant is acutely aware of the rights contained in the Constitution<sup>12</sup>. He is not an infrequent visitor and has enforced them regularly in the high court. The revocation of bail affected the fundamental right of the Applicant. His precious right of freedom is guaranteed by the Constitution. I am enjoined to adopt the approach that advances and promotes the purport of the spirit, the object and the values of the Constitution of the Republic of South Africa. But

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<sup>11</sup> See paragraph 5 supra

<sup>12</sup> See Porritt and another v National Director of Public Prosecution and others 2015(1) SACR 533 and Legal Aid SA case referred in note 1 above.

that statement must not be looked at in isolation. The fair trial principles apply to both parties and in particular they apply to sustain the criminal justice of the Republic. They are not meant to be abused. The new fact approach is but one of the many stratagem he uses.

[16] The fact that the matter is pending elsewhere must have some serious legal implications and consequences. The principles of *lis pendens* are necessary for orderliness. Applicant's attitude is that the two processes are different and distinguishable. He has not explained the differences. That argument is, in my view, fallacious and legally untenable. The primary objective of the two processes is aimed at the regaining of the lost freedom. The essence in this application and in the application pending in the Supreme Court is substantially the same. The admission to bail. Accordingly, it is a disingenuous argument that the present application contains different points than those raised in the special leave application currently pending in the Supreme Court of Appeals. That view stands to be dismissed.

[17] The Applicant has the propensity of disregarding the injunctions. He made a wrong choice notwithstanding the clear and unambiguous directive of Judge Mokgoathleng<sup>13</sup>. He made a choice and must stick to it. This application is an afterthought but on the whole demonstrates the stratagem generally used by the Applicant to delay the trial. Bail is an undertaking to attend trial because at this stage he is presumed to be innocent. The trial needs to be finalised. It is often said "justice delayed is justice denied". Section 35 (3) (d) of the Constitution provides that:

“ Every accused person has a right to a fair trial, which includes the right

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<sup>13</sup> See paragraph 6 above

(d) to have their trial begin and conclude without unnecessary delay ;”.

However, where there are unnecessary delays caused by non- attendances the court may be justified to withdraw bail in order to facilitate the attendance and conclusion of the trial.

### **The delay in this trial – The Zuma principles**

[18] The matter has been on the roll since 2006. It has received in one way or another attention of the high court (Mailula, Borchers, Maluleke, Mokgoathleng JJ) the Supreme Court of Appeal . The Supreme Court, has correctly,lamented the delays. Poonan JA that:

“ ....as has been made plain in this court and in the court and the one below, they ( Applicant and his co-accused) intend to employ every stratagem available to them in order to delay the commencement , and thereafter continuation, of the trial for as long as they possibly can.”<sup>14</sup>

The above observation was made some seven years ago but it is still effectivetoday as it was then. The delay in this matter is totallyunacceptable. This case strangelyhas the hallmarks of the **Zuma Principle**- to drag the case througheven when there aremanifestly no prospects. These particular tactics have since become common place in our courts. The delay of some16years cannot on any platform be justified. Approximately17 judges have in one way or another dealt with this matter not on trial but on peripheral issues.

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<sup>14</sup> Legal Aid Board case at page 184E-G

[19] The Applicant is using the old well-known tricks to cause a delay. The Applicant is now representing himself. He has dismissed the attorneys from the case and hopefully they will never reappear in this matter at any future convenient time. The Applicant continues to manifest his negative and demeaning attitude towards the bench and the prosecution. Such tactics reflect negatively on our justice system and particularly the criminal justice system. The tactics deserve to be rooted out. I am buttressed by the view of Poonan JA referred to above<sup>15</sup>. The conduct of the Applicant is a negation of what any true lawyer will ever call justice. His tactics are inherently unjust, cruel and primitive. We cannot condone his conduct in terms of which he is trampling the administration of justice in to dust. In my view his conduct is vexatious.

[20] I am satisfied that the point in *limine* is well taken. The point is good in law. Therefore there is no need to consider whether Applicant has discharged the onus upon him in terms of Section 60(11)(a) of the CPA. I had a choice. I could have postponed the application until the appeal is finalised. In the interest of justice this is the matter where it has to get a definite pronouncement.

## **Conclusion**

[ 21] Accordingly, the Respondent's point in *limine* is good in law. The application on the so-called new facts is an attempt to get the order of Judge Spilg reviewed by me through the back door. In the circumstances I make the following order; namely:

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<sup>15</sup> See paragraph 17 above.

**The application to be admitted to bail is refused.**

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**RE MONAMA**

**JUDGE OF THE HIGH COURT**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Appearances**

Counsel for the Applicant: Adv. W J Vermeulen SC

Instructing Attorneys:

FJ Cohen Attorneys  
Bramley, Johannesburg

Counsel for the Respondent:

Adv. E Coetzee SC  
Adv. J Ferreira and  
Adv. P Louw

Instructed by:

Director of Public  
Prosecution ,Pretoria.

Date of hearing:

13 December 2017

Date of judgment:

2 March 2018.