

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: SS 154/09

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

THE STATE

and

NORBERT GLENN AGLIOTTI

Accused

**RULING ON THE STATE'S APPLICATION TO HAVE THE ACCUSED'S
EVIDENCE LED AT BAIL PROCEEDINGS IN THE MAGISTRATES'
COURT ADMITTED INTO THE RECORD**

KGOMO, J:

[1] On 12 August 2010, when the State was to call its 7th witness to the witness stand, they encountered a clinch as the intended witness, from MTN Cellular Company according to them, was not available to testify, the reasons

advanced being that the witness had been testifying in another case in the Western Cape and could not arrive in time to take the witness stand.

[2] The defence, through Adv Hodes SC, registered its discontent about this state of affairs, mostly because – according to them – they were not furnished with the requisite statement made by this witness that could make the technical data it is going to explain, intelligible to them.

[3] The State, through Adv D Dakana, intimated that they too were not in possession of that statement but would endeavour to obtain it before the witness testified.

[4] I made it clear to the State counsels that that state of affairs was highly undesirable as it may likely be classified as something akin to “*ambush litigation*”. I reminded the State counsels that the accused was to be given all those statements that he was by law entitled to, and that the State and the defence should come together when the case was adjourned to agree about whatever witnesses were to be called and if need be, the sequence of their appearances at court. I also called upon the State counsels to ensure that the defence was provided with all the necessary statements and/or intended exhibits to enable them to adequately prepare for the accused’s defence.

[5] The State then made an application to this Court for the admission as evidence or into the record of proceedings herein the bail proceedings that were conducted before the Regional Magistrate, Johannesburg, a Mr Eksteen

on 13 December 2006. In those proceedings this accused was the applicant and he was represented by the self-same Adv Hodes SC who is representing him at this trial. The proceedings therein were in terms of section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 (as amended). I will henceforth refer to the Criminal Procedure Act as “*the Act*” and unless an Act is referred to specifically by name, any reference to the Act will be a reference to the Criminal Procedure Act.

[6] For record purposes, it should be mentioned herein at this stage that according to Adv Hodes SC, he was not yet SC at the time. The averment or submission that he was Senior Counsel at the time was made by Adv Dakana during his submissions and argument for the application to be granted. As Adv Dakana did not gainsay the above “*correction*” in his reply, I record it as a fact that at the time the accused applied for bail at the Regional Court on 13 December 2006 Adv Hodes SC was not yet a Senior Counsel.

[7] Both the State and Defence Counsels prepared and used Heads of Argument during their submissions and arguments. They also supplemented the Heads of Argument with verbal ones.

[8] In their Heads of Argument, the State per Adv Dakana submitted that –

8.1 The accused was legally represented by Adv Hodes SC duly instructed by Kanarek Attorneys at the bail hearing. I have already recorded the correction about Adv Hodes’ title as SC at

the time. The gist of his argument was that the accused was there and then represented by an able and experienced counsel.

8.2 The accused did not lead *viva voce* evidence at the bail hearing but that an affidavit was used in lieu of *viva voce* evidence.

8.3 As a consequence, so read the Heads of Argument, the accused was at the time aware of the import and consequences of the affidavit, more so that he was so adequately and effectively represented.

8.4 Adv Dakana submitted that since the accused relied on an affidavit at his bail hearing instead of leading *viva voce* evidence, it was unnecessary for the Magistrate to specifically warn him as required in terms of section 60(11B)(c) of the Act. He further argued that the accused deposed to the affidavit out of his own free will and could clearly not have been unduly influenced.

8.5 Adv Dakana also relied on section 235 of the Criminal Procedure Act which regulates the proof of a record of judicial proceedings at a subsequent trial without the presiding Magistrate therein being called to the witness stand, to prove the

facts of what the accused said at that previous trial or proceedings.

8.6 In substantiation of the State submissions Adv Dakana relied on the following authorities:

8.6.1 *S v Adams* 1993 (1) SACR 611 (C).

8.6.2 *S v Venter* 1996 (1) SACR 664.

8.6.3 *S v Nomzaza* 1996 (2) SACR 14 (A).

8.6.4 *S v Basson* 2005 (2) BCLR 1192 (CC) at 107-123.

8.6.5 *S v Dlamini, Dladla, Joubert and Schietekat* 1999 (2) SACR 51 (CC) at paras [86] – [1000].

8.6.6 *Davis v Tip NO and Others* 1996 (1) SA 1152.

[9] In his supplementary *viva voce* argument Adv Dakana reiterated that –

9.1 the bail affidavit was drawn up by or on his behalf by a seasoned and capable counsel who obviously should have explained his legal rights to him;

9.2 part of the contents of that affidavit were referred to by state witness Clinton Nassif when he was on the witness stand;

9.3 by law this Court can only refuse to accept or admit bail proceedings if the accused was represented by an inexperienced counsel, which was not the case here as Adv Hodes SC is a seasoned, experienced and capable counsel. For this submission he relied on *S v Nyengani* 1996 (2) SACR 520 (E).

[10] He argued further that it is only where oral testimony was tendered at a bail hearing that the presiding officer was obliged to warn the applicant in terms of section 60(11B)(c). He relied on *S v Balkwell and Another* 2006 (1) SACR 60 (N) for the above submission.

[11] In opposing the above application Adv Hodes SC made use of Heads of Argument duly supplemented by verbal arguments. He argued that since the accused was charged under Schedule 6 in the Criminal Procedure Act, he was by law obliged to adduce evidence which would satisfy the court hearing his bail application that exceptional circumstances existed, which in the interests of justice permitted his release. He had no choice in the matter. He further submitted and argued that evidence could be either *viva voce* or by affidavit and that on his advice, the accused deposed to and relied on an affidavit in support of his application. Such affidavit, he submitted, satisfied the evidentiary requirement set in section 60(11B)(c) of the Act.

[12] The crux of the defence's opposition was that by not warning the accused as applicant in that bail application the Magistrate committed a fatal mistake that should result in this application being refused. He argued that the provisions of section 60 (11B) (c) were peremptory and were not complied with. Further that despite the State in this application arguing that by making use of an affidavit the accused as the applicant in the bail proceedings was not electing to testify, and as such it not being necessary that he be duly warned by that court, if (State) is yet seeking to introduce as evidence in this trial that self-same affidavit, which it calls evidence, tendered at the Bail Application.

[13] It was the accused's further submission that the fact that the applicant (i.e. accused and respondent) in this application was represented by counsel and an attorney have no bearing on the fact that peremptory provisions of the law were to be complied with and that as such this application should be refused since they were not complied with.

[14] The defence further argued that since the accused have not admitted the bail proceedings in terms of section 220 of the Criminal Procedure Act and have not utilised same in any manner during this trial to date, these bail proceedings should not be admitted.

[15] Both counsels relied on several decided cases which I will deal with briefly later.

[16] What is paramount and important for a ruling in this case is that both sides are agreed that the accused was not warned by the Regional Magistrate on 13 December 2006 before the bail hearing proceeded.

[17] Furthermore, my understanding of arguments from both sides herein is that it is common cause that whenever an applicant in a bail hearing renders *viva voce* evidence, then the Magistrate is obliged and by law bound to warn him in terms of section 60(11B)(c). The defence's further contention is that even where an accused person or applicant makes use of an affidavit, the presiding officer is still obliged to warn him in terms of the section. The State's argument is that where an affidavit is used, the warning is not necessary, especially where he is represented by a capable or competent or experienced legal representative. The State further contends that it should be obvious in the above case that the applicant's legal representative would have warned him (applicant) of the legal consequences. I wish to place it on record that the timing of a hearing on the admissibility of evidence tendered at a bail hearing is inconsequential. It can be made at any stage of a trial. It is an interlocutory matter. The State is thus within their rights to bring this application at this stage.

See: *S v Basson* 2003 (2) SACR 373 (SCA) at [105].

See also: *S v Basson* 2007 (1) SACR 566 (CC).

[18] Section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 provides as follows:-

“The record of bail proceedings, excluding the information in paragraph (a) shall form part of the record of the trial of the accused following upon such bail proceedings: PROVIDED THAT if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and that such evidence becomes admissible in any such subsequent proceedings.”

[19] Allied to this section is section 235 of the same Act relied upon by the State. Section 235 regulates the procedures followed in proving records of previous judicial proceedings.

[20] In our application at hand, the admissibility of bail proceedings in this subsequent trial is the issue. Section 235, in my view may be of relevance as it also deals with previous judicial proceedings, however, it does not relate to the admissibility of the contents of such proceedings at an accused's subsequent trial. I find the section consequently not directly relevant to the enquiry we are dealing with presently. The case quoted by the state, viz. S v Nomzama, 1996(2) SACR 14 ruled that the evidence given by an accused at a bail application can be allowed in the latter trial “if such evidence is otherwise admissible.”

[21] The rider used in the case “*if such evidence is otherwise admissible*” in my view illustrates the point I made above that the admissibility of the bail evidence is the paramount consideration, not just the admission or proof of the previous record through section 235 of the Criminal Procedure Act. Some authorities contend that such evidence (of affidavit) may only be admitted if the trial court is satisfied that when the accused at the time made and handed

in his affidavit he did so voluntarily, knowingly and intelligibly waived his applicable constitutional rights. In this instance the accused is adamant that he never waived any of his rights.

[22] It is not in dispute that the constitutionality of admitting bail proceedings is not put into question by any of the parties herein. As a result, reliance by the State on *S v Dlamini, Dladla, Joubert and Schietekat* 1999 (2) SACR 51 (CC) is *ex abundanti cautela* or surplus to requirements. However, the principles and the law discussed in that case also go a long way in helping decide issues in our present case.

[23] Trial courts are called upon and are expected to remain alert to their duty to exclude evidence that would impair the fairness of the proceedings before them.

[24] It was held among others in the *S v Dlamini et al* above that:-

“But it is not only trial courts that are under a statutory and constitutional duty to ensure that fairness prevails in judicial proceedings. ... The command that the presiding judicial officer ensure that justice is done applies with equal force to a bail hearing. There the presiding officer is duty bound to ensure that an accused who elects to testify, does so knowing and understanding that any evidence he or she gives may be admissible at trial.”

[25] It is the State’s contention that the presiding Magistrate was not obliged to warn the accused before his affidavit was read into the record because among others his capable and experienced counsel should have explained his rights and the implications of section 60(11B)(c) to him earlier.

[26] In *S v Sejaphale* 2000 (1) SACR 603 (T) during a bail hearing the rights of the accused had been explained to him by his legal representative, but not by the Magistrate. Jordaan J held among others that he (Jordaan J) as the subsequent trial judge, did not have a discretion to admit the record of the bail proceedings as section 60(11B)(c) of the Act (51 of 1977) was peremptory. He further held that it required the presiding Magistrate at the bail hearing to warn the accused accordingly and that failure by the Magistrate to do so, despite the fact that his legal representative have done so is tantamount to non-compliance with the requirements of section 60(11B)(c). The honourable judge then ruled that the bail proceedings record is inadmissible.

[27] Similarly, in *S v Nzima and Another* 2001 (2) SACR 354 (C) Jali J put it as follows at 356i-j:-

“If one reads s 60(11B)(c) it is clear that the Legislature placed the obligation on the court to advise the accused of the fact that the evidence he gives during the bail proceedings may subsequently be used against him in any proceedings. In my view, whether the accused is represented by an experienced legal representative or an inexperienced legal representative, the court still has a duty to establish that the accused's rights have been properly explained to him. It is not a duty which rests upon a legal representative even though the legal representative may assist or complement the court's obligation in explaining the accused's rights.”

The judge here did not differentiate between oral evidence or evidence by affidavit.

[28] The question one is asking one self is whether the honourable judge's reference to even an affidavit in bail proceedings is a misnomer. It is common cause that evidence in judicial proceedings may be tendered verbally or by affidavit. They are all, in my view, evidential material that is placed before the presiding officer for the latter to take a decision. Even State Counsel did not gainsay this when I asked him specifically about it.

[29] Was the presiding officer in the accused's bail application on 13 December 2006 obliged to warn him in terms of section 60(11B)(c) despite the fact that he did not testify *viva voce* but used an affidavit?

[30] Section 60(11B)(c) refers in its contents to subsection or proviso (a) to section 60(11B) that obliges the bail applicant to inform the court whether, firstly, he has any previous convictions, and secondly, whether there are pending charges or cases against him and whether he had been released on bail in respect of such charges. Whether answers or information obtained pursuant to this proviso was given by the accused person or his legal representative the Magistrate is obliged in peremptory terms to enquire from the accused whether he confirms such information. It is a punishable criminal offence to give false information. The question is now why this cannot by rules of interpretation of statute be construed as a requirement that the

presiding officer should inform the applicant of what is required of him in respect of the remaining proviso of section.

[31] In *S v Pienaar* 1992 (1) SACR 178 (W) the issue of evidence on affidavit was in issue. The circumstances under review in that case preceded the coming into operation of section 60(11) of the Act, which was only introduced into the Act by section 4(g) of the Criminal Procedure Second Amendment Act 85 of 1997, which amendment Act came into effect from 1 August 1998. The court held that an affidavit ranked as evidence but not as high as *viva voce* evidence. The court talked therein of higher caste evidence and lower caste evidence. In my view that is a recipe for ambiguity and lack of legal certainty. Evidence should be evidence finish and klaar.

[32] In *S v Snyman and Another* 1992 (2) SACR 169 (C) the court held that though accepted that bail proceedings may form part of subsequent trial proceedings the applicant at bail proceedings should be warned. If not warned, the record is not admissible at subsequent trials. Importantly, the court further held that whether he was properly warned or not is a factual situation that should be determined on a case by case situation.

[33] In *S v Balkwell and Another* 2006 (1) SACR 60 (N) the record of bail proceedings was admitted in the accused's subsequent trial because his counsel referred to or used parts thereof during cross-examination of the state witness(s). The court found that it was the defence that introduced the

contents of the bail proceedings into the trial and could therefore not object to their admission into the record of the subsequent trial itself.

[34] I have listened attentively to all the proceedings in this Court this far: Defence counsel did not once refer to the bail proceedings. The State argues that Clinton Nassif referred once to them in his testimony. That could be so but Clinton Nassif is a state witness not a defence witness. As a consequence, I cannot find and rule that the defence had lifted its shield justifying the admission or use of the bail proceedings in this trial.

[35] The warning in terms of section 60(11B)(c) is an important constitutional safeguard that impacts directly on whether an accused person received a fair trial. The authors, Du Toit, De Jager, Paizes, Skeen & Van der Merwe in their *Commentary on the Criminal Procedure Act* at 9-52 suggests that their understanding of section 60(11B)(c) is that it refers to and should be confined to oral testimony by the accused where he exposes himself to cross-examination. They qualify their submission or opinion, very importantly in my view, when they proceed to state that –

“... Where an accused who was properly warned elects to testify on the merits ..., he may be cross-examined on the merits ...”

[36] The above was the conclusion the court arrived at in *S v Van Wyk* 2005 (1) SACR 41 (SCA) at paragraph [6].

[37] An accused person making an application for bail in terms of section 60(11B)(c) is obliged to discharge the *onus* of proving exceptional circumstances that shows that it is in the interests of justice that he/she be released on bail. There is no choice if that accused person wants to be admitted to bail but to disclose information to the satisfaction of the court at that stage. It may be that at that stage the charge sheet has not yet been fully completed or drafted and as a result, not be fully aware of the precise nature of the allegations of fact that he will or may ultimately have to face in the subsequent or eventual trial. It is also so that at this stage the accused is not yet entitled to the contents of the police docket *per se*. The interests of justice require that the accused's constitutional rights and guarantees be respected. Section 35(5) of the Constitution of the Republic of South Africa, 1996, provides that –

“Evidence obtained in a manner that violates any rights in the Bill of Rights must be excluded if the admission thereof would render a trial unfair or otherwise be detrimental to the administration of justice.”

See: *S v Aimes and Another* 1998 (1) SACR 343 (C).

[38] The above situation or scenario applied to the accused at the time he applied for bail. The charges were not yet finalised. In that fresh and additional charges were only formulated and disclosed to him when this trial started on 26 July 2010.

[39] It is my considered view that even where an accused or applicant in bail hearing concerning Schedule 6 offences, intends to use an affidavit, it is a

peremptory duty of the court, right at the beginning of the proceedings, to warn him fully and comprehensively of the provisions of section 60(11B)(c). That would allow the applicant/accused to make an informed choice before he decides on testifying *viva voce* or making use of an affidavit. It does not make sense to me to want to utilise evidence obtained through both oral testimony and affidavit but only expect the owner of such evidence only to be warned when he testifies orally. As I stated before, both oral evidence and affidavit are evidence that may be used in the subsequent trial. As such, the requisite warning should be issued by the court to the accused before he elects to testify orally or decide to use an affidavit. If he has been so properly warned, then those bail proceedings should be admissible in his subsequent trial. That is why in the *Commentary* and *S v Van Wyk (supra)* the words –

“where the accused was properly warned and he elects to testify ...”

in my view, lends to such an interpretation.

[38] I reiterate: The warning must be issued before the accused makes an election whether to testify *viva voce* or through an affidavit. That would in my view remove the possibility of any absurd interpretation of the section and also ensure a fair trial for an accused person.

[39] Whether he was represented by a good or able or competent or experienced counsel is not a consideration that would affect what ought to be done. It should be done by the court, not by counsel or attorney representing the applicant in the bail proceedings.

[40] For the above reasons the application by the State for the admission of this accused's record and contents of bail proceedings conducted on 13 December 2006 is refused and thus dismissed.

N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

APPLICATION MADE	12 AUGUST 2010
DELIVERED (IN COURT)	16 AUGUST 2010