



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 613/2013

Not Reportable

In the matter between:

JACOBUS MICHAEL PRINSLOO

Appellant

and

THE STATE

Respondent

Neutral citation: *Prinsloo v The State* (613/2013) [2013] ZASCA 178 (29 November 2013)

Coram: Lewis, Theron and Majiedt JJA

Heard: 15 November 2013

Delivered 29 November 2013

Summary: Bail – Pending appeal – court not *functus officio* in respect of further bail application based on new facts.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Mavundla J sitting as court of first instance):

- 1 The appeal is upheld.
- 2 The order of the trial court that it was *functus officio* when a fresh bail application was brought before it is set aside.
- 3 The matter is referred back to the trial court so that it can hear the bail application brought by the appellant.

JUDGMENT

THERON JA (LEWIS and MAJIEDT JJA concurring):

[1] The appellant, Mr Jacobus Michael Prinsloo, was charged and convicted in the North Gauteng High Court (Mavundla J) of murder, theft and the unlawful possession of a firearm and ammunition. He was sentenced to an effective term of imprisonment of twenty five years. After sentence, and pending an application for leave to appeal, the appellant applied for bail and the application was refused. Subsequent to the grant of leave to appeal, the appellant again applied to the high court for bail, on the basis that new facts that had arisen, and that application was also refused. Mavundla J found that the court was *functus officio* in respect of the bail application. It is against that order that the appellant appeals, with the leave of the high court.

[2] The following order was given in this court immediately after argument was concluded:

‘1 The appeal is upheld.

2 The order of the trial court that it was *functus officio* when a fresh bail application was brought before it is set aside.

3 The matter is referred back to the trial court so that it can hear the bail application brought by the appellant.'

The court indicated that reasons for the order would be given. These are the reasons.

[3] The background facts are briefly the following. Shortly after his arrest, the appellant was granted bail in the sum of R20 000, subject to certain conditions. The appellant's passport was not withdrawn and he was allowed to travel outside the country. He is a geologist by profession and a large part of his work was conducted in the neighbouring African countries. After his conviction, the appellant's bail was extended but the amount of bail increased to R30 000. A further condition was imposed that he had to inform the State of any impending travel outside of the Republic.

[4] Argument in respect of sentence was heard on 27 May 2013 and the appellant's bail was extended until the following day, 28 May 2013. He was sentenced on 29 May 2013. The appellant's bail was revoked at that stage. Immediately after the imposition of sentence, the appellant lodged an application for leave to appeal against his convictions and sentences. The appellant then applied for bail, pending the application for leave to appeal. The evidence of the appellant and the investigating officer was led in that application. The high court found that the appellant had not discharged the onus resting on him to show that there were exceptional circumstances justifying his release on bail and refused bail.

[5] On 4 June 2013, the high court granted the appellant leave to appeal against his convictions and sentences. Immediately after leave to appeal was granted, the appellant's legal representative raised the possibility of the court entertaining another bail application. The response of the State was that the court was *functus officio*, having previously refused an application for bail pending an application being brought for leave to appeal. The high court was swayed by the State's argument. The judge said the following in this regard:

‘Yes. Mr de Klerk I am inclined to agree with your colleague that this court is *functus officio*, but having said that, assuming that the court was not *functus officio* I would still, and the mere fact that the bail or the mere fact that leave to appeal has been granted that per se does not necessarily alter the situation, because insofar as the issues that I canvassed in the previous application would still stand. I would not be dissuaded from the prima facie view which I eventually came to in declining bail.’

It must be noted that at that stage, the new bail application had not yet been launched. The approach of the high court, in expressing a view on an impending application, is both surprising and improper.

[6] On 18 July 2013, the appellant made a further application for bail in the high court on the ground of new facts, namely, that he had been granted leave to appeal and had secured additional funds for the purpose of bail (security in the amount of R800 000). At the hearing of this appeal, it was placed on record by the parties that after the appellant had filed the further bail application in the high court and a copy thereof had been placed before the judge, the parties were called to the judge's chambers. It was in chambers that the judge advised the parties that he could not entertain the further bail application as the court was *functus officio*.

[7] The order granted by the high court, dated 18 July 2013, reads:

‘Having heard counsel for the applicant and for the State in chambers it is hereby ordered that:

1. That this Court in respect of the bail application or any further bail application pending the appeal or petition to the Supreme Court of Appeal is *functus officio*;
2. That leave to appeal to the Supreme Court of Appeal against the above order is granted.’

It is this order that is before us.

[8] It is extremely inappropriate for a judicial officer, in chambers, and without properly entertaining an application, to make an order in respect thereof. Applications should, in the usual course, be dealt with in court and after argument has been heard. There are of course exceptions to this general rule, such as urgent applications or where there is good reason for a matter to be heard in chambers.

[9] At the hearing of the appeal, counsel for the respective parties were agreed that the judge in the court below had erred in finding that he was *functus officio*. A judicial officer is not only entitled, but obliged to hear a bail application based on new facts. Section 65(2) of the Criminal Procedure Act 51 of 1977 expressly states that an appeal will not lie in respect of new facts unless such new facts have been placed before the judicial officer against whose decision the appeal has been brought.¹ Although this section refers to a magistrate, it is equally applicable to proceedings in the high court. This court in *S v Bruintjies* 2003 (2) SACR 575 (SCA) confirmed that changed or new circumstances need to be placed before the court during a bail application and not before an appeal court.

¹ Section 65(2) reads:

‘An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts.’

[10] The order made by the high court, that it was *functus officio* in respect of ‘any further bail application pending the appeal,’ deprives the appellant of an opportunity to place the new facts before the trial court. This places the appellant in an invidious position. He is in fact in a state of limbo regarding his attempts to seek bail as an appeal cannot lie until the new facts have been considered by the high court.

[11] It is for these reasons that the appeal was upheld.

L V THERON
JUDGE OF APPEAL

APPEARANCES

For Appellant:

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