

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 383/23

In the matter between

WANDA CHRISTOPHER XALIPHI

APPLICANT

AND

CAPE TOWN REGIONAL MAGISTRATE

1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS, CAPE TOWN

2ND RESPONDENT

Date of hearing: 29 January 2024

Date of Judgment: 19 March 2024 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is an opposed application for the review of a magistrate's ruling to cancel the applicant's bail. The deponent to the applicant's founding affidavit was the applicant's legal representative in the matter before the magistrate. The applicant deposed to a confirmatory affidavit. The Director of Public Prosecutions, Western Cape, deposed to an answering affidavit and Valencia van der Berg, one of the dedicated prosecutors in the matter against the applicant, deposed to a confirmatory affidavit. The first respondent filed a notice to abide. Only the second respondent opposed the application.

[2] The issue was whether the magistrate's decision to order that the applicant be detained in custody pending trial stood to be reviewed and set aside.

[3] The applicant raised concerns about the proper record keeping in this matter. Whilst the use of pre-generated roneo forms allows for easy training as a tool as well as a speedy attention to matters in the ordinarily busy magistrates' courts, they often create a problem where a simple tick or cross is made where something more is desirable, or where abbreviations known to court officials are used which may not be understood by lay persons, sometimes even practitioners. The applicant's confusion is not without foundation because of the use of the roneo forms and such abbreviations. Magistrates should strive, whilst using roneo forms and abbreviations, to keep intelligible records of proceedings. Where I did not agree with the applicant, was that the use of roneo forms and such abbreviations resulted in defective proceedings, which was not proper and therefor irregular. The use of "Acc., W/A or I/C" to refer to "Accused, Warrant of Arrest or In Custody" respectively are so well-known and recognized in court records that they cannot be said to cause any confusion. Where the magistrate's record on 13 April 2022 reads: "Acc 3 before court. W/A cancelled. No(w) enquiry held for failure to appear on 16/3, was I/C", no trained lawyer can claim not to be able to understand what the record conveyed. Read against the background of previous entries on the charge sheet, it is easy to even discern that the (w) was a typo. An experienced reader of court records would easily understand the record to mean: "The accused was before court. The Warrant of Arrest was cancelled. No enquiry was held for the failure of the accused to appear on 16 March, the accused was in custody." A reading of the entry of 16 March would have alerted the reader to know that already at that stage it was indicated that the accused was in custody on another matter.

[4] The applicant's case was that in proceedings as envisaged in section 67 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA), a ruling that provisional bail cancellation be made final where an accused appeared within 14 days, was contrary to section 67. The applicant's case was that the record of 13 April 2022 was a gross irregularity because the applicant was on warning in the matter before court but in custody on another matter. His case was that his non- appearance on 16 March 2022 invoked the provisions of section 170(1) of the CPA. A warrant of arrest had been authorized but not issued against him. He was not arrested and attended court within

the 14 day period. The applicant's case was that there should have been another procedural step to revoke his section 72 warning status. The argument was that the section 67 enquiry did not unilaterally cancel his liberty after being released on warning. The applicant had not failed to appear in compliance with his warning. The case was that his release on warning stood unfettered unless there were proceedings as envisaged in section 72(4) of the CPA.

[5] The applicant was arrested on 14 February 2019. He was a constable in the South African Police Service (SAPS) and worked as a crime scene investigator. He was accused number 3 and appeared together with three other constables in the SAPS. Accused 1 was investigating narcotics related matters. Accused 2 was stationed at a different station and accused 4 also worked at a totally different station. The State alleged that on 26 January 2019 all four accused, together with other persons, arrived at the shops at 37 Strand Street, Cape Town, dressed in police uniforms and wearing bullet proof vests. They informed the shop owners that they had a search warrant and wanted to search the shops. One of the shop owners opened for them, whilst the other shop owners refused. These other shop-owners had doubts and were not satisfied that it was a legitimate search. The accused broke open the security gates and the doors to enter the locked premises of shops not voluntarily opened. A Samsung phone valued at R5000 disappeared during the search. One of the people involved in the search took a bag containing R1620 from one of the shop-owners. One of the shop-owners grabbed that bag from the person's grip. Some of the money fell down and that shop-owner took the money to the shop-owner from whom the bag was removed. The applicant and other accused, and others with them, fled the scene. However, the shop-owners managed to lock accused 1 in the shop and he could not escape. The State alleged that none of the accused was authorized to take part in such a search. Accused 2, the applicant and accused 4 were not even authorised to be in the area at the time. There was no search warrant authorized. The State alleged that the accused, including the applicant, did not take part in a legal search, and that they used their uniforms and firearms as a means to gain access to the shops and also illegally broke into some of the shops.

[6] The applicant and his co-accused faced two charges. Count 1 was fraud in that the accused gave out to the shop-owners that they had a valid search warrant and by means of this misrepresentation induced the shop-owners to believe that they should allow the accused to search whilst in fact they did not have a search warrant or any authorization to search and accused 2, applicant and accused 4 were not even authorized to be in the area whilst on duty, therefore causing potential and/or actual prejudice to one or more of the shop -owners. Count 2 was housebreaking with intent to rob and robbery. The State alleged that the applicant together with other accused broke and entered the shops with the intent to rob, assaulted the complainants and by force took a cellphone and a cash amount from the complainants.

[7] On 28 October 2021 applicant and his legal representative were not at court, for his appearance. A legal representative who then appeared for accused 1 and 4 stood in for applicant's legal representative. The magistrate was informed that appellant was unwell and that a medical certificate would be provided in the next appearance. A warrant of arrest for applicant was authorized but its issue held over until the next date, 11 November 2021. Bail was provisionally cancelled and its forfeiture was held over to 11 November 2021. On 11 November 2021 applicant was at court. His legal representative was absent and another stood in their stead. The stand-in legal representative handed in a medical certificate on behalf of applicant, to explain his absence on 28 October 2021. The State challenged the validity of the medical certificate. The medical certificate was provisionally accepted pending the enquiry. Applicant was released on warning pending the enquiry. The matter was postponed a few times for a variety of reasons before the enquiry was held. One of the reasons, on 16 March 2022, was the admission of applicant in hospital whilst he was in custody on another matter. The enquiry was held on 13 April 2022. The applicant's legal representative informed the court that the applicant conceded that his absence on 28 October 2021 was due to his own fault. The applicant also conceded that the medical certificate handed to court was false and fake. The result was that the magistrate ordered that the bail be finally forfeited to the State.

The matter was postponed for plea and trial and the applicant was remanded in custody.

[8] The applicable provisions of Section 67 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA) provides:

“67 Failure of accused on bail to appear

(1) If an accused who is released on bail –

(a) Fails to appear at the place and on the date and at the time –

(i) Appointed for his trial; or

(ii) To which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or

(b) Fails to remain in attendance at such trial or at such proceedings,

The court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.

(2)(a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.

(b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.

...

[3] The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.”

[9] Section 67 prescribes an automatic sequence of consequences should an accused fail to appear or remain in attendance. The automatic sequence can be set out in 8 crucial consequences:

1. The bail is declared provisionally cancelled.
2. The bail money is provisionally forfeited to the State.
3. A warrant for the arrest of the accused is issued.
4. The provisional order is only valid for a period of 14 days.
5. If the accused does not appear within 14 days or within a period extended by the court, the provisional cancellation of bail and the provisional forfeiture of bail becomes final.
6. If the accused appears within 14 days, they must satisfy the court that the failure to appear or to remain in attendance was not due to fault on their part.
7. If they satisfy the court that non-appearance or failure to remain in attendance was not due to fault on their part, the provisional cancellation of bail and the provisional forfeiture of the bail money lapses.
8. If the accused fails to satisfy the court that failure to appear or to remain in attendance was not due to fault on their part, the court shall confirm the provisional cancellation of bail and the provisional forfeiture of the bail money.

[10] Section 67 deals with the provisional and final cancellation of bail and forfeiture of bail money. Proceedings as envisaged in section 67 is a summary enquiry and not a formal trial. Its consequence may be loss of liberty and forfeiture of bail money, but does not result in a conviction and a sentence could not be imposed [*S v Williams* 2012 (2) SACR 158 (WCC) at para 3]. The procedure in section 67 differs from the one on section 67A, which criminalized failure to appear or to comply with a bail condition. For purposes of section 67A proceedings, a charge sheet must be drawn and a formal trial held [*S v Mabuza* 1996 (2) SACR 239 (T) at 243e-245c]. The State did not prosecute the applicant's failure to appear in the ordinary way and did not put him on trial. The State did not trigger section 67A proceedings and a conviction and sentence was incompetent. I am not persuaded that the magistrate's decision amounted to a gross irregularity in her approach to section 67.

[11] The problem, in my view, can be traced back to 11 November 2021. It is common cause that the applicant was, from that date onwards, released on warning. In other words, there was a quantum leap from Chapter 9 of the CPA which deals with bail (sections 58-71), regulated by amongst others section 67, to Chapter 10 of the CPA, regulated by section 72 and 72A. The decision to place the applicant on warning seemed to be arbitrary. It was not preceded by any informed submission by either the State or the defence. Magistrates needs to be careful especially where such radical departures are made, and should ensure that the parties are heard and the decision is a product of informed judicious industry. I have my doubts about the correctness of the status of an accused being on two fronts for all intents and purposes. The first, having his disputed medical certificate provisionally admitted and postponing the enquiry into its authenticity postponed to a future date. In my view, the appropriate consequence was to extend his bail until there was information on oath that further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail (section 68(1)(f)), or any other information as envisaged in section 68 of the CPA. Secondly, the release of an accused on warning is in lieu of bail [section 72 of the CPA]. Release on warning is an alternative to bail. In other words, release on warning is available as another possibility to bail. It is a self-standing status of an accused in criminal proceedings. It is not an ancillary simply to provide additional support to bail. The State did not raise any issues with the decision of the magistrate to add the status of the applicant to an alternative to bail on 11 November 2021. Whether rightly or wrongly, the status of the applicant was dual between 11 November 2021 and 13 April 2022, technically on bail and on warning.

[12] Section 72A of the CPA reads:

“72A Cancellation of release on warning

Notwithstanding the provisions of section 72(4), the provisions of section 68(1) and (2) in respect of an accused who has been granted bail, are, with the necessary changes, applicable in respect of an accused who has been released on warning.”

I have already made reference to section 68(1)(f). I find it appropriate to quote the section 68(g) in full:

“68 Cancellation of bail

(1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released on not, upon information on oath that –

(g) it is in the interests of justice to do so,

Issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.”

[13] The pro-forma form of the magistrate made no reference to section 68, 72(4) or 72A of the CPA. The handwritten notes of the magistrate also made no reference to the sections. I am unable, on that score alone, to conclude that the magistrate did not have these provisions in mind when the order to commit the applicant to prison was made, against the background of the salient facts in this matter. The failure to make reference to the enabling provisions, in circumstances where the order itself was a competent one, did not render the decision to be reviewed and set aside. For these reasons I make the following order:

The application is dismissed.

DM THULARE
JUDGE OF THE HIGH COURT