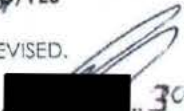




IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: REV 93/2021

(1)	REPORTABLE: NO /YES
(2)	OF INTEREST TO OTHER JUDGES: NO /YES
(3)	REVISED.  30/09/2021

In the matter between:

THE STATE

and

EMMANUEL SEROKA

ACCUSED

REVIEW JUDGMENT

NAUDÉ AJ:

- [1] This is a special review in terms of **Section 304(4) of the Criminal Procedure Act, 51 of 1977, as amended ("the Act")**. The Acting Regional Court Magistrate, Mr. R.J Marais, has referred this matter to this court with a request that this court, in the interest of justice, exercise its inherent powers to review the decision of the District Court Magistrate not to attend to the bail application as was referred to him by the Regional Court Magistrate after appearance in the Regional Court.
- [2] The Accused was arrested on 16 September 2020 on a charge of Robbery (with aggravating circumstances) for using a firearm and initially appeared in the Groblersdal District Court under case number MH 174/2020 where the Accused abandoned his bail application on 12 October 2020 while duly represented by Legal Aid South Africa.
- [3] The Accused was transferred to and appeared in the Groblersdal Regional Court on 13 April 2021 under case number SH77/2021 during which appearance he terminated his Legal Aid Attorney's mandate and instructions. The Accused proceeded in person and was resolute to represent himself.

- [4] On 26 July 2021 a pre-trial was concluded and a trial date was fixed for 8 September 2021. The Accused however indicated that he now wished to apply for bail.
- [5] The matter was referred back to the District Court for the hearing of the bail application on 28 July 2021 as there is only one Regional Court Magistrate stationed at Groblersdal who had to attend to the trial on 8 September 2021 and was therefore precluded from attending to the bail application which will involve the hearing of evidence on the merits of the case.
- [6] The Accused appeared in the District Court on 28 July 2021 as directed by the Regional Court Magistrate, but the District Court Magistrate declined to attend to the bail application and relied on the decision of this court in the matter between **The Director of Public Prosecutions, Limpopo v Rameez Patel & Another** under case number REV85/2020 dated 30 April 2021.
- [7] The District Court Magistrate did not immediately bring his decision to the attention of the Regional Court Magistrate. Only when the Accused again appeared in the Regional Court for trial on 8 September 2021 was the

Regional Court Magistrate apprised of the situation which gave rise to this special review.

[8] It is against this background that this Court is called upon to decide whether the District Court correctly relied on the **Rameez Patel-matter *supra*** and invoked the provisions of **Section 60(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Act")** in its refusal to hear the bail application. The crisp issue therefore arising for determination in the present matter exclusively turns on a proper interpretation of the meaning of **Section 60(1)(b) of the Act** and the **Rameez Patel – matter *supra***.

[9] **Section 60(1) of the Criminal Procedure Act 51 of 1977** provides as follows:-

"An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit."

[10] **Section 60(1)(b) of the Act** provides that:-

"Subject to the provisions of section 50(6)(c), the court referring an accused to any other court for trial or sentencing retains jurisdiction

relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time."

[Own emphasis]

[11] **Section 50(6)(c) of the Act** states as follows:-

"The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorized thereto in writing by him or her may if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court."

[12] **John Van der Berg In Bail, A Practitioner's Guide, Third Edition at page 49** stated as follows:-

"The provision is somewhat less clear than s 60(1) as it read before the 1995 amendment, and which provided that 'an accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior court, to that court, to be released on bail...'. This lack of express provision

notwithstanding, however, it is submitted that 'the court' referred to in s60(1)(a) will of necessity be the court (and, moreover, usually a lower court) in which the accused makes his first appearance or, subsequently, the trial court (which may be a lower court or a superior court)."

- [13] Further, **John Van der Berg** on page 49 of **Bail, A Practitioner's Guide**, states as follows:-

"6.2.1 Transfer of accused for trial or sentencing

Subject to the curtailment of the accused's right to be brought to court outside ordinary court hours, the court (usually the district court) referring the accused to another court (usually the regional court or High Court) for trial or sentencing will retain jurisdiction in respect of bail until the accused appears in such other court for the first time...

Difficulties of interpretation have arisen as a result of the amendment of s50(6), particularly when it is read in conjunction with s60(1)(b) of the Act, which provides that

the court [usually a magistrate's court] referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time. [emphasis added.]

*Does this mean that the magistrate's court, once it has referred an accused to the regional court or the High Court for trial, is functus officio with regard to the matter of the accused's bail, and retains no further jurisdiction thereanent? Or may it be said that the magistrate's court and the higher court in question hold concurrent jurisdiction once the accused has appeared in the latter court? The question is one of some importance, as it fairly frequently happens that a higher court is for one reason or another unable or unavailable to hear a bail application of an accused on trial or awaiting for trial before it. In such cases the accused's right to apply for bail speedily may be denied him if the referring lower court were deprived of its original jurisdiction. The question was considered in **Director of Public Prosecutions, Eastern Cape, v Louw NO: In re S v Makinana 2004 (2) SACR 46 (E)** where it was observed [at 56g]:*

'The words 'subject to the provisions of s 50(6)(c) in s 60(1)(b) must be interpreted in conformity with, and in such a way as to promote, the values of the Constitution and the spirit, purport and objects of the Bill of Rights. It must be interpreted, in other words, so that it promotes the value of, and the right to, freedom as well as the right to be 'released from detention if the interest of justice permit, subject to reasonable conditions' and the right of access to court. More than that, it must be interpreted in such a way that it gives effect to the State's obligations, in terms of s 7(2) of the Constitution, not only to abstain from interfering with these rights – the negative obligation to respect them – but also to

positively facilitate their exercise – the positive obligations to protect, promote and fulfil them.'

*In the course of granting a declaratory the court in Makinana held that the magistrate's court has exclusive jurisdiction to hear a bail application in respect of any case in which an accused person is charged with a Schedule 6 offence (subject to a directive in terms of section 50(6)(c)) from the first appearance of the accused until he appears in such higher court to which his matter may be transferred, whereupon such other court shall enjoy jurisdiction to entertain a bail application. **The court did not declare such higher court to be vested with exclusive jurisdiction to consider bail once the accused has appeared before it. [writer's emphasis]***

In S v Mzatho and Others 2007 (2) SACR 309 (T) the court approved of the concurrent jurisdiction approach by holding that in appropriate circumstances (for instance where it would be unhealthy for an area's sole regional magistrate to hear a bail application as well as the subsequent trial) a regional magistrate could refer the matter back to the magistrate's (district) court, even though the accused had already appeared before him pursuant to a referral by the lower court."

- [14] The above referred to approval stated in **Mzatho (*supra*)** was echoed and restated with approval in the unreported decision of **S v Hlongwane & Others (AR507/13) [2015] ZAKZPHC 1 (28 January 2015)** where it was stated:-

"40. In the result the court issued a declaratory order that the regional court, confronted with a bail application which in the opinion of the presiding regional magistrate it could not entertain, had the power to refer the bail application to a lower court if such referral would, in the opinion of the deciding regional magistrate, be in the interest of justice and serve to protect the fundamental rights of the applicant for bail as entrenched in the Constitution.

41. In my view similar considerations apply in the present matter for the protection of the rights of sentenced applicants for leave to appeal from the magistrates' and the regional courts in terms of section 309B, as well as petitioners for leave to appeal in terms of section 309C."

- [15] In **The Director of Public Prosecutions, Limpopo v Rameez Patel & Another *supra***, the First Respondent was denied bail in the High Court and was remanded in custody on 2 March 2020. The matter was postponed to 1 to 12 February 2021 for trial and to 16 and 17 April 2020 for a bail application in the High Court, which application was never

brought, but instead the First Respondent went back to the Magistrate's Court to apply for bail, despite already having appeared in the High Court after the matter was transferred to the High Court for trial.

[16] The Magistrate in the **Rameez Patel matter *supra***, in granting bail after the High Court has made an order that the First Respondent is to remain in custody, acted irregularly and in effect sat as a court of appeal, although it was on new facts, which she could not have done.

[17] In this court's view, the present matter should be distinguished from the **Rameez Patel matter *supra***, in that in the present matter the Accused was referred back by the Regional Court to the court of first instance for a bail application as opposed to the situation in the **Rameez Patel matter *supra*** where the High Court already refused bail and postponed the matter without referring the matter to the Magistrate's Court and the Magistrate's Court then *mero motu* dealt with the bail application which was already dealt with by the High Court.

[18] In **The Director of Public Prosecutions, Limpopo v Rameez Patel & Antother *supra*** at para 24 this court held as follows:-

*"In both **S v Mzatho and Others 2007 (2) SACR 309 (T)** and in **S v Hlongwane & Others (AR507/13) [2015] ZAKZPHC 1 (28 January 2015)** the emphasis is on the Regional Court **referring** a matter back to the Magistrate's Court for a bail application."*

[19] In the circumstances, considering the above case law, it is this court's view that once an accused person has appeared in another court, pursuant to a transfer of such person from the transferring court, for sentencing or trial purposes, such receiving court shall be vested to the exclusion of the transferring court, with exclusive jurisdiction in respect of bail application proceedings, unless the receiving court refers the matter back to the transferring court for a bail application. In such instance, where the matter has been referred back to the transferring court, such transferring court shall have the necessary jurisdiction to entertain the bail application.

[20] The District Court Magistrate loses sight of the fact that this court in the matter of **Rameez Patel *supra***, distinguished the case on the facts and did not intend to interfere with the current practices in the lower courts where Regional Courts refer cases back to the District Courts for bail applications. The keyword is "referred back to". It is only in instances

where there is an absence of a referral from the receiving court back to the transferring court, or in simple terms from the High Court or Regional Court back to the District Court, that a District Court has no jurisdiction to entertain a bail application once the accused has appeared before such receiving court.

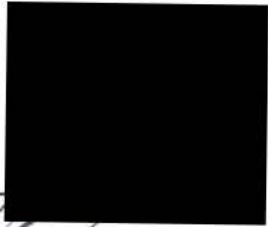
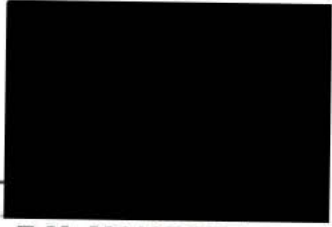
[21] In this court's view, the **Rameez Patel matter** is to be distinguished on the facts. The **Mzatho and Hlongwane-matters *supra*** still finds application in the interest of justice in situations where a receiving court, and especially where a solitary Regional Court Magistrate is precluded from attending to both the bail application and the trial in the same matter and specifically refers a matter back to the District Court for the bail application.

[22] In the result, the District Court Magistrate's reliance on the **Rameez Patel matter** in the present matter is misconceived. He incorrectly interpreted and applied the principles laid down therein in the present matter and in doing so acted improperly in refusing to hear the bail application of the Accused. In the result the application for review must succeed.

[23] This court therefore makes the following order:-

1. The refusal by the District Court Magistrate in the District Magistrate's Court to hear the bail application is declared invalid and set aside.
2. The District Magistrate's Court is ordered to hear the bail application within 7 (seven) days from date of this order.

I AGREE:


M. NAUDÉ
ACTING JUDGE OF
THE HIGH COURT
E.M. MAKGOBA
JUDGE PRESIDENT OF
THE HIGH COURT